CONSTITUTIONAL LAW, COMMENTARY ON CONSTITUTIONAL THEORY

BY: THOMAS SERGEANT

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CONSTITUTIONAL LAW.

BEING A VIEW OF THE

PRACTICE AND JURISDICTION

OF THE

COURTS OF THE UNITED STATES,

AND OF

CONSTITUTIONAL POINTS DECIDED.

BY THOMAS SERGEANT, ESQ.

SECOND EDITION, WITH ADDITIONS AND IMPROVEMENTS.

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PREFACE

TO THE SECOND EDITION.

IN the present edition, the writer has endeavoured to improve the work by the addition of cases decided since the former edition, and also of a considerable number previously determined: an Introduction has also been prefixed. He hopes he will have succeeded in rendering the treatise more useful to those who may engage in the investigation or study of the subjects it embraces.

PHILADELPHIA, *July* 31st, 1830.

PREFACE TO THE FIRST EDITION.

THE author of the following treatise believes its object and plan to be novel. He has met with no work, whence he could derive assistance. He does not doubt, that many imperfections may be found in it, which he has himself been unable to detect or remedy. The learned and candid reader will appreciate the difficulties attending the undertaking, and make every reasonable allowance.

Every American lawyer must feel the utility of reducing to system, the principles and practice of our National Jurisprudence, of tracing them up to their constitutional source, and of exhibiting, in a succinct manner, the general origin, and uniform harmony, of the whole. If the writer has succeeded in laying the foundation for a work of this kind, he will be satisfied; leaving to more competent hands, the completion of a task, which must greatly aid in the diffusion of knowledge, on subjects of the highest importance, and most extensive application.

PHILADELPHIA, *November* 11th, 1822.

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INTRODUCTION.

NATIONAL JUDICIARY POWERS EXERCISED IN THE UNITED STATES FROM THE SETTLEMENT OF THE COLONIES TO THE ADOPTION OF THE PRESENT CONSTITUTION.

The states of which our union was at first composed, during the period antecedent to the adoption of the constitution of the United States, while colonies of the British empire, and while connected together, at first by the Congress, and afterwards by the articles of the Confederation, exercised within their respective limits the main portion of the judicial authority of the country, through the medium of tribunals constituted by themselves, and governed by the common law, the principles of equity, their own acts of assembly and usages, and such British statutes as had been extended to, or adopted by them. But during this period there were judicial controversies over which the colonial or state courts did not entertain jurisdiction at all, or entertained it in subordination to, or by delegation from the national authority residing in a power supposed to be the depository of a common interest, and possessing a general jurisdiction.

This period may be divided into three portions: — 1. The government and jurisdiction of the crown of England began with the settlement of the colonies, and continued until the fifth of September, 1774, when a Congress first met to consider of the public grievances,

and gradually prepared for, and repelled hostilities. At this era the revolution commenced

2. The government by a Congress continued till the first of March, 1781, when the articles of confederation were finally ratified.

3. On the fourth of March, 1789, the articles of confederation were superseded by the adoption of the present constitution.

It is proposed to consider the subject under these three divisions.

I. Of the period that elapsed while the colonies were dependent on the crown of England.

During the period antecedent to the revolution, courts of vice admiralty were established in some, and probably in all of the states by the crown of Great Britain; in some instances by a right reserved in their charters, and in others without. The nature and extent of their jurisdictions depended on tho commissions of the crown, and acts of Parliament conferring additional authorities. The commissions of the crown gave the courts which were established a most ample jurisdiction over all maritime contracts, and over torts and injuries as well in ports as upon the high seas; and acts of Parliament enlarged or rather recognised this jurisdiction by giving or confirming cognisance of all seizures for contraventions of the revenue laws.(a)

(a) Be Lovio *v.* Boit, 2 Gall. 470. In the charter of Massachusetts, in 1692, there is an express reservation of the exclusive right in the crown to establish Admiralty courts by virtue of commissions issued for this purpose. Ib. No such reservation, however, is contained in the charter of William Penn, granted the fourth of March, 1600. On the contrary, it gives to William Penn and his heirs, their deputies and lieutenants, power to appoint and establish any judges and justices, magistrates and other officers whatsoever, for what causes soever, (for the probates of wills, and lor the granting of administrations) with what power soever, and in such forms as to them should seem most convenient: and by judges by them delegated to award process, hold pleas, and determine all actions, suits, and causes whatsoever, as well criminal as civil, real, personal and mixed, &c. sec. 5. By a subsequent part of the charter, William Penn, his heirs or assigns, were made personally responsible for any misdemeanors committed or permitted by them against the laws of trade and navigation, and subjected to forfeiture of the charter for not paving the damages awarded by the courts of Westminster. sec. 14. "

A court of vice admiralty was, notwithstanding, established at an early date, tor the province of Pennsylvania, and the territories or counties of

In England the Court of Admiralty never possessed any jurisdiction in revenue causes; that was appropriated by the common law to the court of Exchequer. But the vice admiralty courts in this country when colonies, and in the West Indies, obtained, by the provisions of the statute of 12 Car. 2, commonly called the navigation act,

New Castle, Kent, and Sussex, on the Delaware. It existed in 1703, 1 Proud's Hist. Penn. 406, and continued till the revolution. I have perused the records of this court from the year 1735 to the year 1746, in the course of which time there were three different commissaries or judges of the court, which was held at Philadelphia. They were commissioned by the crown, under the great seal of the High Court of Admiralty of England, but the commission itself 1 have not met with. During the vacancies that occasionally occurred, the proceedings were carried on in the name of the Lords Commissioners for executing the office of Lord High Admiral of England. Brown, in his Civil and Admiralty Law, says, that all the powers of vice admiralty within his majesty's dominions are derived from the High Admiral, or the Commissioners of the Admiralty of England, as inherent and incident to that office. Accordingly, by virtue of their commissions, the Lords of the Admiralty arc authorized to erect courts of vice admiralty in North America, the West Indies, and the settlements of the East India Company. 2 Bro. Civ. and Ad. Law.

It is presumed, says Judge STORY, in the note to his learned opinion in De Lovio *v.* Boit, that the commissions are usually in the same form. One of the latest is to the governor of the royal province of New Hampshire in 6 Geo. 3, (1766.) It authorises him "to take cognisance of, and proceed in all causes civil and maritime, and in complaints, contracts, offences, or suspected offences, crimes, pleas, debts, exchanges, actions and demands, accounts, charter parties, agreements, suits, trespasses, inquiries, extortions and demands, and business civil and maritime whatsoever, commenced or to be commenced between merchants, or between owners and proprietors of ships and other vessels, and merchants, or others whomsoever, with such owners and proprietors of ships, and all other vessels whatsoever, employed or used within the maritime jurisdiction of our vice admiralty of our said province, &c. or between any other

persons whomsoever, had made begun or contracted for any matter thing cause or business whatsoever, done or to be clone within our maritime jurisdiction aforesaid, &c. &c. and moreover in all and singular complaints contracts agreements causes and business civil and maritime to be performed beyond the sea or contracted there, however arising or happening," with many other general powers. And it declares the jurisdiction to extend "throughout all and every the sea shores, public streams, ports, fresh waters, rivers, creeks, and arms as well of the sea as of the rivers and coasts, whatsoever of our said province," &c. In point of fact the vice admiralty courts of Massachusetts, before the revolution, exercised a jurisdiction far more extensive than that of the admiralty in England. De Lovio *v.* Boit, 2 Gall. 470, 471, note. See also the Little Joe, Stewart's Ad. Reps. 394.

The commission to the governor of New Hampshire above mentioned may, perhaps, be deemed an extension of the powers of the courts of

and of 7 & 8 Will. 3, c. 22, a jurisdiction in revenue causes totally foreign to the original jurisdiction of the Admiralty and unknown to it; though it was held that appeals lay from them in such causes to the Admiralty in England. (6) In questions of prize in the vice admiralty courts an appeal lay to the commissioners of appeals consisting

vice admiralty beyond former precedents. For we find the Congress of 1774 and 1775, on repeated occasions, complaining of these extensions by the crown, in order to enforce the obnoxious statutes passed to impose duties for the purpose of raising a revenue in America. The declaration and resolves of Congress of the 14th October, 1775, mention, among other grievances, that the British Parliament had extended the jurisdiction of the courts of Admiralty, not only for collecting the said duties, but for the trial of causes merely arising within the body of a county, 1 Journ. Cong. 27, and that the acts of 4 Geo. 3. c. 15, and c. 34, 5 Geo. 3. c. 25, 6 Geo. 3. c. 52, 7 Geo. 3. c. 41, and c. 46, and 8 Geo. 3, extended the power of the Admiralty courts beyond their ancient limits. ib. 30. See also ib. 41. 47. In the address to the inhabitants of the colonies, of October 21st, 1774, it is stated, that in the year 1768 a statute was made to establish courts of Admiralty and vice admiralty *on a new model,* expressly for the end of more effectually recovering the penalties and forfeitures inflicted by acts of Parliament formed for the purpose of raising a revenue in America. ib. 48. See also ib. 51. 190. By the records of the vice Admiralty Court of Pennsylvania, &c., from 1735 to 1746, before referred to, it appears, that the business of the court was inconsiderable in amount. It consisted of proceedings by the collector of customs by information against vessels and goods for breaches of the acts of Parliament relating to the revenue: libels for seamens' wages: orders for surveys of damaged vessels and goods, and of wrecks, and appraisement thereof, with power to the commissioners appointed to adjust the salvage in cases of wreck: records of protests: and, towards the end of the time, registers of letters of marque granted by the governors, and prize proceedings against vessels captured from the French and Spaniards. There is one proceeding to authorize persons to take an inventory of the effects in a vessel, the master of which was drowned in the Delaware after arrival, and one other on a bottomry. It may be remarked that although the proceedings are strictly formal, no instance appears of an answer or claim by a defendant or claimant on oath or affirmation.

(6) 2 Bro. Civ. and Ad. Law, 491, yet the extent of the jurisdiction of the Admiralty courts in the colonies seems to have been, for some time, a subject of considerable discussion and difference of opinion in England. In *Chalmers's* collection of the opinions of eminent lawyers on various points of jurisprudence, chiefly concerning the colonies, fisheries, and commerce of Great Britain, published at London in 1814, there are several opinions to be found on this subject. In July, 1702, *Sir John Cooke,* Advocate General, gave an opinion, that penalties and forfeitures under the act of navigation, 12 Car. 2, c. 18, the act for the encouragement of trade, 15 Car, 2. c. 7, the act for preventing the planting of to-

chiefly of the privy council. In instance and revenue causes it lay to the High Court of Admiralty in England, and thence to the Delegates.(c) The power of the High Court of Admiralty to receive appeals from the vice admiralty courts in revenue causes has been disputed, on the ground that they were not in their nature causes civil or maritime, but

that it was a jurisdiction specially given to the vice admiralty courts by the statute of 7 and 8 Will. 3, c. 22, which took no notice of any appellate jurisdiction in the High Court of Admiralty in such cases. But the point was fully settled in favour of this jurisdiction in the year 1754.(d)

Controversies between two of the provinces concerning the extent of their charter boundaries or rights, came before the king in his privy council who exercised original jurisdiction therein, on the principles of feodal sove-

bacco in England, and for regulating the plantation trade, 22 and 23 Car. 2. c. 26, might be prosecuted in the admiralty courts of the plantations, as well as penalties and forfeitures under the act relating to the plantation trade, 7 and 8 Will. 3. 2 Chalm. Opin. 193.

In August of the same year, the Attorney General, *Northey,* gave it

as his opinion to the board of trade, that the jurisdiction of the admiralty courts of the colonies extended only to prosecutions arising under the statutes of Car. 2. above mentioned. Ib. 187.

In 1720, however, Mr. West, who was assigned as counsel to the Commissioners of trade and plantations, was of opinion that the statutes 13 Rich. 2, c. 5, 15 Rich. 2, c. 3, 2 Hen. 4, c. 11, and 27 Eliz. c. 11, by which the admiralty jurisdiction in England was limited, were not introductive of new laws, but only declaratory of the common law, and were, therefore, of force even in the plantations, and that none of the

acts of trade and navigation gave the admiralty judges in the West Indies an increase of jurisdiction beyond that exercised by the High Court of Admiralty at home. He was also of opinion that the superior courts of common law in New England had a power to grant prohibitions to the admiralty courts, and states that prohibitions were the remedy constantly applied there to prevent their encroachment.

It is stated by the Attorney General, *Northey,* in the above mentioned opinion, that an action of trover had been brought and was then depending in the Queen's Bench, against *Col. Quarry,* the judge of the admiralty in Pennsylvania for condemning in his court an unregistered vessel trading there.

(c) 1 Wheat. 19. 2 Bro. Civ. and Adm. Law, 493. Blackstone, (3 Comm. 70.) says, an appeal also lay to the king in council. But this opinion of his seems to be relinquished. 2 Bro. Civ. and Adm. Law, 493.

(d) 2 Bro. Civ. and Adm. Law, 493, note. 2 Rob. 248. See the note of Mr. Wheaton to the case of the Sarah, 8 Wheat, 396.

reignty.(e) Thus in July 1764 the king in privy council approved the report of a committee of council for plantation affairs relative to the disputes that had for some years subsisted between the provinces of New Hampshire and New York, concerning the boundary line between those provinces; and ordered and declared the western bank of the river Connecticut to be the boundary line.(f) A general superintending power by way of appeal was exercised by the king in council from the decisions of the colonial tribunals. For example, in the year 1685, an appeal of Sir William Vaughan, from a verdict and judgment against him in the courts of New Hampshire at the suit of Robert Mason Esq. as

proprietor of that province, for certain lands and tenements in Portsmouth in the said province, was heard by counsel before the committee for trade and plantations of the privy council, who reported that the verdict and judgment should be affirmed, and they were ratified and confirmed accordingly by the king in council.(g) In the case of Jeoffry Jones which was an ejectment brought in New Jersey, in the reign of Will. III. in which a verdict was found and judgment given, the judgment was afterwards reversed by the king in council on a writ of error.(h) And such appeals from the courts in Pennsylvania and in the other colonies to the king in council were common before the revolution.(i) In some of the colonies the appeal was first to the governor and council, and from them to the king in council.(k)

In the year 1764, the nature and extent of the right of appeal to the governor and council, attracted much attention in the colony of New York. Prior to the year

(e) 1 Bl. Comm. 231. 1 Vez. 444. 3 Belknap's History of New Hampshire, 296. Appendix, No. X. Ib. 345. Appendix, XLI. Cited in the case of Forsey v. Cunningham, New York, 1764.

Pamph. 49. See post

(i) The act of assembly of Pennsylvania for establishing courts passed in 1722, saves the right of appeal from any court to the king in council or to such courts in Britain as the king should appoint, and imposes the conditions of appeal. 1 Smith's Laws of Penn. 140. See also the charter to W. Penn.

(k) See the case of Gordon *v.* Lowther, 2 Ld. Ray. 1447, a ease of that kind brought from the island of Barbadoes. It is there stated, that the rule was, that the party appealing must procure the proceedings to be transmitted, and proceed within a year after the appeal allowed in the plantation: and the appeal was dismissed in that case under this rule.

1753, the governor's instructions from the crown were to allow appeals to the governor and council in case of errors, from any of the courts of common law. But in that year the phraseology was changed and the instructions were to allow appeals from any of the courts of common law, and for that purpose to issue a writ in the manner which had been usually accustomed. The amount was also fixed and the security regulated. Thomas Forsey recovered a verdict and judgment for £.1500 damages, against Waddel Cunningham, in the Supreme Court of New York, for assault, battery, and wounding. The defendant having failed in a motion for a new trial, procured two writs, directed to the court by the lieutenant-goveritor, (Golden,) one to stay execution, the other commanding the proceedings to be brought before the governor and council. The court refused obedience to these writs, and delivered their opinions to the governor and council, that no appeal lay from the common law courts to the governor and council to hear the cause upon its merits, and reverse or control the verdict

of a jury, but only by a Writ of error to examine errors in law. The lieutenant governor insisted on the right to entertain an appeal, but the council agreed with tho judges. The legislature took up the subject with warmth, and denounced the attempt as dangerous to the rights of the people. Cunningham petitioned the king and council for liberty to appeal to them. They refused this request, but determined that the appeal to the governor and council ought to be admitted, and from them either party might appeal to the king in council.(l)

II. Of the period during which the national authority was exercised by Congress.

As a necessary consequence of the revolution, the judicial power of the crown in the colonies, as well as all its other authority, ceased; and from the commencement of the war in April, 1775, Congress, with the approbation of the colonies and people, and from the emergency of the crisis, exercised the sovereign authority of the country,

(l) Forsey *v.* Cunningham, New York, 1764, Pamp. What further proceedings were had does not appear.

so far as related to war and peace. They raised armies and navies, and directed military operations, emitted bills of credit, made treaties, and received and sent ambassadors; commissioned privateers, prescribed the objects of capture, and made rules for the distribution of prizes. As the legality of all captures on the high seas depends on the law of nations, and a just and uniform execution of that law is essential to the sovereign power, which might be implicated with foreign nations in the results of its administration, Congress had for this purpose a rigftt of maintaining , a control by appeal, in cases of capture, as well over the decisions of juries as of judges.(m) When Congress, therefore, in November 1775, first authorised the capture of English vessels of war, and of other vessels employed in the service and supply of the English armies, by vessels to be commissioned by Congress, they recommended to the several legislatures of the united colonies, as soon as possible to erect courts of justice, or give jurisdiction to those in being, concerning such captures; the trials thereof to be by a jury, under such regulations as to the respective legislatures should seem expedient; but that in all cases an appeal should be allowed to Congress, or such person or persons as they should appoint for the trial of appeals, under certain provisions as to the time of demanding and lodging the appea^ and giving security.^)

The application to Congress on appeal was by petition, which, at first, was usually referred to a special committee appointed in each case, consisting of five members. But on the 30th January, 1777, Congress resolved to appoint a

standing committee, to consist of five members, to hear and determine these appeals, and to them the petitions were referred when presented.(o) Three members were added in May, but in October following, the number was restored to five, they, or any three, to hear and determine.

The resolutions of Congress of November, 1775, above

(m) Penhallow *v.* Doane's adms. 3 Dall. 80.

(n) \ Journ. Cong. 259, 260. The state courts of admiralty also exercised jurisdiction in instance causes. See Hopkinson's Rep.

(o) Journ. Cong. The first standing committee of appeals was appointed on the 30th January, 1777, and consisted of Mr. Wilson, Mr. Sergeant, Mr. Ellery, Mr. Chase and Mr. Sherman.

mentioned, was complied with by several states; some allowing appeals to Congress on a larger, some on a more contracted scale. In some instances the acts passed by the states gave rise to questions concerning the respective authorities of Congress and of the states, which occasioned much debate and difference of opinion in Congress and elsewhere; and some of these questions were not finally determined till after the adoption of the present con.stitution. In July, 1776, the legislature of the state of New Hampshire passed an act which allowed an appeal to Congress, or persons appointed by them, only when the vessel capturing was fitted out at the charge of the united colonies; in other cases the appeal was to be to the Supreme Court of judicature of that state.(jo) A citizen of that state, acting under the commission of Congress, in a vessel owned by citizens of New Hampshire, captured a vessel as prize, on the high seas, in October, 1777. Being claimed by citizens of Massachusetts, a trial by jury took place in the New Hampshire court maritime, erected by the act of that state of July, 1776, and the jury found a verdict for the captors. The claimants prayed an appeal to Congress, but the court refused it, because it was contrary to the law of that state. The claimants then appealed to the superior court and a jury; there also a verdict was found for the captors. The claimants then pray-:* ed an appeal to Congress, and petitioned Congress, who /'.referred it to the committee of appeals, and that commit"1 tee decided in June, 1779, that they had jurisdiction. Af*;.ter the confederation, the court of appeals reversed the decrees passed by the courts of New Hampshire, and in -the year 1795, the Supreme Court of the United States, on appeal from the Circuit Court of New Hampshire, carried into effect the former decree of the court of appeals.^)

In the case of the sloop Active, the jurisdiction of Congress was also disputed. In that case, on a libel in the court of Admiralty of Pennsylvania, the jury found a verdict distributing the proceeds of a prize among certain

(p) In November, 1779, the legislature extended the liberty of appeal to Congress, to every case wherein the subject of any foreign nation in amity with the United States should be interested in the dispute: but allowed it no further.

(<f) Penhallow v. Doane's adms. 3 Dall. 80.

claimants. From this sentence or decree, an appeal was taken to Congress, and the committee of appeals, in March, 1779, reversed the decree, and ordered process to issue out of the court of Admiralty of Pennsylvania, to carry the decree of reversal into effect. The judge of the court of Admiralty refused to conform to this order, alleging as a reason an act of the legislature of Pennsylvania, declaring that the finding of a jury should establish the facts in all trials in the court of Admiralty without re-examination or appeal; and that an appeal was permitted only from a decree of a judge. Congress, however, resolved in March, 1779, that their committee had jurisdiction, and made ineffectual efforts to induce the assembly of Pennsylvania to confer with them on the subject. After the adoption of the present constitution, the decree of the committee of appeals was enforced in the courts of the United States.(r)

In January, 1780, Congress resolved to establish a court for the trial of all appeals from the courts of Admiralty of the states, in cases of capture, to consist of three judges with salaries, appointed and commissioned by Congress, two of whom should constitute a quorum. The court was empowered to appoint a register. The trials therein were to be according to the usages of nations, and not by jury; and they fixed the place of their first session at Philadelphia, and afterwards at such times and places as the court should judge most conducive to the public good, so that they did not at any time sit further eastward than Hartford, in Connecticut, or southward than Williamsburgh, in Virginia. On the 22d January, they elected the judges by ballot, (s) The style of the court, it was subsequently resolved, should be the *Court of Appeals incases of Capture;* and regulations were made as to the oaths of the judges and register, the time of entering and lodging appeals, and giving security; and the causes depending and papers were ordered to be transferred to this court.(t)

Applications were sometimes made to Congress to or-

(r) See U. S. *v.* Peters, 5 Cranch, 115. Ross », Rittenhouse, 2 Ball. 160. U. S. c. Bright and others, 3 Hall's Law Journ. 225.

(*) Mr. Wythe, Mr. Paca, and Mr. Hosmer were elected. Mr. Wythe afterwards declined, and Mr. Cyrus Griffin was elected in his place.

(0 6 Journ. Cong. 156.

der this court to receive appeals. In September, 1784, we find an application to Congress, and instructions by them to receive an appeal, where, by the indisposition and death of the register of the court of Admiralty of Pennsylvania, the stipulations were not executed in due form and in due time.(w) In February, 1782, a resolution was adopted in another case, authorizing the appeal.(Y) On the other hand they refused to interfere after the

decision of the court,(y) or in favour of a suitor in the court of appeals where a loss was occasioned by such suitor or his friend.(r)

In February, 1786, Congress resolved, that as the war was at an end, and the business of the court of appeals in a great measure done away, the salaries of the judges should cease.(a) In June, 1786, they were authorized to grant rehearings or new trials, and a *per diem* allowance was ordered during the sitting of the court, and the time employed in travelling to and from the same.(6)

In relation to controversies between states concerning the rights of soil and jurisdiction, applications were, in several instances, made to Congress. In December, 1779, they resolved, that as it appeared from the representation of the delegates from the state of Pennsylvania, that disputes had arisen between the states of Pennsylvania and Virginia, relative to the extent of their boundaries, which might be productive of serious evils to both states, and tend to lessen their exertions in the common cause, it be recommended to the contending parties, not to grant any part of the disputed land, or to disturb the possession of any person living thereon, and to avoid any appearance of force, until the dispute could be amicably settled by both states, or brought to a just decision by the intervention of Congress; that possessions forcibly taken be restored to

(«) 7 Journ. Cong. 180.

(x) Ib. 277.

(y) Ib. 250.

<z) Ib. 271.

(a) 11 Journ. Conjr. 33.

(6) Ib. 123. By the act of Congress of the 8th May, 1792, sec. 12, the records and proceedings of this court, are ordered to be deposited in the office of the clerk of the Supreme Court of the United States, Who is authorized to give copies; and such copies are to have like faith and credit as all other proceedings of said court.

the original possessors, and things placed in the situation in which they were at the commencement of the war, without prejudice to the claims of either party .(e)

So, the disputes existing between the states of New York, New Hampshire and Massachusetts, and the people inhabiting the present state of Vermont, then styled the New Hampshire grants, were brought before Congress by their applications, and Congress recommended laws to be passed by the respective states, expressly authorizing Congress to hear and determine all differences between them, relative to their respective boundaries, in the mode prescribed by the articles of confederation, (which had then been agreed to in Congress, but were not ratified by all the states.) New York and New Hampshire passed such laws, and a hearing before Congress took place.

A controversy subsisting between the states of Virginia and New Jersey, respecting a tract of land called Indiana, lying on the river Ohio, was, in consequence of instructions from the Legislature of New Jersey to their delegates in Congress, and the petitions of Indiana proprietors, heard before a committee of Congress, who reported in May 1782, that the purchase of the Indiana company was made *bona fide,* &c. (c?)

During this period there existed nothing resembling the appellate authority from the tribunals of the respective colonies previously exercised by the king in council.

III. Of the government of the Union under the articles of Confederation.

The declaration of independence in July, 1776, operated as a permanent transfer from the crown of England of the high national powers lately exercised by Congress, and was naturally followed by the establishment of a regular government, amongst whose different departments these powers might be distributed. Accordingly, the day after that on which the declaration of independence was resolved on by Congress in a committee of the whole (June 11th 1776,) a proposition was made, and a committee appointed to prepare and digest the form of a confederation

(c) 5 Journ. Cong. 456.

(<0 7 Journ. Cong. 364. 9 Journ. Cong. 64.

to be entered into between the colonies.(e) The articles of confederation were agreed to in Congress on the 15th November 1777,(f) but were not to be conclusive until they were approved by the legislatures of all the states.(g-) Eleven of the states ratified them in 1778, and one in 1779, and the last of the thirteen states on the 1st March 1781. The completion of the ratification was announced by Congress on the 23d March 1781, and the government commenced its operations.

By the articles of confederation, the judicial power of the United States was defined and somewhat extended, though it was still restricted to narrow limits. The ninth article provided, that the United States in Congress assembled, should have the sole and exclusive right and power, 1st, Of appointing courts for the trial of piracies and felonies committed on the high seas. 2d, Of establishing courts for receiving and determining appeals in all cases of capture: provided, that no member of Congress should be appointed a judge of any of the said courts. 3d, The United States in Congress assembled were also to be, by the same article, the last resort on appeal, in all disputes and differences then subsisting or that thereafter might arise, between two or more states concerning boundary, jurisdiction, or any other cause whatever; which authority was to be exercised by judges, or commissioners, to be appointed in the manner therein particularly described, their judgment to be final; provided, that no state should be deprived of territory for the benefit of the United States. 4th, All controversies concerning the private right of soil claimed under different grants of two or more states, whose jurisdictions, as they might respect such lands and the states which passed such grants, were adjusted j the said grants, or either of them, being at the same time claimed to have originated antecedent to such settlement of jurisdiction; were on the petition of

either party in Congress, to be finally determined, as near as might be, in the same manner as the foregoing.

Such was the limited extent of judicial power under the confederation, and its exercise was arranged in the following manner.

(e) 2 Journ. Cong. 207. (f) 3 Journ. Cong. 502. *(g)* Article 13.

1. An ordinance was passed^) for establishing courts for the trial of piracies and felonies committed on the high seas, by which persons charged with these offences, or accessaries thereto, were to be inquired of and tried by the grand and petit jurors according to the course of the common law in like manner as if committed on land. The justices of the Supreme or Superior Court of judicature, and judges of the court of admiralty of the several and respective states, or any two or more of them, were appointed judges.(e) The punishment was to be the same as if the offences were committed on land. When there was more than one judge of a court of admiralty, the supreme executive power of the state was to commissionate one (of them) exclusively, to join in performing the duties required by the ordinance. All forfeitures were to go to the state, when conviction took place.

When courts were held under the authority of this ordinance, the judges sat in the state court house, the prisoners were confined in the state gaol under the custody of state officers, and were executed, on conviction capitally, by the order of the sheriff.(&)

2. No new court of appeals was constituted after the articles of confederation; but the court, as then organised, appears to have continued. The judicial power of Congress under the articles of confederation, in appeals in cases of capture, seems, however, to have been narrowed considerably by the constructions given to the articles of confederation in the state courts. Thus, in Pennsylvania, by an act of the legislature passed prior to the complete ratification of the articles of confederation, a court of appeals was constituted, " for reviewing, reconsidering and correcting the definitive sentences and decrees of the court of admiralty of that state, other than in cases of capture upon the water in time of war from the enemies of the United States." A complainant filed a libel in the state court of admiralty, to recover damages against the defendant, for taking from him on the high seas, an English vessel, which he had captured as prize, in which the state

(A) April 5th 1781. 7 Journ. Cong. 65.

(i) By an ordinance passed in March, 1783, a judge of the court of admiralty was always to form one of the court. 8 Journ. Cong. 146.

(K) 2 Vol. Debates of Congress in 1789, page 286, speech of Mr. Smith of South Carolina.

court of admiralty decreed damages and costs. On appeal to the state court of appeals that court held, 1st. that an appeal did not lie in the case to the court established by Congress, because the words of the articles of confederation authorising the establishing of courts

for receiving and determining finally appeals in all cases of capture, meant captures as prize, when such prize was brought *infra prcesidia* of the United States; and as the prize in this instance was not brought *infra prcesidia* of the United States, but was recaptured by the British, that court had no jurisdiction. 2d, That the state court of appeals had jurisdiction, because the legislature intended to give it jurisdiction in appeals from the admiralty in all cases in which the appeal was not resigned to the United States, and if this were not the case there would be a defect of justice.(7.)

3. A court consisting of five commissioners, organised under the articles of confederation, sat at Trenton, in November and December, 1782, to determine the controversy which had long subsisted between the states of Pennsylvania arid Connecticut, relative to the territory of Wyoming. These states appeared respectively by counsel, as agents, and their proofs and arguments were heard. On the 30th December, 1782, the court decreed, unanimously, that the state of Connecticut had no right to the lands in controversy, and that the jurisdiction and preemption of all the territory lying within the charter boundary of Pennsylvania claimed by Connecticut, of right belonged to the state of Pennsylvania.(m)

Proceedings also took place in the years 1786, and 1787, for constituting courts to determine controversies respecting territory, between the states of Massachusetts and New York, and also between the states of South Carolina and Georgia: but they were never completed, as these states amicably adjusted the disputes.(w)

As well before as after the articles of confederation, Congress, by the exercise of an appellate jurisdiction, in all cases of capture, had the means of enforcing the law of nations, so far as related to questions of prize. To enforce it in other respects, they were dependent on the aid

(0 Talbot *v.* Commanders, &c. of three brigs. 1 Ball. 95.

(m) 8 Journ. Cong. 83. The court consisted of William Whipple, Welcome Arnold, William C. Houston, Cyrus Griffin, and David Brearly, Esquires.

(n) 12 Journ. Cong.

of the state governments. ^ In August, 1779, they resolved, that the President and Supreme Executive Council of Pennsylvania, be informed, that any prosecution which it might be expedient to direct for such matters and things in certain publications and transactions as were against the law of nations, should be carried on at the expense of the United States.(o) In November, 1781, they recommended to the legislatures of the states, to pass laws punishing infractions of the laws of nations, committed by violating safe conducts or passports granted by Congress: by acts of hostility against persons in amity with the United States: by infractions of the immunities of ambassadors: by infractions of treaties or conventions: and to erect a tribunal, or to vest one already existing with power to decide on offences against the law of nations, and to authorize suits for damages by the party injured, and for compensation to the United States for damages sustained by them from an injury done to a foreign power, by a citizen.(p)

In the case of De Longchamps, who was convicted and sentenced in the court of Oyer and Terminer of Pennsylvania, in the year 1784, for committing a violation of the law of nations, by insulting M. Marbois, the secretary of the French legation, and for assault and battery on him, the court declared, that the law of nations formed a part of the municipal law of Pennsylvania, and it seems enforced it.(y) No act appears to have been passed in this state in pursuance of the recommendation of Congress. After the arrest of De Longchamps, the Supreme Executive Council of Pennsylvania gave information of it in a letter to Congress, and requested their advice,(r) and the committee of states approved thereof.(s)

On the 24th June, 1776, after independence had been resolved upon, but before it was declared, Congress denned allegiance and treason; declaring the latter to consist in levying war against any of the colonies within the

(o) 5 Journ. Cong. 367. In the case of Cornelius Sweers, in the year 1778, reported 1 Ball. 41, Congress employed counsel to prosecute in the state court. 4 Journ. Cong. 494. See also 5 Journ. Cong. 283, in the year 1779.

(p) 7 Journ. Cong. 234.

(q) Respublica *v.* De Longchamps, 1 Ball. 111.

(r) 9 Journ. Cong. 277.

(«) 9 Journ. Com, of States, 6,

^ame, or being adherent to the king of Gfreat Britain, or other enemies of the said colonies or any of them, within the same, giving to him or them aid or comfort; and recommending it to the legislatures of the colonies, to pass laws for punishing persons proveably attainted of open deed by people of their condition. We find several instances of persons convicted in Pennsylvania in the year 1778, under the laws of that state, for treason committed therein.^)

In the ordinance passed in October, 1782, for regulating the post offices of the United States, (the power to establish and regulate post offices throughout the United States being vested in Congress by the articles of confederation,) Congress imposed penalties for official misdemeanors, which were made recoverable by action of debt in the name of the Post Master General, in the state where the offence was committed. But, generally speaking, Congress had no power to exact obedience, or punish disobedience by pecuniary mulcts or otherwise, but were dependent on the laws and tribunals of the several states; so that when laws became necessary to secure the interests of the union, they were obliged to request the state legislatures to pass them. Thus, for example, we find Congress in the year 1782, calling on the legislatures of the states to pass laws to empower commissioners appointed by Congress to settle the accounts of the military department, to call for witnesses and examine them on oath or affirmation, touching the accounts. (M) It was even necessary to pass a resolution to request them to enact laws to enable the United States to recover from individuals debts due, and effects belonging to the United States;(V) and in July 1784, we find the committee of States, (who sat during

the recess of Congress,) complaining, that none of the state legislatures had made the i provision requested agreeably to their recommendation, by which the interests of the United States had already suffered greatly, and requiring that it should be done without loss of time, and again *earnestly* recommending the adoption of measures to enable the United States to

(0 See 1 Ball. 35. 39.

(u) 4 Journ. Cong, 83, in 1778. 5 Journ. Cong. 296, in 1779. 7 Journ. Cong. 298, in 1782. *(x)* 7 Journ. Cong. 298.

sue for and rec6ver their debts and effects and property, and any damages they had sustained or might sustain.(y)

Hence it appears that all cases of national or local import were decided by the state jurisdictions exclusively, except disputes between states, questions arising under grants of land by two or more states in certain cases of prize on appeal, and piracies or felonies on the high seas. To these exceptions may be added suits against one of the states in the courts of another, which the latter refused to take cognisance of on the general principle that a state was sovereign, and one sovereign could not be sued in the courts of another.(z) The state courts exercised no jurisdiction in causes arising from a national impost or revenue: for none such existed prior to the present constitution of the United states. State imposts existed, and the state tribunals entertained the causes arising out of them.(a)

Under the confederation, no tribunal was vested with the appellate authority which before the revolution was exercised by the king in council from the decisions of the courts of the respective colonies.(b)

The members of the Convention which formed the constitution of the United States had witnessed the practical operation of our judicial institutions under the crown of England and the confederation, and had the best opportunities of observing the excellencies and defects of both systems. It may be presumed that in arranging the judicial power they intended to embrace what experience had shewn to be salutary in preserving harmony amongst ourselves and with foreign nations, and what wisdom dictated as essential to secure obedience to the authorities intended to be vested in the different departments. Hence some portion of the judicial power resembles that exercised in former times, but a considerable share of it grew out of the establishment of a general government, designed to superintend exclusively the great political concerns of the country.

(y) 9 Journ. Cong. Com. of States, 29.

(«) Nathans v. Commonwealth of Virginia, 1 Dall. 77.

(a) See causes of this description reported 1 Dall. 62, 197. In Pennsylvania they were tried by jury.

(6) The only judicial power analogous to this is the appellate jurisdiction vested in the Supreme Court of the United States under the present constitution from the highest state courts, in cases arising under the constitution, laws or treaties.

THE

COURTS OF THE UNITED STATES,

&c. &c.

CHAPTER I.

SUPREME COURT — ORGANIZATION.

THE constitution provides in the 1st article, (sect. 8, 9.) that Congress shall have power to constitute tribunals inferior to *The Supreme Court:* and directs in the 3rd article, (sect. 1,1.) that the judicial power of the United States shall be vested in *one Supreme Court,* and in such inferior courts as Congress may, from time to time, ordain and establish. A chief justice is recognized in the 1st article of the constitution, which provides that when the President of the United States shall be tried before the senate, on impeachment, the chief justice shall preside, (sect. 3, 6.) The organization of this court, in relation to the number of its judges, the places and periods of its session, &c. is provided for by the act of Congress, of September 24th, 1789, commonly called the Judicial Act, and other acts subsequently passed, *(a)*

By the 1st sect, of the act of September 24th, 1789, the Supreme Court shall consist of a chief justice and five associate justices, any four of whom shall be a quorum, and shall hold, annually, at the seat of government, two sessions; the one commencing the first Monday of February, and the other the first Monday of August. And the associate justices shall have precedence ac-

(a) Th>s act was draughted by a committee of senate composed of Messrs. Ellsworth, Paterson, Maclay, Strong, Lee, Bassett, Few, and Wingate. Senate Journ. April 7th, 1789.

cording to the date of their commissions, or when the commissions of two or more of them bear date on the same day, according to their respective ages.

But by the act of April 29, 1802, sect. 1. the Supreme Court shall be holden by the justices thereof, or any four of them, at the City of Washington, and shall have one session in each and every year, to commence on the first Monday of February annually; (altered by the act of May 4, 1826, to the second Monday of January;) and if four of the said justices shall not attend within ten days after the time hereby appointed for the commencement of the said session, the business of the said court shall be continued over till the next stated session thereof; *provided always,* that any one or more of the said justices, attending as aforesaid, shall have power to make all necessary orders touching any suit, action, writ of error, process, pleadings, or proceedings returned to the said court

or depending therein, preparatory to the hearing, trial, or decision of such action, suit, appeal, writ of error, process, pleadings, or proceedings.

The 2d section enacts, that it shall be the duty of the associate justice resident in the fourth circuit formed by this act, (Maryland and Delaware) to attend at the city of Washington, on the first Monday of August next, and on the first Monday of August each and every year thereafter, who shall have power to make all necessary orders touching any suit, action, appeal, writ of error, process, pleadings, or proceedings; and that all writs and process may be returnable to the said court, on the said first Monday in August, in the same manner as to the session of the said court, herein before directed to be holden on the first Monday in February; and may also bear teste on the said first Monday in August, as though a session of the said court was holden on that day. And it shall be the duty of the clerk of the Supreme Court to attend the said justice on the said first Monday in August in each and every year, who shall make due entry of all such matters and things as shall or may be ordered as aforesaid by the said justice. And at each and every such August session, all actions, pleas, and other proceedings relative to any cause, civil or criminal, shall be continued over to the ensuing February session.

By the act of February 24th, 1807, sect. 5, the Supreme

Court of the United States shall hereafter consist of a chief justice and six associates; any law to the contrary notwithstanding. And for this purpose, there shall be appointed a sixth associate justice, to reside in the seventh circuit, (Kentucky, Tennessee, and Ohio,) whose duty it shall be, until he is otherwise allotted, to attend the Circuit courts of the said seventh circuit, and the Supreme Court of the United States, and who shall take the same oath, and be entitled to the same salary as are required of, and provided for, the other associate justices of the United States.

By the act of 21st January, 1829, sect. 1, if, at any session of the Supreme Court, four justices thereof shall not attend, on the day appointed for holding said session, such justice or justices as may attend, shall have authority to adjourn said court from day to day, for twenty days after the time appointed for the commencement of said session, unless four justices shall sooner attend; and the business of said court shall not in such case be continued over to the next stated session thereof, until the expiration of the said twenty days, instead of the ten days now limited by law.

The 6th section of the act of September 24th, 1789, provides that the Supreme Court may, by any one or more of its justices being present, be adjourned from day to day, until a quorum be convened: and though one of the justices should be dead, it seems four would constitute a quorum.(A)

By the act of 21st January, 1829, sect. 2, if it shall so happen, during any term of the Supreme Court, after four of the judges shall have assembled, that, on any day, less than the number of four shall assemble, the judge or judges so assembling, shall have authority to adjourn said court, from day to day, until a quorum shall attend; and, when expedient and proper, may adjourn the same without day.

By sect. 8. their oath or affirmation is prescribed: and by sect. 7, the court is authorized to appoint a clerk, who is to take an oath or affirmation, and to give bond with sureties.

The act of May 8,1792, sect. 12, provides that all the

(6) Pollard v. Dwight. 4 Cranch, 421.

records and proceedings of the court of Appeals heretofore appointed, previous to the adoption of the present constitution, shall be deposited in the office of the clerk of the Supreme Court of the United States, who is thereby authorized and directed to give copies of all such records and proceedings to any person requiring and paying for the same, in like manner as copies of the records and other proceedings of the said court, are by law directed to be given; which copies shall have like faith and credit as all other proceedings of the said court.

By the 7th sect, of the act of February 25th, 1799, whenever, in the opinion of the chief justice, or in case of his death, or inability, of the senior associate justice of the Supreme Court of the United States, a contagious sickness shall render it hazardous to hold the next stated session of the said court at the seat of government, it shall be lawful for the chief, or such associate justice, to issue his order to the marshal of the district within which the Supreme Court is by law to be holden, directing him to adjourn the said session of the said court, to such other place within the same or an adjoining district, as he may deem convenient, and the said marshal shall thereupon adjourn the said court, by making publication thereof in one or more public papers, printed at the place by law appointed for holding the same, from the time he shall receive such order until the time bylaw prescribed for commencing the said session. And the district judges shall respectively, under the same circumstances, have the same power, by the same means, to direct adjournments of the district and circuit courts, within their several districts, to some convenient place within the same respectively.

CHAPTER II.

SUPREME COURT. — ORIGINAL JURISDICTION.

THE constitution expressly defines and fixes the original jurisdiction of the Supreme Court, by declaring the cases in which it shall take original jurisdiction*;* and that in others it shall take appellate jurisdiction.(a) Congress may, by legislative enactment, enforce the provisions of the constitution on this head; but it cannot assign to the Supreme Court original jurisdiction in any case in which it is not vested in that court by the constitution.^)

The provisions of the constitution that relate to the original jurisdiction of the Supreme Court, and the judicial power of the United States, are the following.

Art. III. Sec. 1, 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as congress may, from time to time, ordain and establish.

Sec. 2,1. The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states — between a state and citizens of another state — between citizens of different states — between citizens of the same state, claiming lands under grants of different states — and between a state or the citizens thereof and foreign states, citizens, or subjects.

Sec. 2,2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and

(a) Marbury *v.* Madison. 1 Cranch, 137. 175. (i) Ib.

fact, with such exceptions, and under such regulations as Congress shall make.

Amendments. — Art. 7. In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

Amendments. — Art. 11. The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

By the act of September 24th, 1789, sect. 13. the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens; and except also, between a state and citizens of other states or aliens, in which latter case it shall have original, but not exclusive jurisdiction. And shall have, exclusively, all such jurisdiction of suits or proceedings *against* ambassadors or other public ministers, or their

domestics or domestic servants, as a court of law can have or exercise consistently with the law of nations. And original, but not exclusive jurisdiction of all suits brought *by* ambassadors or other public ministers, or in which a consul or vice-consul shall be a party. And the trial of issues in fact, in the Supreme Court, in all actions at law, against citizens of the United States, shall be by

jury.(c)

Soon after the adoption of the constitution, several suits

against states were brought in the Supreme Court, by citizens of other states. The states, however, refused to ap-

(c) No act of Congress gives to any other court concurrent jurisdiction in suits between a state and citizens of other states or aliens, though here declared not exclusive: unless the 11th sec. of this act does so as to aliens, by the grant to the circuit court of cognisance of suits where an alien is party. See 4 Wash. C. C. Rep. 200. 344. Nor is concurrent jurisdiction given by act of Congress to any other court in suits *by* ambassadors or other public ministers, or *by* a consul or vice-consul. The 11th section of this act gives the district courts jurisdiction of suits *against* consuls and vice-consuls.

pear to these suits; and it was insisted that the clause in the constitution, extending the judicial power of the United States, to controversies between a state and citizens of another state, embraced only suits brought *by* a state, and did not include suits brought against a state. But in the case of Chisholm *v.* Georgia,(o?) it was decided by the Supreme Court that assumpsit might be maintained against a state by a citizen of a different state. This decision occasioned the 11th amendment to the constitution above mentioned, which was construed not only to prohibit the bringing of suits against a state by citizens of another state or aliens, from the time of its adoption, but to put an end to all suits of that description which were then pending.(e) This amendment, however, does not affect controversies between two or more states,(f) or between a state and foreign states, or suits brought by a state against citizens of a different state. But it seems, a state cannot go into a court of the United States, to enforce its own penal laws in any case.(g-)

But to deprive the Circuit Court of jurisdiction on the ground that states are parties, such states must be either nominally or substantially parties. It is not sufficient in an ejectment brought by one individual against another in which no state is before the court, that the suit may in its result consequentially affect a state or states. As for instance, that grants made by such states are in litigation, "and that in the event of the verdict, retribution must be made by

either of them, or that the issue is, in which of two states the land in dispute lies: for the decision between individuals cannot affect the rights of a state.(A)

A state may proceed originally in the Supreme Court for the purpose of contesting a right of soil(t') Upon the question, whether there was any mode by which a state might have the right of jurisdiction tried, WASHINGTON, J. Would not say that a state could sue at law for such an incorporeal right as that of sovereignty and jurisdiction, but said that even if a court of law would not afford a re-

d) 2 Ball. 419.

e) Hollingsworth v. Virginia. 3 Ball. 378. See 2 Dall. 480. note.

f) See for example, New York *v.* Connecticut. 4 Dall. 3.

g) Cohens *v.* Virginia. 6 Wheat. 399. *h)* Fowler v. Lindsey. 3 Dall. 411.

i) Ib. New York *v.* Connecticut et al. 4 DalL 3

medy he saw no reason why a remedy should not be obtained in a court of equity. The state of New York might, he thought, file a bill against the state of Connecticut, praying to be quieted as to the boundaries of the disputed territory: and this court, in order to effectuate justice, might appoint commissioners to ascertain and report those boundaries. CUSHING J. intimated that a state has a remedy under the constitution and law to determine a contest of jurisdiction. But PATERSON J. declared that it was not necessary to determine how far a suit might, with effect, be instituted in the Supreme Court to decide the right of jurisdiction between two states, abstractedly from the right of soil.(k)

Whether a state might institute proceedings in the Supreme Court to annul a contract made by it in a law passed by its legislature, on the ground of fraud and corruption in the members of such legislature, query. It is certain that individuals cannot bring such questions incidentally and collaterally before the court. And if a bill were filed by the state for such purpose, third persons, purchasers for a valuable consideration, having no notice of such fraud and corruption, would have a good title.(m)

An indictment for an assault committed by a private individual on a foreign minister, within the United States, in violation of the provision of the 27th section of the crimes act of 1790, is not a case within the constitution, which declares, art. 3. s. 2. 2. that in all cases affecting ambassadors, other public ministers, and consuls, the Supreme Court shall have original jurisdiction. It is a case which affects the United States, and the individual prosecuted, but not the minister, inasmuch as he is not concerned either in the event of the prosecution, or in the costs attending it. The Circuit Court has jurisdiction in such case, under the 11th sect, of the act of 24th September, 1789.(n)

In a criminal case that occurred in the year 1793, in

(k) Fowler *v.* Lindsey. 3 Dall. 411. See New York *v.* Connecticut et al. 4 Dall. 3, 4, note, where the state filed a bill in equity, in the Supreme Court, praying an injunction, but the court refused it, because the state was not a party to the suits below, nor interested in the decision of them.

(m) Fletcher *v.* Peck. 6 Cranch, 87.

(n) United States *v.* Ortega. 11 Wheat. 467.

the Circuit Court, it was contended that the word *original* in the constitutional grant of jurisdiction to the Supreme Court, meant *exclusive,* and that Congress could not vest jurisdiction in any other court in cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party, enumerated in the second clause of the second section of the third article.(o) It was therefore contended that the Circuit Court had no jurisdiction in an indictment against the defendant, who was consul from Genoa, under the grant to the Circuit Court of criminal jurisdiction by the 11th sect, of the act of September 24th, 1789; and of this opinion was IREDELL J. But WILSON J. and PETERS, district judge, were of opinion that the constitution did not preclude Congress from vesting a concurrent jurisdiction in such inferior courts as they might establish, and having done so as to the Circuit Court, it had jurisdiction. And with this the opinion of IREDELL J. previously delivered in the case of Chisholm *v.* Georgia,(p) seems to concur.

That the understanding of the first Congress was, that • the word original did not mean exclusive, appears from the 13th sect, of the act of September 24th, 1789, which declares the jurisdiction of the Supreme Court in several cases embraced in the constitutional grant of original jurisdiction to the Supreme Court, to be "original but not

1 exclusive;" and from the 11th section of that act, by which jurisdiction is given to the District Court in all

,j suits against consuls, or vice consuls, except those of a

,/ certain description.(^)

(o) United States v. Ravara. 2 Dall. 297.

(p) 2 Dall. 419. See Cohens *v.* Virginia. 6 Wheat. 692. Com1 monwealth *v.* KoslofF. 5 Serg. and Rawle, 545.

(5) 2 Dall. 419. See Cohens *v.* Virginia. 6 Wheat. 692. Commonwealth *v.* Kosloff. 5 Serg. and Rawle, 545. Yet it is difficult to reconcile with the foregoing, the language of MARSHALL, C. J. in Osborn *v.* U. S. Bank. 9 Wheat. 820. 821.

" In those cases in which original jurisdiction is given to the Supreme Court, the judicial power of the United States cannot be exercised in its appellate form." " With the exception of those cases in which original jurisdiction is given to thia court, there is none to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the constitution." " The constitution establishes the Supreme Court, and defines its jurisdiction. It enumerates casrs in which its jit-

In Marbury *v.* Madison,(r) it was held, that Congress cannot vest in the Supreme Court original jurisdiction in a case in which the constitution had clearly not given that court original jurisdiction, and that affirmative words in the constitution, declaring in what cases the Supreme Court shall have original jurisdiction, must be construed negatively as to all other cases, or else the clause would be inoperative and useless. The 13th sect, of the act of 24th September, 1789, vests in the Supreme Court power to issue writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office under the authority of the United States. It was determined, in that case, that the authority given by this section, to issue a mandamus to public officers, was a grant of original jurisdiction not warranted by the constitution, because it was not within the specified cases in which the Supreme Court is by the constitution vested with original jurisdiction, and the act of Congress, in this respect, was held to be void. The court, therefore, refused to issue a mandamus to the secretary of state of the United States, commanding him to deliver to the persons appointed, commissions of justices of the peace for the District of Columbia, which had been signed by the president of the United States, and sealed with the great seal, though they were of opinion that the parties complaining were entitled to the commissions.^)

risdiction is original and exclusive: and then defines that which is appellate," &e. See the case of United States *v.* Ortega. 11 Wheat. 467, and Mr. Wheaton's note.

(r) 1 Cranch, 137. See the opinion explained, Cohens v. Virginia. 8 Wheat. 400,401.

(s) Marbury c. Madison. 1 Cranch, 137.

CHAPTER III.

SUPREME COURT-ORIGINAL JURISDICTION-PRACTICE,

BY the 14th sect, of the act of September 24th, 1789, all the courts of the United States have power to issue writs of *scire facias, habeas corpus,* and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

By the 17th sect, of the act of September 24th, 1789, all the courts of the States have power to impose and administer, all necessary oaths or affirmations; and to punish, by fine or imprisonment, at the discretion of said courts, all contempts of authority in any case or hearing before them: and 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.

The Supreme Court possesses, without the provision of written law, a power over their own officers, and to protect themselves and their members from being disturbed in the exercise of their functions; such as to fine for contempt, imprison for contumacy, and enforce the observance of order.(a) They could have exercised the power to fine and imprison for contempts without the aid of this act of Congress; or in cases, if such should occur, to which its provision does not extend. The act is a legislative assertion of a right

as incidental to a grant of judicial power, and is to be considered either as an instance of abundant caution, or as a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits, namely, fine and imprisonment.^)

(a) Ex parte Bollman and Swartwout. 4 Cranch, 93. United States v. Hudson and Goodwin. 7 Cranch, 34.

(6) Anderson *v.* Dunn. 5 Wheat. 227, 228. See also Ex parte Kearney. 7 Whpat. 38.

The act of May 8th, 1792, sec. 1. provides that all writs and processes issuing from the Supreme, or a Circuit Court, shall bear teste of the Chief Justice of the Supreme Court, or, (if that office be vacant) of the associate justice next in precedence; and all writs and processes issuing from a District Court shall bear teste of the judge of such court, or, (if that office shall be vacant,) of the clerk thereof, which said writs and processes shall be under the seal of the court from whence they issue, and signed by the clerk thereof. The seals shall be provided at the expense of the United States.(c)

By sect. 2, the forms of writs, executions, and other process, *except their style,(d}* 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,"(e) in those of equity, and admiralty and maritime jurisdiction, shall be according to the principles, rules, and usages which belong to courts of equity, and to courts of admiralty respectively, as contradistinguished from courts of common law; except so far

(c) By an act passed the 29th September, 1789, entitled " An Act to regulate processes in the courts of the United Stales," the same provision was made, and under its authority the Supreme Court, at February term, 1790, established a seal for that court and the circuit courts. See 2 Dall. 399. This act was continued till the end of the session of 1791-2, by the act of February 18th, 1791, and was then suffered to expire.

(d) Query the meaning of these words here. The style of the process of this court, until altered by law, was fixed by the court at February term, 1790, to be "the President of the United"States." 2 Dall. 400*. That style has continued ever since in the Supreme Court and Circuit Courts, though it became a subject of difference between the Senate and House of Representatives on the passage of the act of May 8th, 1792. The bill as it came from Senate contained a clause that " all writs and processes issuing out of the Supreme and circuit courts should be in the name of the President of the United States"; but the house struck it out, with a view that they might be issued in the name of the United States. The Senate insisted on the clause, and the house adhered to their amendment. It finally passed without the clause: but the rule of court has never been altered.

(e) The act of 29th September, 1789. This act directed that the forms of writs and executions, except their style, and modes of process in the circuit and district courts, should be the same in each state respectively, as were then used and allowed in the Supreme Courts of the same, until further provision was made, and except where by that act, or other statutes of the United States, was otherwise provided. It made no provision, in this respect, for the Supreme Court.

as may have been provided for by the act of 24th September, 1789: 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 shall think proper, from time to time, by rule to prescribe to any circuit or district court concerning the same.(f)

At August term, 1792, the Supreme Court ruled, that they considered the practice of the Ring's Bench and Chancery in England, as affording outlines for the practice of this court; and that they would from time to time make such alterations therein as circumstances might render necessary.(g-)

The act of March 2,1793, sect. 7, provides, that it shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts, directing the returning of writs and processes, the filing of declarations, and other pleadings, the taking of rules, the entering and making up judgments by default, and other matters in the vacation — and otherwise, in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts respectively, as shall be fit and necessary for the advance of justice, and especially to that end to prevent delay in proceedings.

As, notwithstanding the 11th article of the amendments to the constitution, there are cases in which a state may be sued by original process in the Supreme Court, the decisions on the practice in such cases may be useful.

In a suit against a state, the delivery of a copy of the writ to the governor and attorney general of such state is a good service.(/i) And if the state do not appear after such service, on proclamation being made, the court will grant a rule to shew cause why, on non appearance by a certain day, judgment by default should not be entered against such state.(z')

(f)Theactof 29th September, 1789, provided that the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction should be according to the course of the civil law.

(g) 4 Dall. 411.

(ft) Chisholm *v.* The State of Georgia. 2 Dall. 419. Huger v. The State of South Carolina. 3 Dall. 339.

(*) Oswald *v.* The State of New York. 2 Dall. 415.

Where the state refused to appear in an action of assumpsit, after the writ had been duly served, the court ordered the plaintiff to file his declaration by a certain day, and that certified copies thereof should be served on the governor and attorney general, and that unless the state in due form appeared, or shewed cause to the contrary in that court, by the first day of the next term, judgment by default should be entered. Judgment by default was afterwards entered accordingly, and a writ of inquiry awarded.(k)

So in a suit in equity, if a subpœna issued out of this court has been duly served, and the state do not appear, the complainant is entitled to proceed *ex parte:* and in this case, the complainant moved for, and obtained commissions to take the examination of witnesses in several of the states.(l)

If a party, having a right to sue in this court, as for instance, a state or a foreign minister, wish to institute a suit against a person confined by process of an inferior court of the

United States, there need be no process, such as is used in England, by *habeas corpus ad respondendum,* to bring his body actually into court. An original writ from this court being directed to the marshal of the district, who has charge of his person, would require him to take the defendant into custody, and confine him in the same gaol where he is already confined, till he gives bail.(m). Nor would such writ lie where the defendant is confined by process from a state court: for a state court is not an inferior court in any sense, except in the particular cases in which an appeal lies from their judgment to this court; and in these cases the mode of proceeding is particularly described, and is not by *habeas corpus.(n)*

By a rule of court, made at February term, 1790, the clerk of the Supreme Court is to reside and keep his office at the seat of the national government, and is prohibited from practising as an attorney or counsellor in the Supreme Court, while he continues clerk. Attorneys or

(k) Chisholm *v.* The State of Georgia. 2 Ball. 419, 420. (0 Huger v. The State of South Carolina. 3 Ball. 3.
(m) Ex parte Bollman and Swartwout. 4 Cranch, 97, (n) Ib.

counsellors must have been such for three years, in the Supreme Courts of the state to which they belong, and their private and professional characters must appear to be fair before they can be admitted to practice in this court: and their oath or affirmation is prescribed.

CHAPTER IV.

SUPREME COURT — APPELLATE JURISDICTION.

THE appellate jurisdiction of the Supreme Court depends on the 3d article of the constitution, (sec. 2. 2.) which provides that, in all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as Congress shall make.

In the construction of this clause it has been held, that it vests in the Supreme Court, an appellate jurisdiction in all cases where original jurisdiction is given to the inferior courts, with only such exceptions, and under such regulations as Congress may make.(a) For though the decision and reasoning in the case of Marbury *v.* Madison,^) would seem to imply it,(c) yet the clause giving the Supreme Court appellate jurisdiction *in all other cases* than those in which original jurisdiction is granted, does not deprive the Supreme Court of appellate jurisdiction in any cause originating in the inferior courts of the United States, or in any case in the highest courts of the states when such case arises under the constitution, laws or treaties. The original jurisdiction vested in the Supreme

(a) Wilson v. Mason. *I* Cranch, 22. (6) I Cranch, 137.

(c) See Commonwealth *v.* Kosloff. 5 Serg. and Rawle, 545, and the reasoning of the court, Cohens *v.* Virginia. 6 Wheat. 399.

Court by the constitution, is founded entirely on the character of the parties. In its appellate jurisdiction, the character of the parties does not govern, but the character of the case. It is therefore, no objection to the exercise of its appellate jurisdiction that the character of the parties is such that it might have entertained original jurisdiction. Thus in a case arising in a state court, under the laws of the United States, it is no objection to the appellate power of this court, that a state is party: nor in a case decided in a Circuir Court of the United States, that an ambassador or consul is party; but an appeal or writ of error lies in such cases.(o?)

Had Congress simply erected a Supreme Court and inferior courts, without saying in what cases a writ of error or appeal should lie, the Supreme Court would have possessed all the appellate jurisdiction which the constitution embraces; but as Congress has power to limit the exercise of its appellate jurisdiction, and to make exceptions respecting its exercise, and under that power has declared in what cases a writ of error or appeal shall lie, an exception of all other cases is implied. For it seems it is a general principle applicable as well to the appellate power of the Supreme Court as to the inferior courts established by acts of Congress, that the judicial power granted by the constitution, can only be exercised in the cases and in the modes prescribed by act of Congress: the constitution and laws must both concur in order to vest it.(e)

Under the acts of Congress, the appellate jurisdiction given by the constitution, is exercised by the Supreme Court in the following different modes.

1. By writ of error, from final judgments of the circuit courts, of the district courts, exercising the powers of circuit courts, and of the superior courts of territories, exercising the powers of circuit courts in certain cases.

2. By appeal from final decrees of the circuit courts, of the District courts exercising the powers of circuit

(d) Cohens v. Virginia. 6 Wheat. 392..

(e) United States *v.* Moore, 3 Cranch, 170. Durousseau v. The United States. 6 Cranch, 312. Wilson *v.* Mason, 1 Cranch, 91. Wiscart v. Dauchy. 3 Ball. 237. See *post.* Circuit Court.

courts, and of the superior courts of territories exercising the powers of circuit courts in certain cases.

3. By writ of error from the final judgments and decrees of the highest court of law or equity in a state, in certain

cases.

4. By certificate from a circuit court, that the opinions of the judges are opposed on points stated.

5. By mandamus, prohibition, habeas corpus, certiorari, procedendo.

CHAPTER V.

SUPREME COURT-WRITS OF ERROR TO COURTS OF THE UNITED STATES.

THE act of 24th September, 1789, declares, insect. 13, that the Supreme Court shall have appellate jurisdiction from the circuit courts in the cases therein after provided for. And in sect. 22, after enacting that final decrees and judgments in civil actions, in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined and reversed, or affirmed in a circuit court, holden in the same district, upon a writ of error, whereto shall be annexed, and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record, and assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge, &c., the adverse party having at least twenty days' notice, it provides, that upon a like process may final judgments and decrees in civil actions, and suits in equity, in a circuit court, brought there by original process, or removed there from courts of the several states, or removed there by appeal from a district court, where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be reexamined and reversed, or affirmed in the Supreme Court; the citation being, in such case, signed by a judge of such circuit court, or justice of the Supreme Court, and the adverse party having at least thirty days' notice. But there shall be no reversal in either court on such writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity as is in the nature of a demurrer, or for any error in fact.

The cases in which writs of error lie from the Supreme Court, to courts of the United States, are regulated by,

1. The courts.

2. The nature of the judgments rendered.

3. The parties.

4. The value of the matter in dispute.

5. The time within which such writ of error must be brought

1. Of the courts to which writs of error lie.

We have seen that by the 12th and 22d sections of the act of September 24th, 1789, a writ of error lies to the final judgments of the circuit courts in certain cases.

By other acts of Congress, a writ of error lies from the Supreme Court to most of the district courts exercising the powers of circuit courts;(a) and in relation to courts of this description the following decision has been made, which, as these courts are all erected on the same model, may be considered as establishing a general rule in relation to them.

The act of March 26,1804, erecting Louisiana into two territories, established a district court in the territory of Orleans, consisting of one judge, who was in all things to have and exercise the same jurisdiction and powers which were by law given to, or might be exercised by, the judge of Kentucky district. The act of September 24th, 1789, sect. 10, had vested the District Court of Kentucky with the powers of a circuit court, and provided that writs of error and appeals should lie from decisions therein, to the Supreme Court, in the same causes as from a circuit court to the Supreme Court, and under the same regulations. It became a question under these acts, whether a writ of error lay from the Supreme Court to the District Court of the territory of Orleans, in a common law suit, in which the district court, as such, had original jurisdiction.

It was decided,

(a) See *post.* District Court — Organization.

1. That merely by the appellate powers granted to the Supreme Court in the constitution no writ of error lay, because the appellate jurisdiction of the Supreme Court is limited and regulated by the act of September 24th, 1789, and other acts, and all cases in which appellate jurisdiction is not given to the Supreme Court by act of Congress are excepted.

2. That the intent of the act of September 24th, 1789, sect. 10, was to give a writ of error from the Supreme Court to the District Court of Kentucky district, in all cases there decided, which, if decided in a circuit court, either in an original suit or on an appeal, would be subject to a writ of error.

3. That the intent of the act of March 26,1804, was to place the District Court of the territory of Orleans, in all respects, on a footing with the District Court of the Kentucky district, and therefore a writ of error well lay in that

case.(A)

But where the act establishing a district court, with the powers of a circuit court, directs that writs of error shall lie from its decisions to a particular circuit court, (as was the case as to the district of Maine, by the 10th sect, of the act of September 24th, 1789,) no writ of error lies to such district court from the Supreme Court, although such district court has all the original jurisdiction of a circuit court.(c)

On the ground that no act of Congress had authorized an appeal or writ of error from the General Court of the Northwestern Teritory, it was decided in 1803, that a writ of error from the Supreme Court to that court could not be sustained.(rf) But by the act of March 3, 1805, sect. 1, the superior courts of the several teritories of the United States, in which a district court has not been established by law, shall, *in all cases in which the United States are concerned,* have and exercise, within their respective territories, the same jurisdiction and powers which are by law given to, or may be exercised by the District

(6) Durosseau *v.* The United States. 6 Cranch, 307. See Organization of District Court — Appeal.

(c) United States e. Weeks. 5 Cranch 1.

(d) Clarke e. Bezadone. 1 Cranch, 212. See Territorial Courts.

Court of Kentucky district, and writs of error and appeals shall lie from decisions therein, to the Supreme Court for the same causes, and under the same regulations as from the said District Court of Kentucky district.

2. Of the nature of the judgments rendered in the courts below.

To sustain a writ of error from the Supreme to the circuit court, the judgment in the latter, must be a judgment in a suit originally brought there, or removed thither from a state court. It does not lie upon a judgment rendered in the circuit court in a cause brought from the district to the circuit court by writ of error; for the 22d section of the act of September 24th, 1789, allows a writ of error from the Supreme to the circuit court, only in civil actions that are brought there by original process, or removed from the courts of the several states.(e)

By an act of Congress of the 22d May 1826, it was enacted, that appeals and writs of error shall lie from decisions in the District Court for the northern district of New York when exercising the powers of a circuit court, and from decisions which may be made by the circuit court for the southern district of said state, in causes heretofore removed to said circuit court from the said district court sitting as a circuit court to the Supreme Court of the United States in the same manner as from circuit courts. Where the District Court of the northern district rendered a judgment of which it had cognizance under its ordinary jurisdiction as a district court which was affirmed in the Circuit Court for the southern district, it was held that no writ of error lay from the latter to the Supreme Court.(f)

In one instance a writ of error was taken out from the Supreme Court to the Circuit Court of the District of Columbia in a criminal case, and the judgment of the circuit

(e) United States *v.* Goodwin. 7 Cranch, 108. United States *v.* Gordon. 7 Cranch, 287. United States v. Barker. 2 Wheat. 395. United States *v.* Ten Brock. 2 Wheat. 242. In the last case, it being probable the question raised on the record would frequently occur, the court, at the desire of the Attorney-General, gave an opinion on the case, and afterwards dismissed the writ of error.

(f) Southwick *v.* Postmaster General. 2 Pet, S. C. Rep. 447.

court was affirmed; but no question was raised as to the jurisdiction/ *g)* But it was afterwards decided that no writ of error lies from the Supreme Court to the Circuit Court of the United States or of the District of Columbia, in criminal cases.(^) The only mode in which such cases can be removed from the former, is by a certificate, that the opinions of the Judges are opposed. The denial of this authority to sustain a writ of error, it is said, proceeded upon great principles of public policy and convenience. If every party had a right to bring before this court every case in which judgment had passed against him for a crime or misdemeanor or felony, the course of justice might be materially delayed and obstructed, and 'in some cases, totally frustrated; and as this court cannot *directly* revise a judgment of the circuit court in a criminal case, it cannot do it indirectly through the medium of a *habeas corpus* to bring up a person in custody under such

judgment.0

The general principle is, that a writ of error lies only from the final judgment of the circuit court. Therefore where the circuit court overruled the defendant's plea to a bill in equity, and ordered him to answer, it was held that no writ of error lay under the act of September 24th, 1789, on this order.(j) So, where the court below stayed proceedings in a suit instituted by the plaintiff against the defendant to be restored to the possession of the batture at New Orleans, on the suggestion of the district attorney, it seems a writ of error was not the proper remedy, but a mandamus in the nature of a procedendo.(&)

But though the judgment below is imperfect and informal, yet if it is not merely interlocutory, but goes to the whole merits of the case, and is in its nature final, so that an execution might issue upon it, the defendant is entitled to a writ of error. As where the declaration in the circuit court was in debt upon a bond in the penal sum of 60,000/., which had been taken from the defendant below, as an indemnity in an attachment brought by him and others,

(g) United States *v.* Simons. 1 Cranch, 252.

(h) United States *v.* More. 3 Cranch, 159. United States u. La Vengeance. 3 Dall. 297.

(i) Ex parte Kearney. 7 Wheat. 42.

(*j*) Rutherford *v.* Fisher. 4 Dall. 22.

(k) Livingston *v.* Dorgenois. 7 Cranch, 597.

against the plaintiff, in a state court. The defendant pleaded 1, performance; 2, that no costs had been awarded to the plaintiff below, in the attachment suit, nor had any damages been recovered by him for the suing of the attachment. The plaintiff replied, 1, that the defendant had not performed the condition. 2, That the court did award costs, which he was ready to verify by a transcript of the record. 3, He demurred to so much of the plea as respected damages. The defendant rejoined, 1, As to the costs, nul tiel record; 2, As to the damages, he joined in the demurrer. The court gave judgment that the second plea of the defendant was not sufficient to bar the plaintiff, and gave judgment for the plaintiff on his demurrer to that plea. The issue was tried by jury, who found for the plaintiff the debt in the declaration mentioned, to be discharged by the payment of 1800 dollars damages. One objection to the writ of error was, that no judgment was given on the rejoinder of nul tiel record. But the court held that the writ of error lay.(l)

A writ of error lies from the Supreme to the circuit court of the district of Columbia, to remove a judgment awarding a peremptory mandamus to admit the defendant in error to office, provided the matter in dispute be sufficient in value.(m)

If the judgment of a circuit court be reversed by the Supreme Court on error brought, and a mandate is issued to it to carry into effect the judgment of the Supreme Court agreeably to the 24th section of the act of September 24th, 1789, and such circuit court does not correctly execute the mandate, a writ of error is the proper remedy.^) But it seems the merits of the original judgment cannot be thereby again inquired into.(o)

It seems, as a general rule, that a writ of error will not lie to a decision upon a matter within the discretion of the court below.(p) Thus, if the court below refuse to set aside a nonsuit, and grant a new trial, a writ of error does

(I) Wilson *v.* Daniel. 3 Dall. 401.

(m) Columbian Insurance Company *v.* Wheelwright et al. 7 Wheat. 534. See M'Clung *v.* Silliman. 6 Wheat. 598. A writ of error on a dismissal of a motion for a mandamus.

(n) Martin v. Hunter's Lessee. 1 Wheat. 3S4.

(o) Bowdler *v.* M'Arthur. 7 Wheat. 58.

(p) Young *v.* Clark. 7 Cranch, 569.

not lie/y) nor does it lie upon a refusal to reinstate a cause after it has been dismissed by the parties,(V) nor upon a judgment of nonsuit.(V)

It cannot be assigned for error that the court below refused a continuance of the cause, after issue joined, on account of the absence of a material witness,(0 or refused to o-rant a new trial,(w) or to allow a declaration or plea to be amended,(«) or a new one to be filed,(;r) or allowed several pleas in a writ of nght,(«/) or that the court permitted a

special replication to be substituted for a general one.(^) But a case may occur where it would be error in a court, after having allowed one party to amend, to refuse to suffer the other to amend also, before trial.(a) In Young *v.* Black,(6) the former opinions of the court, as to allowing a writ of error in cases depending on the discretion of the court, were recognized as law, but it was declared that they are not to be extended further.

It is doubtful whether a refusal by the court below to compel a party to join in a demurrer to evidence, can, in any case, be assigned for error. But, it is certainly. not error in the court to refuse this, if the party demurring will not admit the facts which the other party attempts to prove, or offers evidence to contradict them, or endeavours to establish propositions inconsistent with the evidence of the other party.(c)

But a writ of error lies, it seems, on a bill of exceptions to instructions given by the court below, to triers determining on a challenge of a juror for cause,(c?) and it seems

(q) United States *v.* Evans. 5 Cranch, 280.

(r) Welch *v.* Mandeville. 7 Cranch, 152.

(s) Van Ness *v.* Buel. 4 Wheat. 73.

(t) Woods *v.* Young. 4 Cranch, 237. See Marine Insurance Company *v.* Hodgson. 6 Cranch, 217.

(w) Hendersons. Moore. 5 Cranch, 11. Marine Insurance Company *v.* Hodgson. 5 Cranch, 187, 6 Cranch, 217. S. C. Barr. *v.* Gratz. 4 Wheat. 213.

(v) Moss *v.* Riddle. 5 Cranch, 358. Walden *v.* Craig, 9 Wheat, 576.

(x) Marine Insurance Company *v.* Hodgson. 6 Cranch, 217.

(y) Liter *v.* Green. 2 Wheat. 306.

(z) Mandeville*. Wilson. 5 Cranch, 17.

(a) Ibid.

(6) 7 Cranch, 569.

(c) Young *v.* Black. 7 Cranch, 569.

(d) Mimia », Hepburn. 7 Cranch, 290.

to a refusal by the court below to rule the party to grant oyer of letters testamentary.(e)

As the consent of parties cannot give jurisdiction, and it is the error of the court below to sustain a cause in which they had no jurisdiction, the plaintiff in error may assign for error that the court to which as plaintiff below, he had chosen to resort, had not jurisdiction.(f)

It seems' no writ of error lies to this court upon an error in fact, such as the death of a party, as the 22d section of the act of September 21th, 1789, prohibits any reversal for error in fact.(g)

The parties are not precluded from bringing a writ of error on the final judgment, and thereby bringing the whole case before the court, by the circumstance that the case has been before removed by a certificate that the opinions of the Judges were opposed; because on such removal, the court considers only the questions on which the Judges were opposed, and not the whole casc.(A)

It seems also, that if a motion be made to a state court for a *mandamus* to an officer of the United States, and the court sustain their jurisdiction, but on a view of the merits of the claim dismiss the motion, appeals may be made to this court from both decisions, by writ of error.(z')

If a verdict be general, subject to the opinion of the court, on a statement of facts, which facts appear on the record, this court will consider them on error brought, and decide according to the law arising upon them.(&.) But the report of a judge who tried the cause, of the facts upon which an application to the court was made to grant relief, or for a new trial, where there is a general verdict without reference to those facts, is no part of the record^/) And if the verdict below be for the defendant, subject to the opinion of the court on the points reserved, and judgment be entered accordingly, and there be no

(e) Wilson v. Codman's executor. 3 Cranch, 193.

(/") Capron v. Van Norden. 2 Cranch, 126. See *post.* Appear ance.

(g) Penhallow *v.* Doane. 3 Dall. 54.

(h) Lee *v.* Ogle. 2 Cranch, 33.

(i) M'Clungu. Silliman. 6 Wheat. 598.

(k) Faw *v.* Roberdeau's Executors. 3 Cranch, 174. Tucker *v.* Oxley. 5 Cranch, 34. Brent *v.* Chapman. 5 Cranch, 358.

(I) Inglee v. Coolidge. 2 Wheat. 263.

statement of the facts or points reserved on the record, the judgment will be reversed, and a *venire facias de novo* awarded: the facts ought to appear so that the judgment might be reversed or affirmed on its merits.(m)

Though the bill of exceptions brought up by writ of error, states in general terms, that the court below instructed the jury, " that the several matters and things allowed and proved, were not sufficient to bar the plaintiff, nor constituted any defence;" yet the Supreme Court will entertain the writ of error, and look through the record, to examine whether the instructions should have been different. But such a mode tends to embarrass a court of error, more than if the matters complained of appeared distinctly.(n) Only so much

however of the charge of the court as is essential to the merits of the cause should be stated on the record; the practice of stating it *in extenso* on the record is unnecessary and inconvenient. The court, where matters are incidentally introduced into the charge, for purposes of argument or illustration, will examine only the substance of it, and if it appear upon the whole, that the law was justly expounded to the jury, general expressions, which may need, and would receive qualification, if they were the direct point in judgment, are to be understood in such restricted sense.(o)

A compact between the legislatures of two states since the adoption of the constitution, in relation to titles to land, and the mode in which the courts should determine them, cannot deprive the Supreme Court of its appellate jurisdiction granted by the constitution and laws. If, therefore, such compact had provided, that from the decisions in relation to titles in the state courts, no appeal or writ of error should be allowed, yet it would not take away the right of the Supreme Court to sustain a writ of error to the district court, (acting as a circuit court,) to which the cause had been removed from the state court, in which it was commericed.(p)

3. As to the parties.

(m) Smith o. The Delaware Insurance Company. 7 Cranch, 434. <n) Otis *v.* Walter. 2 Cranch, 22. (o) Evans *v.* Eaton. 7 Wheat. 426. *(p)* Wilson *v.* Mason. 1 Cranch, 92.

No suit can be commenced or prosecuted against the United States: the acts of Congress do not authorise such a suit. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court, where they have, like those of an individual, been re-examined, and affirmed, or reversed.^)

4. In respect to the value of the matters in dispute.

The writ of error is given, as we have before seen, by the 22d sect, of the act of September 24th, 1789, where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs. This affirmative description implies a negative of all cases where the matter in dispute is of the sum or value of two thousand dollars or less: and in these cases, a writ of error does not lie.(r)

Where an action of debt was instituted on a bond in the penal sum of 60,000/., conditioned for the performance of certain things, and the jury gave a, verdict for the plaintiff, for the debt mentioned in the declaration, to be discharged by the payment of 1800 dollars'damages, and the judgment was entered for the sum of 60,000/., debt, and the costs, to be discharged by the payment of the said 1800 dollars and the costs, the court, (WILSON and IREDELL J. diss.,) held, that the judgment was to be considered as a judgment at common law for the penalty of the bond, and, therefore, that the court had jurisdiction in error,

and affirmed the judgment.(s) But where debt was brought on a bond given by the defendant for 20,000 dollars, conditioned for the faithful performance of his duty as marshall, and in reply to the plea of performance, the plaintiff assigned as a breach, the not paying over 328 dollars, and judgment was given for the defendant, the court held the sum in dispute to be less than 2,000 dollars, and that they had not jurisdiction on a writ of error.(if)

In actions for damages, as trover, trespass, &c., if the judgment below be for the plaintiff, that judgment ascer-

(g) Cohens v. Virginia. 6 Wheat. 411,412. (r) Durousseau *v.* The United States. 6 Cranch, 314. *(s)* Wilson *v.* Daniel. 3Dall. 401. 2. Dall. 360. Note. {<) United States *v.* M'Dowel. 4 Cranch, 316.

tains the sum in dispute.(w) It was, therefore, held, where the award in the Circuit Court of Columbia was for 45 dollars, that the plaintiffs could not remove the cause by writ of error to the Supreme Court, though the sum claimed by them in the court below exceeded 100 dollars.(v) In replevin on a distress for rent, the amount for which the avowry is made, and for which judgment is rendered for the avowant is the real matter in dispute, (w) If the judgment be for the defendant, the Supreme Court has not, by any rule or practice, fixed the mode of ascertaining that value. It seems however, that the sum claimed in damages in the declaration is to be considered the sum in dispute.(x)

But in an action for property, as detinue, &c., where tho value of the matter in dispute does not conclusively appear on the record, the court will admit affidavits to shew the real value of the matter in dispute, and to sustain their jurisdiction;(*y)* but it seems the writ of error is not to be a supcrsedeas.(z) Thus, in an action of dower in the circuit court by the plamtift below, in which she recovered judgment on demurrer, and the value of the property did not appear in the record, the court made a rule which is considered as a general rule,(«) that the plaintiff in error should be allowed to obtain affidavits to shew the real value, to be taken on a certain number of days notice to the defendant or her counsel in the state from which the record was returned: the rule as to affidavits to be mutual.^) So on a supplemental bill in equity, praying a discovery of title and surrender of land in satisfaction of a prior decree: affidavits will be allowed, to shew the value of the land to be sufficient to authorise a writ of error, where it does not appear in the record.(c) So, where in replevin, the replevin bond was in the penal law of 1200 dollars, and therefore *prima facie,* the matter in dispute

(M) Cooke v. Woodrow. 5 Cranch, 13. See Wilson c. Daniel, 3 Dall. 401.

u) Wise *v.* Columbian Turnpike Company, 7 Cranch, 276.

w) Peyton v. Robertson, 9 Wheat. 527.

x) Cooke *v.* Woodrow. 5 Cranch, 13.

y) Williamson *v.* Kincaid. 4 Dall. 20.

2) Cooko *v.* Woodrow. 5 Cranch, 13.

a) 1 Cranch, xvni.

(b) Williamson c. Kincaid. 4 Dall. 20.

(c) Course v. Stead. 4 Pall. 22.

was not within the jurisdiction of this court in error, time was allowed to procure affidavits to rebut: but not being obtained by the last day of the term, the writ of error was dismissed.(o?) For it seems it is incumbent on the plaintiff in error, to shew that the Supreme Court has jurisdiction.^)

So, as a writ of error lies from the Supreme to the Circuit Court of the district of Columbia, to remove a judgment rendered by such circuit court awarding a peremptory mandamus to restore certain persons to office, where the matter in dispute is of sufficient value, the court to ascertain that, will direct the plaintiffs in error to furnish affidavits; but if it do not appear on such affidavits, that the value of the matter in dispute is sufficient to give this court jurisdiction, the writ of error will be quashed. And in such case the value of the office is the only matter in dispute, and its value must be ascertained by the salary.(f)

5. Within what time a writ of error must be brought.

By the 22d sect, of the act of September 24th, 1789, writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of, or in case the person entitled to such writ of error be an infant, *feme covert, non compos mentis,* or imprisoned, then within five years as aforesaid, exclusive of the time of such disability.

(A) Rush *v.* Parker. 5 Cranch, 287.

(e) United States *v.* The Brig Union. 4 Cranch, 21G. See Appeal, (value.)

(f) Columbian Insurance Company *v.* Wheelwright. 7 Wheat. 534.

CHAPTER VI.

SUPREME COURT — APPEALS.

In cases of equity and of admiralty and maritime jurisdiction, the decrees of the courts below are now removed to the Supreme Court by appeal, as well from the circuit courts, as from the district courts acting as circuit courts,(a) and from the superior courts of territories, in cases in which the United States are concerned.(6)

Formerly, these cases, by the provision of the 22d section of the act of September, 24th, 1789, were removed by writ of error, in the same manner as judgments in common law

proceedings, and no other mode was permitted.^) In order to furnish the Supreme Court with the facts of the case, the 19th section of the act of September 24th, 1789, made it the duty of the circuit courts, in causes in equity, and of admiralty and maritime jurisdiction, to cause the facts on which they founded their sentence or decree, fully to appear on record, either from the pleadings and decree itself, or a state of the case agreed by the parties, or their counsel, or if they disagreed, by a stating of the case by the court. It was held, under this act, that if a case were removed, with a statement of facts, and also with the evidence, still the statement was conclusive as to all the facts contained in it;(<f) and if no such statement of facts accompanied the record, the court affirmed the decree, even though the evidence were annexed.(e) It was also held, that the decree of the court below might be reversed in part, and affirmed in part; and the court was not bound by the common law doctrine of reversals. It might award the costs of the court below to be paid or not in its discre-

(a) Durousseau *v.* The United States. 6 Cranch, 307. (6) Act of March 3, 1805, sect 1. See *ante* 38, of Writs of Error to the Courts of the United States.

(c) Blaine *v.* The ship Charles Carter. 4 Ball. 22. Wiscart *v.* Dauchy. 3 Ball. 327.

(d) Jennings *v.* The brig Perseverance. 3 Dall. 336.

(e) Ib. Hills «. Ross. 3 Dall 184.

tion, and order the parties to pay their own costs in the Supreme Court.(f)

This system being found inconvenient,^) it was abolished by the act of 13th February, 1801, establishing a new system of circuit courts. But this act being repealed in the following year by the act of March 8th, 1802, the system was, for a short time, inadvertently revived, till the passage of the act of March 3, 1803.(/i)

By the 2d section of the act of March 3, 1803, from all final judgments and decrees, rendered or to be rendered in any circuit court, or in any district court, acting as a circuit court, in any cases of equity, of admiralty and maritime jurisdiction, and of prize or no prize, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of two thousand dollars, shall be allowed to the Supreme Court of the United States; and upon such appeal, a transcript of the libel, bill, answer, depositions, and all other proceedings, of what kind soever, in the cause, shall be transmitted to the said Supreme Court, and no new evidence shall be received in the said court on the hearing of such appeal, except in admiralty and prize causes; and such appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error. And the Supreme Court is thereby authorized to receive, hear, and determine, such appeals. And so much of the 19th and 22d sections of the ' act of 1789, as came within the purview of that act, it was declared should be, and the same were thereby repealed. Since this act, causes of equity, and of admiralty and maritime jurisdiction cannot be removed to the Supreme Court by writ of error, but only by appeal: and the removal by appeal must be under the same rules, regulations, and restrictions, as writs of error are subjected to by the act of September 24, 1789; namely, those which respect the time

within which a writ of error shall be brought, and in what instances it shall operate as a *supersedeas:* the citation to the adverse party; the security to be given by the plaintiff in error, and the restrictions upon the appel-

(f) Penhallow *v. Dome. 3* Dall. 54.

(*g)* See opinion of Ellsworth C. J. Wiscart v. Dauchy. 3 Dall. 328. and The San Pedro. 2 Wheat. 141. (A) United States *v.* Hooe. 1 Cranch, 318.

late court as to reversals in certain enumerated cases, and they must be substantially observed.^') Where, however, an appeal is prayed at the same term in which the decree is pronounced, a citation is not neccssary.(F) It follows, that in these causes an appeal may be taken at any time within five years, subject to the saving contained in the 22d section of the act of September 24, 1789.(7) If the appeal is prayed for within five years, and is actually allowed by the court below within that period, it is good notwithstanding the security is given after the five years are expired. The court below might have disallowed the appeal in that case, but not having done so it is valid. The mode of taking security and time of perfecting it are matters of discretion to be regulated by the court granting the appeal.(m) And if an appeal to the Supreme Court be refused by the circuit court, in a case where it ought to be allowed, the Supreme Court, on the party's producing an authenticated copy of the record, would apply a remedy. But they will not, regularly, interfere on a petition accompanied with papers purporting to be the substance of the record, not authenticated.(w)

The writ of error submits to the revision of the Supreme Court only the law; but the remedy by appeal brings before the Supreme Court the facts as well as the law. It may correct on an appeal, not only wrong conclusions of law from the facts, but wrong conclusions of fact from the evidence.(o) For this purpose, all the testimony which was before the circuit court ought to-belaid before this court on an appeal: and where it appears on the record, that witnesses were examined in the circuit court, and were referred to in the decree, whose testimony does not appear in the record, the decree will be reversed, and the cause remanded.(p) The parties may wave testimo-

(i) The San Pedro. 2 Wheat. 132. See writ of error. Practice, post.

(k) Ib. Ileily *v.* Lamar. 2 Cranch, 349.

(I) The San Pedro. 2 Wheat. 132.

(m) The Dos. Hcrmanos. 10 Wheat. 311.

(n) Hay *v.* Law. 3 Cranch, 179. Tho court however expressed an opinion from which the court below was able to decide whether an appeal lay or not.

(o) Ib.

(p) Conn. *v.* Penn. 5 Wheat. 424,

ny by consent, but if this consent do not appear, it will not be presumed.(^)

In admiralty causes, an appeal suspends the sentence altogether: it is not res *adjudicata,* till the final sentence of the appellate court.(r) It is lawful to allege what was not before alleged, and to prove what was not before proved.(s)

The appellate power of the Supreme Court extends to remove an admiralty or maritime cause from the circuit court, brought there by appeal from the district, court: differing in this respect from a writ of crror.(f) Bnt, like a judgment on which a writ of error lies, the decree, in order to sustain an appeal, must be final. No appeal lies, therefore, from an interlocutory decree dissolving an injunction with>costs,(«) nor from the decree of a state court, affirming the decretal order of an inferior court of equity of the same state, refusing to dissolve an injunction granted on the filing of the bill.(w) But a decree for tho sale of mortgaged property, upon a bill to foreclose, is a final decree, from which an appeal lies to the Supreme Court.(w) And though a decree of the court below be final, so far as respects the court making it, it is not definite as to the subject matter, while an appeal exists: and though, generally speaking, the province of an appellate court is to inquire whether a decree when rendered, was erroneous or not, yet if between the decree and the decision of the appellate court, to which an appeal has been taken, a law intervenes, such as a treaty, and changes the rule, the law must be obeyed.(x) So if a condemnation take place in the court below, under a law then existing, and pending an appeal, and before condemnation in the appellate court, the law is repealed, without any special provision, the appellate court will reverse the condemnation.(*y)* though

(?) Ib.

(r) Yeaton r>. Tho United States. 5 Cranch, 200 («) Ib.

(*) United States *v.* Goodwin. 7 Cranch, 108. Wiscart *v.* Dauchy 3 Ball. 321. See *ante 31,* Writ of error, (w) Young *v.* Grundy. G Cranch, 51. (») Gibbons *v.* Ogden. 6 Wheat. 448, *(w)* Ray *v.* Law. 3 Cranch, 179. *(xS* United States c. Schooner Peggy. 1 Cranch, 103. *(y)* Yeaton v. The United States. 5 Cranch, 280.

the proceeds were paid over to the appellee before the expiration of the law, and in this case will order restitution generally.(z)

Where a mandate is issued by this court, on reversing the decree of an inferior court, and that court does not correctly execute the mandate, an appeal lies.(a) But on such appeal, nothing is before the Supreme Court but what *is* subsequent to the mandate;(6) it does not authorise an inquiry into the merits of the original decree,(c) and it seems the court will not, on motion, open their original decree.(W) By this, however, is understood no more than that whatever has been formerly before the court and was disposed of by the decree, is considered as finally disposed of. But if there are any new points or rights in controversy, not so terminated, the original proceedings may be inspected and such new matters determined on an appeal from a mandate.(c)

The court, on appeal, will not take notice of the interest in the cause of parties who do not appeal. Where, therefore, there was an appeal by the claimant below from the decree of

the circuit court, awarding salvage to the appellees, the Supreme Court would not inquire whether the court below ought not to have decreed greater salvage to the appellees.(f)

In an equity cause, the circuit court may invest in the stocks the proceeds of property sold by their order, notwithstanding the pendency of an appeal.(g-) So on an appeal in an admiralty cause from the circuit court, the property in litigation, or its proceeds, do not follow the cause into the Supreme Court, because the Supreme Court acts only by mandate: and the circuit court may in such case order the disposition thereof, though it be there on appeal from the district court. (A)

(«) Schooner Rachel *v.* The United States. *6* Cranch. 329. (a) Martin v. Hunter's lessee. 1 Wheat. 354. Himely *v.* Rose. 5 Cranch, 313.

(6) Himely o. Rose. 5 Cranch, 313.

(c) Browder *v.* M'Arthur. 7 Wheat. 58.

(d) Himely v. Rose. 5 Cranch, 313.

(e) The Santa Maria. 10 Wheat. 442.

?/) M'Donough *v.* The Mary Ford. 3 Ball. 198. *(g)* Spring c. The South Carolina Insurance Company, fi Wheat. 519.

(X) The Collector. C Wheat. 203.

In respect to the sum or value of the matter in dispute the same principles seem, generally speaking, to apply to appeals as have been stated in relation to writs of error.(z') The appellant must shew, where the value is doubtful, that it is sufficient to give the Supreme Court jurisdiction: the court below can neither give, nor take away its jurisdiction: nor is it given by the circumstance, that the claimants below, the appellees, had submitted their claim to the court below.Q') It seems, a witness may be sworn *viva voce* as to the value.(&) If the district court has had the property appraised by three sworn appraisers, which appraisement was no further acted upon, it is not conclusive evidence of the value, but it is better than the testimony of one witness. If the property had been delivered up to the claimants, on security given to the appraised value, it would have been conclusive of the value^/) After deciding on evidence, that the value is not sufficient to sustain the appeal, the court will not continue the case, in order to enable the appellant to procure affidavits to shew the value.(m)

In matters of practice, in suits of equity as well as of admiralty and maritime jurisdiction, the act of May 8th, 1792,(V) provides, that the forms of writs and other process except their style,(o) and the forms and modes of proceeding, shall be according to the principles, rules, and usages which belong to courts of equity, and to courts of admiralty, respectively, as contra-distinguished from courts of common law, except so far as may have been provided for by the act of September 24th, 1789,(p) 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 shall think proper from time to

time by rule to prescribe, to any circuit or district court concerning the same. In conformity to these principles, in causes of equity, and of admiralty and mari-

(i) Course c. Stead. 4 Ball. 22. See *ante,* 46.

(^United States *v.* The Brig Union. 4 Cranch, 216.

(&)Ib.

(I) Ib.

(m) United States c. The Brig Union. 4 Cranch, 21C.

(w) See *ante* 30, Practice in original suits.

(o) See ib.

(p) Seeib.

time jurisdiction, the general rule of the court is, to adopt the customs and usages of courts of admiralty and equity, constituted on similar principles, with a discretionary power to adapt the practice and rules of the court to the peculiar circumstances of this country, subject to the control of Congress.(^) In prize causes especially, the allegations, the proofs, and the proceedings are in general modelled upon the civil law, with such additions and alterations as the practice of nations, and the rights of belligerents and neutrals, unavoidably impose. The Court of Prize is emphatically a court of the law of nations: and does not take its character or rules from the mere municipal regulations of any country/}-) A general power to make rules, in certain cases, is also given by the 7th section of the act of March 2,1793.(s)

By a rule of court, made at February term, 1816,(Y) it was ordered, that in all cases where farther proof is ordered by the court, the depositions which shall be taken shall be by a commission to be issued from this court, or from any circuit court of the United States. And by another rule made at February term, 1817, in all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof. And no such commission shall issue but upon interrogatories to bo filed by the party applying for the commission, and notice to the opposite party, or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross interrogatories within twenty days from the service of such notice: provided, however, that nothing in this rule shall prevent any party from giving oral .testimony in open court, in cases where, by law, it is admissible.

These rules conform to the proviso of the 30th section of the act of September 24, 1789, that nothing therein contained should be construed to prevent any court of the United

States from granting a *dedimus potestatem* to take depositions according to common usage, when it may be

(q) Grayson v. The State of Virginia. 3 Dall. 320. *(r)* The Schooner Adeline. 9 Cranch, 244. («) See Practice in Original Suits, ante 31. (*) Wheat. Dig. xiii.

necessary to prevent a failure or delay of justice, which power they shall severally possess. But the provisions of the preceding part of that section as to taking depositions *de bene csse* do not apply to cases pending in the Supreme Court, though such had been the practice. Testimony by depositions can be regularly taken for the Supreme Court, only under a commission issuing according to its rules.(w) And such depositions are not, under any circumstances, to be considered as taken *de bene esse,* but are evidence in chief and absolutely, whether the witness reside beyond the process of the court, or within it.(v)

By the 30th section of the act of September 24th, 1789, the mode of proof by oral testimony, and examination of witnesses in open court, shall be the same in all the courts of the United States, as well as in the trial of causes in equity, and of admiralty and maritime jurisdiction, as of actions at common law.

In an appeal from the circuit court, in an instance or revenue cause, which had been ordered to farther proof at a former term, a witness being offered for the claimants to be examined *viva voce* the court, for the sake of convenience, ordered his deposition to be taken in writing out of court. (¥)

1 New evidence is admissible in instance or revenue causes, which are pending in this court on appeal, as well as in prize causes: and a commission may be obtainfed for that purpose.(?/) If the court below should deny an order for farther proof, when it ought to be granted, or allow it improperly, and the objection be taken by the t>arty, and appear upon the record, this Court on appeal, can administer the proper relief. But, if such evidence appear upon the record, without order or objection, it will be presumed to have been done by consent, and the irregularity is waved.(^) And the further proof will be extended to captors as well as claimants.(a)

(u) The Argo. 2 Wheat. 287. The London Packet. 2 Wheat. 372. See the 30th section, *post.* Circuit Court, Practice.

(») Sergeant» Biddle. 4 Wheat. 508.

(*) The Samuel. 3 Wheat. 77.

(y) Brig James Wells. 7 Cranch, 22. The Clarissa Claiborne, Ib. 107. The Argo. 2 Wheat. 289. note.

(z) The Pizarro. 2 Wheat. 227.

(a) The Grotius. 8 Cranch, 356. 9 Cranch, 368.

An affidavit taken in the Court below, under an order for farther proof, not arriving till after condemnation, being attached to the record, was allowed to be read as evidence in this court on appeal.(i) But the court rejected affidavits offered by the claimant as further proof which had not been taken under a commission, and ordered the further proof to be taken under a commission.(c)

On appeal it is the practice of the Supreme Court to hear the cause, first on the evidence transmitted from the circuit court; and to decide on that, whether farther proof will be allowed. If such farther proof is allowed, an order

is made.(c?)

By a rule of the Supreme court of February term, 1817, whenever it shall be necessary or proper, in the opinion of the presiding Judge in any circuit court, or district court, exercising circuit court jurisdiction, that original papers of any kind should be inspected in the Supreme Court upon appeal, such presiding Judge may make such rule or order for the safe keeping, transporting, and return of such original papers, as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings.(e) By a rule of court of February term, 1824, in all causes of equity and admiralty jurisdiction heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant or other exhibit found in the record as evidence, unless objection was taken thereto below and entered of record; but the same shall otherwise be deemed to have been^admittedby consent.(f)

As the Supreme Court in prize causes has only an appellate jurisdiction, a claim cannot be interposed there after appeal.(g) But if the court below has proceeded to adjudication before the lapse of *a year and a day,* this court will remand the cause, with directions to the court below, to allow a claim to be filed, and the libel to be amend-

(5) The London Packet. 2 Wheat. 372.

(c) Ib. See Mason, 14, S. C. _ . .

(d) Ib But it is said that this applies only to prize causes, and that in instance or revenue causes farther proof may be exhibited in the Supreme Court on appeal before the hearing, and if the court have doubts then, still farther proof may be ordered. Note to the Argo. 2 Wheat. 289.

(e) 2 Wheat, vii.

(*f)* 9 Wheat Pref.

(g) Ship Soci'ete. 9 Cranch, 209. The Harrison. 1 Wheat. 298.

ed.(h) When an absolute decree has been once made by the Supreme Court on appeal in a prize case, awarding restitution, the parties cannot afterwards set up in the court below any claims for deductions, liens, or charges, which might have been sustained if they had

previously been brought before the court. Such claims are extinguished by the unconditional decree of restitution.(i)

Where merits clearly appear on the record, it is the settled practice of the Supreme Court, in admiralty proceedings, not to dismiss the libel for irregularity in statirg the ground of proceeding, but to allow the party to assert his rights by a new allegation: and for this purpose it will remand the cause to the circuit court, with directions to allow an amendment.(j)

As to damages and costs, the court are not bound to adjudge damages for delay in all cases.(k) For, where the decree of the circuit court in a prize cause was affirmed, the court, under the circumstances, refused to increase the damages, the prize having been sold by the agreement of the parties, and the money afterwards stopped in the hands of the marshal by a third person, the original owner of the prize, and they allowed interest only on the debt and not on the damages.(l) So, the damages may be decreased on affirmance, to the benefit of the plaintiff in error.(m) But, it seems, that the facts regulating the increase or decrease of the damages must arise and appear upon the record («) Thus where the circuit court, on affirming the decree of the district court, in an admiralty cause, in favour of the libellant, decreed that the defendants should pay all expenses, the Supreme Court would not admit a certificate of respectable citizens of the amount of the damages, nor would they inferfere to suggest a mode of assessing them: they allow no damages

(A) The Harrison. 1 Wheat. 298.

(ij The Santa Maria. 10 Wheat. 444.

(j) The Schooner Adeline. 9 Cranch, 244. The Caroline. 7 Cranch, 496. The Edward. 1 Wheat. 261. The Divina Pastora. 4 Wheat. 52. The Marianna Flora. 11 Wheat. 38.

(ft) See Writ of Error. Practice, *post.*

(I) Jennings c. The Perseverance. 3 Ball. 336.

(m) Penhallow v. Doane. 3 Dall. 304, note. 1 Dall. 54,

(n) Cotton 0. Wallace. 3 Dall. 304, note.

but for delay.(o) They gave, in that case, as damages, eight per cent, on the amount of sales from the time of the decree of the circuit court, and ordered the plaintiff in error to pay the costs accrued since the decree had beea affirmed by the Supreme Court at a former term, subject to the opinion of the court on the question of damages.(jo) Where there is an absolute decree of restitution by the Supreme Court on appeal, and damages for the detention or delay are not given against the claimant by such decree, they cannot be afterwards awarded. And if such claimant has obtained the property on a stipulation not providing for interest, the court will not give interest from the date of the stipulation nor even from the decree of restitution, though he has had the use of the property: it

would, however, be proper that the stipulation should contain an express condition that the party should pay interest if so decreed by the court.(^)

The allowance of counsel fees, as part of the damages given by the inferior court, in their decree, will not be permitted in this court, if it appear by the record:(r) but if such allowance do not appear by the record, the court will not notice it.(s)

The costs of a case printed for the use of the court, will not be allowed in affirming a decree, by way of damages for delay. However convenient it might be, no law allows it.(tf)

By rule of court of February term, 1810,(w) upon the reversal of a judgment or decree of the circuit court, the party in whose favour the reversal is, shall recover his costs in the circuit court.

(o) Ib. 3 Dall. 302.

(*p)* Cotton r. Wallace. *3* Dall. 302.

(?) The Santa Maria. 10 Wheat. 445.

(r) Arcambel *v.* Wilson. 3 Dall. 306.

(s) Jennings «. The Brig Perseverance. 3 Dall. 336.

(0 ib.

(u) Wheat. Dig. xiii.

CHAPTER VII.

SUPREME COURT — WRITS op FPTJOT* TO STATE COURTsf ERR°R 1O

THE 3d article of the constitution, (sect. 2. i.) declares, that the *judicial power* of the United States shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made or which shall be made under their authority. And the same article, (sect. 2. 2.) after declaring in what cases the Supreme Court shall have original jurisdiction, provides, that in the above mentioned cases, among the others enumerated to which the judicial power of the United States extends, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as Congress may make. As, under this latter provision, the appellate jurisdiction of the Supreme Court is dependent on the acts of Congress,(a) it can be exercised only in the manner prescribed by them: and all that Congress has thought it necessary to do in cases arising in the state courts, under the constitution, laws, and treaties of the United States, has been, to provide in certain cases an appeal by writ of error to the Supreme Court, from the decisions of the highest courts of the states, in which a decision could be had.(6)

The 25th section of the act of September 24th, 1789, accordingly enacts, that a final judgment or decree, in any suit in the highest court of law or equity of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised

(a) Durousseau *v.* The Bank of the United States. 6 Cranch, 307. United States v. Moore. 3 Cranch, 159. See *ante,* 33, 34.

(b) M'Intire v. Wood. 7 Cranch, 504.

under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of such their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, riglt. privilege, or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute, or commission, may be re-examined, and reversed or affirmed in the Supreme Court of the United States, upon a writ of error, the citation being signed by the chief justice or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner, and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court; and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the the face of the record, and immediately respects the before mentioned questions of validity, or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

The sum or value of the matter in dispute is not material in a writ of error to a state court.(c)

The act of Congress does not prescribe the tribunal to which the writ of error must be directed: it may therefore be directed to any court of the state, in which the record and judgment of the highest court of that state may be found. If the highest court has, according to the law and practice of the state, after giving a judgment remitted the record and its judgment to the inferior court whence it -came, before receiving a writ of error from the Supreme Court of the United States directed to them, they cannot execute such writ, as they have parted with the record.

(c) So decided in 1823, Buel *v.* Van Ness. 8 Wheat. 323.

To remove the judgment in such case, the writ of error must be directed to the court to which the record is remitted, unless the objection to the direction of the writ of error be

waved by consent.(rf) It need not appear on the face of the writ of error or proceedings that the state court, whose judgment is removed by it, is the highest state court in which a decision could be had. If such be not the case, the objection may be taken advantage of by motion to the Supreme Court to quash the writ on the ground that it was improvidently issued.(e)

As to what constitutes the highest court of a state in which a decision could be had, it has been held, that if the decision was had in the superior judicature of a state, it is considered such a decision, notwithstanding the Legislature might, by the law and practice of that state, on petition of the party failing, re-hear the cause, and set aside the decision, but could not make a new decision.(f) And so also it seems, a decision by a court of hustings of a borough which had refused an appeal to a higher state court, on the ground that the case was not subject to revision in any other court of the state, is a judgment in the highest court of such state in which a decision in the suit could be had, and may be removed to the Supreme Court of the United States by writ of error.(g) An ordinance of a city laying a tax is an authority exercised under a state, and a writ of prohibition from a state court to the corporation is a suit; and a decision by the highest court in the state on appeal from such court in the prohibition suit, is a final judgment within this act.(A)

The judgment of the highest court of a state roust be final. For where there had been in the inferior court of the state, judgment for the plaintiff, and the highest court of the state, on a bill of exceptions, reversed that judgment and remanded the cause to the inferior court, with directions to award a *venire facias de novo,* the writ of error from the Supreme Court of the United States to such highest court on their judgment of reversal, was dismiss-

(d) Gelston *v.* Hoyt. 3 Wheat. 246.

(e) Buel *v.* Van Ness. 8 Wheat. 321. (f) Olney c. Arnold. 3 l)all. 308.

(g Cohens *v.* Virginia. 6 Wheat. 264. 290. 376.

(h) Weston *v.* The city council of Charleston. 2 Pet. S. C. Rep. 449.

ed.(j') The writ of error need not upon its face purport to be issued upon *a final judgment* of the highest court in the state. That may be ascertained when the record is brought up in pursuance of the writ; and if the writ has issued improvidently it may be quashed: but *prima facie,* it is sufficient if it is issued on a judgment of such court(jT) If on a writ of error to the judgment of a state court, the Supreme Court reverses such judgment, and issues a mandate, directing the state court to carry into effect the judgment of the Supreme Court, and the state court gives an opinion declining to obey the mandate, on the ground that the Supreme Court had not jurisdiction, and that the act of Congress allowing a writ of error from the Supreme Court of the United States to state courts was unconstitutional, such opinion is a final judgment on which the party may have another writ of error, and the former record is not then before the court.(&) But whether the Supreme Court has authority to issue a writ of mandamus to the state court, in such case, to enforce the former judgment, *query.(T)*

To entitle a party to his writ of error from the Supreme Court, on the ground of the case being one that arises under a law of the United States, the decision of the highest state court must be *against* the privilege claimed under such law, treaty, &c. I" or, if the defendants in a suit in the state court, apply to it for a removal of the cause to a circuit court of the United States, on the ground of their being aliens, and the court grant the removal, the plaintiffs cannot avail themselves of a writ of error from the Supreme Court to remove such decision; for the decision is not against the privilege claimed, but in favor of it.(m) So, where in ejectment neither side claims under a treaty, nor is affected by it, but the defendant sets up an outstanding title in a third person, which he contends is protected by treaty, and therefore the title is not in the plaintiff, and the highest court of the state decide against such title, it is not a case in which a writ of error lies from

(f) Houston c Moore. 3 Wheat. 433. Winn e. Jackson. 11 Wheat.

135.

(j) Buelu. Van Ness. 8 Wheat. 320. *(k)* Martin v. Hunter's lessee. 1 Wheat. 304. (Z) Martin v. Hunter's lessee. 1 Wheat. 362. (m) Gordon *v.* Caldcleugh. 3 Cranch, 2G8.

the Supreme Court of the United States; for, though the words of the act of Congress extend the jurisdiction of the Supreme Court to cases where is drawn in question the construction of a treaty, and the decision is against the title, right, privilege, &c. these words must be restrained by the constitution, which is confined (art. iii. sect. 2. 1.) to cases arising *under* treaties, &c.(V)

The only title asserted by the defendants in error, (plaintiffs below in a bill in equity,) to the land in dispute, was founded on an alleged confiscation of it by tho state of Maryland, and a conveyance by the state to them. The title set up by the plaintiffs in error, and the only one that could resist that claimed by the grantees of the state, was under the treaty of peace of September 6th, 1783, the 6th article of which, they contended, protected their rights, if the confiscation by the laws of the state was not complete prior to the treaty. The court below decided, that the confiscation was complete, and that the treaty did not operate upon it: and they declared, and it was admitted by the parties, that when the confiscation is not complete before f the treaty, the estate is protected by the treaty. It was held, that the Supreme Court of the United States had jurisdiction by writ of error, as the point to be decided was, whether this was a case of confiscation within the meaning of the 6th article of the treaty, and involved the *I* construction of that treaty, as well as the defendant's title '. under the state laws.(o) And this court is not confined ' to the abstract enquiry into the correctness of the construction put upon a treaty by the court below; nor need it appear that they have given any construction to it. It is sufficient if it appear, that a title was set up under it, * and that a decision took place against the title so set up, although there might be other grounds on which the decision was had against the title.(//)

But if there be various grounds of claim stated in the court below by bill in equity, some of which are dependent on acts of Congress, and others consist of matters of fraud or contract, and the court below decide against them all, and dismiss the bill, this court, on the writ of error, will

(n) Owings v. Norwood. 5 Cranch, 344. See 6 Wheat. 379. *(o)* Smith v. Maryland for the use of Carroll et al. 6 Cranch, 286. *(p)* Martin v. Hunter'* Lessee. 1 Wheat. 304.

take into consideration only such grounds of claim as arise under the acts of Congress, and examine how far the court below decided right as respects them; it will not look into circumstances of alleged fraud or contract, unless they had induced the court below to determine against the person having the title under the laws of the United States. The opinion of the state court on the fraud or contract is conclusive, and the only question to be discussed here, is the title of the plaintiff under the acts of Congress.(*q}*

If two citizens of the same state, in a suit in the highest state court, claim under the same acts of Congress, the Supreme Court of the United States has jurisdiction by writ of error to remove the decision below. The object of the constitution and acts of Congress is not merely to maintain the authority of the constitution and laws of the United States in cases arising under them, but to give the Supreme Court power to render uniform the construction of the laws of the United States, and the decisions upon rights or titles under those laws.(r)

If a state court, on a motion for a mandamus to an officer of the United States, to do an act from which a party claims a benefit by virtue of a law of the United States, sustain the jurisdiction to issue such writ, the controlling power of this court may be exercised under the description of an exemption claimed by the officer over whom the jurisdiction is exercised: and though the state court after a hearing dismiss the claim on the merits, yet this court, it seems, on a writ of error brought by the plaintiff, will affirm the judgment with costs, and declare as the reason thereof, that the court below had no authority to issue a mandamus in the case.(s)

But it must appear from the record, that an act of Congress, the constitutionality of a state law, &c., were applicable to the case. This need not be stated in terms, but it must appear on the record.(t) Thus where in a case removed by writ of error from the highest court of a state,

(*q)* Matthews *v.* Zane. 7 Wheat. 164. 206. See Miller *v.* Nichols. 4 Wheat. 311.

(r) Ib. 4 Cranch, 382. 5 Cranch, 92.

(*) M'Clung *v.* Silhman. 6 Wheat. 598.

(<) Martin *v.* Hunter's Lessee. 1 Wheat. 304. Inglee *v.* Coolidge, 2 Wheat. 363. Hickie *v.* Stark. 1 Pet. S. C. Rep. 98.

the act of Congress supposed to have been disregarded, was, that giving the United States priority in cases of insolvency, and a claim by the district attorney on behalf of the United States under that act appeared on the record, but the fact of insolvency did not appear on the record, it was held, that had that appeared, it would have been sufficient: but as it did not appear, and no other question was presented than the correctness of the decision according to the state laws, that was a question over which this court had no jurisdiction,

and the writ of error was dismissed.(w) The report of a judge who tried the cause, containing a statement of the facts on which the court below in its discretion might grant relief or a new trial, cannot be received to shew the question raised in the cause, though annexed to the return of the writ of error. It is not like a special verdict, or statement of facts agreed of record, upon which judgment is to be pronounced; and therefore the verdict being general, and the question raised appearing only by the report of the judge to be respecting an act of Congress, the writ of error was dismissed.^) The opinion of the court below pronounced after verdict is not to be considered part of the record.(w) Nor can orders made in the state court after the removal of the record into the Supreme Court of the United States by writ of error, not as amendments, but introducing new matter, be brought into the latter court or in any manner affect it. The cause must be tried on the record as it stood when removed.(,r)

The appellate jurisdiction from the highest state courts by writ of error under the act of September 24th, 1789, was exercised by the Supreme Court in a variety of cases without question, until the year 1815, when, on the reversal by the Supreme Court of the judgment of the court of appeals of the state of Virginia, and mandate issued, that court gave an opinion, that the constitution did not warrant the vesting in the Supreme Court of the United States an appellate jurisdiction from the judgments of state

(M) Miller P. Nichols. 4 Wheat. 311. See Williams v. Norris. 12 Wheat. 117. Montgomery *v.* Hernandez, ib. 129.

(v) Inglee v. Coolidge. 2 Wheat. 363. See Lanusse v. Barker. 3 Wheat. 101.

(w) Williams v. Norris. 12 Wheat. 121. (»)lb.

courts, and declined obedience to the mandate (y) But on a new writ of error, the Supreme Court held, that the iurisdiction was constitutionally vested in them by the act of September 24th, 1789.(z) In the celebrated case of *Cohens* v. *Virginia*,(a) in 1821, this point was again raised and decided in the same manner, and it was also determined, that the Supreme Court had such appellate jurisdiction, though one of the parties was a state, and the other a citizen of that state; and whoever might be the

parties.

An act of Congress for the regulation of the local affairs of the District of Columbia, is a law of the United States under the 26th sect, of the act of September 24th, 1789. And so, it seems, is any act passed by Congress by virtue of the power to exercise exclusive legislation given by the 8th sect, of the 1st article of the constitution. And a case in which the validity of such act, or of a state law as repugnant to such act, is drawn in question, if decided by the highest state court against the validity of such act of Congress, or in favor of the validity of such law, is the subject of a writ of error. So also is it, if the question be, whether Congress, in passing such act intended to legislate beyond the district of Columbia; for such point involves the question, whether the act, if intended so to operate, is warranted by the constitution.^) So, ifthis court reverse the judgment of the highest state court, and issue a mandate, which the state court declines to obey, on the ground

that the act of congress of September 24th, 1789, vesting this court with appellate jurisdiction from state courts, is unconstitutional and void, such opinion is a denial of the validity of a statute of the United States, and error lies upon it from this court.(c) And on such writ of error, the former record is not before the court, but only the judgment and proceedings in the state court subsequent to the mandate.(rf) In the important case however *of Martin* v. *Hunter's Lessee,(e)* from motives of a

(y) Cited 6 Wheat. 352. note *a.*

(z) Martin c. Hunter's Lessee. 1 Wheat. 304.

(a) 6 Wheat. 264.

(6) Cohens v. Virginia. 6 Wheat. 264.

(c) Martin v. Hunter's lessee. 1 Wheat. 304.

(d) Ib. See also Browder *v.* M'Arthur. 7 Wheat. 58.

(e) 1 Wheat. 355.

public nature, the court went back to the former record, and re-examined the question of its jurisdiction, as it stood upon the record formerly in judgment.

A writ of error lies from the Supreme Court of the United States to remove a judgment rendered in the highest state court against the defendant, on an information brought by the attorney for the state, to recover a fine imposed by the state law for the use of the state.(f) And, it seems, the right to issue such writ of error extends under the act of September 24th, 1789, to criminal cases.(g)

It seems to be the general opinion, that, from a decision by a state court or judge on a *habeas corpus,* in a case arising under the constitution, laws, or treaties of the United States, no appeal or writ of error lies to the Supreme Court of the United States under the present provision of the acts of Congress. Yet, it seems, the subject is within the power of Congress, and they might enact regulations providing for the exercise of the appellate power of the Supreme Court in such cases.(/t)

A writ of error is a writ of common right in the cases to which the jurisdiction of the appellate court extends. A judge or justice ata his chambers cannot refuse to sign a citation, or take security, on the ground that the judgment is not final, or that the court is not the highest court of the state in which a decision could be had. The writ is the act of the court, and if it has issued improvidently the proper mode of proceeding is by motion to the court itself to quash the writ.(z')

(f) Cohens o. Virginia. 6 Wheat. 264.

(g) Cohens *v.* Virginia. 6 Wheat 387. See Martins. Hunter's lessee. 1 Wheat. 377. United States *v.* Moore. 3 Cranch, 169. *(Ji)* Case of Lockington. 5 Hall's Law Journ. 06. (i) Duel *v.* Van Ness. 8 Wheat. 321.

CHAPTER VIII.

SUPREME COURT — OPINIONS OPPOSED IN THE CIRCUIT COURT.

ANOTHER mode, in which a case may be removed from the circuit to the Supremo Court is, by a certificate that the opinions of the judges of the circuit court are opposed, returned agreeably to the 6th sect, of the act of 29th April, 1802.

Under the act of the 24th September, 1789, sect. 4, the circuit courts were composed of three judges consisting of any two justices of the Supreme Court and the district judge of the district, any two of whom constituted a quorum. Afterwards the two justices of the Supreme Court, by the 3d sect, of the act of 13th April, 1792, were to change their circuits, unless otherwise agreed to by them, or differently assigned by four judges of the Supreme Court, in cases where the public service, or the convenience of the judges required it. But by the first section of the act of March 2d, 1793, the attendance of only one of the justices of the Supreme Court was declared to be sufficient; and in order to provide for a division of opinion, the 2d sect, of the same act enacted that if the court were divided on the final hearing of a cause, or of a plea to the jurisdiction of the court, the cause should be continued to the succeeding court, and if upon a second hearing when a different judge of the Supreme Court should be present, a like division should take place, the district judge adhering to his former opinion, judgment should be rendered in conformity to the opinion of the presiding judge.(a)

But the act of 29th April, 1802, which at present regulates the circuit court proceedings, made the judges of the Supreme Court stationary, so that the same judge constantly attended one circuit, which provision was attended with this difficulty that the court being always

(«) See United States v. Daniel. 6 Wheat. 547.

composed of the same judges, any division of opinion would leave the question undetermined. To remedy this inconvenience, the 6th sect, provides, that whenever any question shall occur before a circuit court upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court, at their next session to be held thereafter, and shall by the said court be finally decided. And the decision of the Supreme Court, and their order in the premises shall be remitted to the circuit court, and be there entered of record, and shall have effect according to the nature of the said judgment and order. *Provided,* that nothing herein contained, shall prevent the cause from proceeding, if, in the opinion of the court, farther proceedings can be had, without prejudice to the merits. And *provided* also, that imprisonment shall not be allowed, nor punishment in any case be inflicted, where the judges of the said court are " divided in opinion upon the question touching the said imprisonment or punishment.(6)

The provisions of this act extend to criminal as well as civil cases.

If a case comes up in error in consequence of the opposition in opinion of the judges of the circuit court, the Supreme Court will consider only the single question or questions upon which the judges were opposed, and not the whole case: but the parties are not thereby precluded from bringing a writ of error on the final judgment below.(c) And when the cause is removed to the Supreme Court, by adjournment in consequence of the opposition in opinion of the judges of the circuit court, the Supreme Court cannot inquire whether the parties to the cause were properly before the circuit court,(c?) nor indeed into any other matter than the principle on which the judges below were divided.(e) But this court has no jurisdic-

(6) See United States o. Worrall. 2 Ball. 384. United States v. Williams. 4 Hall's Law Journ. 461, where this happened under the former system.

(c) Ogle e. Lee. 2 Cranch, 33. Wayman c. Southard. 10 Whsat. 64.

(d) Wayman v. Southard. 10 Wheat. 20. (e)Ib. 21.

tion of the question on which the opinions of the judges of the circuit court were opposed, if it arose on a proceeding subsequent to the decision of the cause, as for instance on the amount of the security bond to be given by the party applying for a writ of error.(f)

But a suit cannot be removed in this manner, which has been brought from the district to the circuit court by writ of error: for the district judge could not sit in the circuit court on a writ of error from his own decision, and consequently there could be no opposition of opinion to be certified to the Supreme Court.(g-) Nor can a division of opinion on a motion for a new trial in any case, whether civil or criminal, be removed in this manner.(/i) An opposition of opinions in the judges of the circuit court on a motion to instruct and order their clerk to issue a writ of *habere facias possessionem* in favour of a plaintiff who has recovered judgment in ejectment made after an injunction issued by a state court, may be certified and removed in this manner.(z')

Where the opinions of the judges are opposed, they do not assign any reasons in favour of their respective opinions, but merely state the point of disagreement, in order that either party may carry it to the Supreme Court for ultimate decision.(&)

(f) Devereaux t> Marr. 12 Wheat. 212. *(g)* United States t. Lancaster. 6 Wheat. 434. *(h)* United States *v.* Laniel. 6 Wheat. 542.

(i) M'Kims c. Voorhies. 7 Cranch, 279. There was no appearance for the defendant in this case.

(k) United States v. Smith and Ogden, 89, per Paterson, J.

CHAPTER IX.

SUPREME COURT — APPELLATE POWER — HABEAS CORPUS, &c.

Other modes in which the Supreme court exercises its appellate power are *habeas corpus,* prohibition, *mandamus,* &c. By the 14th section of the act of September 24,1789, all the Courts of the United States have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And either of the Justices of the Supreme Court, as well as Judges of the district court, shall have power to grant writs of *habeas corpm* for the purpose of an inquiry into the cause of commitment; *provided,* that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody under, or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

Whether the Supreme Court had power to issue a habeas corpus to inquire into the cause of commitment of a person in custody under a commitment of the circuit court of the district of Columbia, was a question that arose in the case of Bollman and Swartwout, who were committed by that court on a charge of treason.(o) The principal objections made to it were, that the act of Congress confined that power to a single judge of the Supreme or district court, and that it was the exercise of an original jurisdiction in a case in which it was granted by the constitution. But the court decided, on a comparison of the above sections with the 33d section of the act of September 24, 1789, which authorizes the Supreme Court to admit to bail in criminal cases, that it had the power, and

(a) 4 Cranch, 75.

that the jurisdiction exercised by *habeas corpus* in such case is not original, but appellate. It is the revision of a decision of an inferior court, by which a citizen has been committed to gaol. It does not touch the question of guilt but of imprisonment, and they awarded the writ. — CUSHING and JOHNSON J. dissented, on the latter ground. Prior to this case the Supreme Court had exercised a similar jurisdiction, without objection, in Hamilton's case,(6) where the commitment was by the district judge, and in Burford's casc.(c) In a late case where the question was again made, whether this court had authority to issue a *habeas corpus* where a person was in gaol under the warrant or order of any other court of the United States, the court declared that the point had already passed *in rem judicatam* in this court: that in the case *of Boll-man* v. *Sivartwout,* it was expressly decided, upon full argument, that this court possessed such an authority, and the question had ever since been considered at rest.(c?)

But the Supreme Court will not grant a *habeas corpus,* to bring up a person who is in custody of the Marshal under a commitment of a circuit court of the United States for a contempt: nor, if granted, will it inquire whether the court erred in its judgment of the law applicable to the case, if there be no question but that such commitment was made by a court of competent jurisdiction, and in the exercise of an unquestionable authority. The adjudication of the court below is a conviction, and is conclusive, and the commitment in consequence is an execution; and the exercise of the power of revising the case on a *habeas corpus,* would be the exercise of an appellate jurisdiction in criminal cases, which is an authority not granted by the laws of the United States, except by a certificate that the opinions of the judges are opposed; and the court will not do indirectly, what they cannot

do directly. Where, therefore, the party was in gaol, in custody of the Marshal, under a commitment of the circuit court for the district of Columbia, for an alleged contempt in refusing to answer a question put to him as a witness, on the trial of an indictment,

(6) 3 Dall. 17.

(c) 3 Cranch, 448.

(d) Ex parte Kearney. 7 Wheat. 41.42.

the Supreme Court refused to grant a *habeas corpus* to bring up his body.(e)

The Supreme Court has power to issue not only this writ *of habeas corpus ad subjiciendum,* to inquire into the cause of commitment, but also the *habeas corpus ad prosequendum, testificandum et deliberandum.(f)* But the acts of Congress do not extend to it the writ of *habeas corpus ad rcspondendum,* nor *ad satisfacicndum,* as they are not processes necessary for the exercise of the jurisdiction of the Supreme Court; nor the writ of *habeas corpus ad faciendum et recipicndum,* commonly denominated a *habeas corpus cum causa,* a different mode of bringing up suits from the courts below • being provided by the acts of Congress.(e-)

On the return of the *habeas corpus,* if the court go into an examination of the evidence upon which the commitment was grounded, it is unimportant whether the commitment be regular in point of form or not: the court will proceed to do what the court below ought to have done.(/i) So if a certificate from the secretary of state of the United States of the appointment of certain magistrates, before whom affidavits were made, on which the commitments were founded, be informal, and may readily be corrected, the court will proceed to consider the subject as if the certificate were corrected, retaining however any final decision, if against the prisoners, until the correction shall be made.(z)

The question to be determined on a *habeas corpus* for the purpose of inquiring into the cause of commitment is, Whether the accused shall be discharged, or held to trial: and if the latter, in what place the trial shall take place, •*, and whether the accused shall be confined or admitted to bail. If upon this inquiry it manifestly appears, that no crime has been committed, or that suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him. Otherwise he must either be committed to prison or give bail.(&) The

(e) Ex parte Kearney. 7 Wheat. 38. See also Anderson c. Dunn 6 Wheat. 204. (f) 3 Cranch, 448.

(ff) Ib.

(/«) Ex parte Bollman and Swartwout. 3 Cranch, 114.

(t) Ib. 130.

(fc) See Commitment, *post.*

majority of the court, therefore, being of opinion that there was not sufficient evidence against the accused of the fact of their levying war against the United States to justify their commitment on the charge of treason, discharged them: being divided in opinion as to their having committed an offence of another description.(l)

The limitation in the first clause of the 14th section above mentioned, that the writs shall be agreeable to the principles and usages of law, means those general principles and those general usages which are to be found, not in the legislative acts of any particular state, but in that generally recognised and long established law, which forms the substratum of the laws of every state.(m)

On *habeas corpus* for a prisoner a *certiorari* may issue from the Supreme Court to the clerk of the circuit court, to certify the record by which the cause of commitment may be examined, and its legality investigated.(n)

The 13th section of the act of September 24, 1789, also vests in the Supreme Court power to issue writs *of prohibition* to the district courts when proceeding as courts of admiralty and maritime jurisdiction. And such prohibition lies to the district court to stay proceedings before sentence, when that court entertains a jurisdiction not granted by the law of nations, or constitution, or laws of the United States.(o) And such proceeding in prohibition, or other similar writ, is appellate in its nature.(*p)*

By the 13th section of the act of September 24, 1789, it is further provided, that the Supreme Court shall have power to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office under the authority of the United States.

The issuing of a mandamus to courts, is the exercise of an appellate jurisdiction, and therefore constitutionally vested by this act in the Supreme Court; but a mandamus directed to a public officer belongs to original jurisdiction, and by the constitution, the exercise of original jurisdic-

(T) Ex parte Bollman and Swartwout. 3 Cranch, 75.

(m) United States v. Burr, appendix, 2d part, 185, 6. Per Marshall

C. J.

(n) Ex parte Burford. 3 Cranch, 448. (o) United States *v.* Peters. 3 Ball. 121. (p) Cohens i>. Virginia. 6 Wheat. 397.

tlon by the Supreme Court is restricted to certain specified cases, which do not comprehend a mandamus. The latter clause of the above section, therefore, authorising this writ to be issued by the Supreme Court, to persons holding office under the authority of the United States, is not warranted by the constitution, and is void, and the court will not enforce it. The court, therefore, refused to issue a mandamus to the secretary of state of the United States, commanding him to deliver to the relator a commission of justice of

the peace for the district of Columbia, which had been signed by the President of the United States, and sealed with the great seal.(y)

A mandamus will not be granted to a district judge, commanding him to issue a warrant in a case in which he acts in a judicial capacity in the matter, and has determined against issuing it. The court has no power to compel a judge to act according to the dictates of any judgment but his own.(r)

Where the court below stayed proceedings in a suit, upon a suggestion of the district attorney of the United States, it seems, a mandamus *nisi,* in the nature of a procedendo, is the proper remedy.(s)

The Supreme Court was divided in opinion on the question, whether the attorney general of the United States had a right *ex officio,* to apply for a mandamus to the judges of the circuit court, commanding them to proceed to execute certain duties imposed upon them by an act of Congress relating to invalid pensioners, which they had declined executing.(Y) It is doubtful whether the Supreme Court can interpose by mandamus to the circuit or district court to regulate them in respect to the conduct of their officers as for instance to restore an attorney suspended by their authority.(w)

The Supreme Court cannot remove a cause from the circuit court by *certiorari,* on the allegation that the circuit court has no jurisdiction of the case, but that the jurisdiction over it belongs to the Supreme Court; the mode of

(q) Marbury *v.* Madison. 1 Cranch, 175. (r) United States v. Lawrence. 3 Ball. 42. *(s)* Livingston v. Dorgenois. 7 Cranch, 577. *(f)* Hayburn's Case. 2 Dall. 409. («) Ex parte Burr. 9 Wheat. 529,

removal is different by the law.(u) Nor, it seems, does a *certiorari* lie in such case, to change the *venue,* and grant an impartial trial.(V)

A *certiorari* issues on an allegation of diminution,(*y)* or, where that will not answer, the court will direct a special *certiorari* to be framed, suited to the case.(z)

In some one or other of these modes, must a cause be brought before the Supreme Court; for it will not take cognisance of a cause not regularly brought before it. As where a suit was depending in a circuit court, and the attornies stated a case, and presented it to the Supreme Court for consideration and decision, the court refused to consider and decide it.(a) But it seems the Supreme Court have sustained an appeal from a decree of the circuit court entered by consent *pro forma,* to bring the case before the Supreme Court.(6)

») Fowler v. Lindsey. 3 Ball. 411. *x* Fowler v. Lindsey. 3 Ball. 411. *y* Ex parte Burford. 3 Cranch, 448. *z* Barton v. Pettit. 7 Cranch, 288.

a Bewhurst *v.* Coulthard. 3 Ball. 409. See also Lanusse v. Barker. 3 Wheat. 101. And United States *v.* Tenbrock. 2 Wheat. 248. (6) Fitzsimmons *v.* Ogden. 7 Cranch, 2.

CHAPT2R X.

SUPREME COURT — WRIT OF ERROR — PRACTICE.

THE practice of the Supreme Court on writs of error, will be considered under different heads.

1. As to the power to issue writs, forms, and style of process, general rules of practice, regulations as to attornies and counsellors, &c. See Supreme Court — Practice in Original Suits, *ante,* 19.

2. Whence the writ of error issues.

It was determined by the Supreme Court, in the year 1791, that writs of error could regularly issue only from the office of the clerk of the Supreme Court.(a) The inconvenience of such a rule occasioned the provision of the act of Congress of May 8th, 1792, sect. 9, that it should be the duty of the clerk of the Supreme Court of tl\e United States, forthwith to transmit to the clerks of the several circuit courts, the form of a writ of error, to be approved of by any two of the judges of the Supreme Court, and it should be lawful for the clerks of the said circuit courts to issue writs of error agreeably to such forms, as nearly as the case may admit, under the seal of the said circuit courts, returnable to the Supreme Court, in the same manner as the clerk of the Supreme Court may issue such writs in pursuance of the act of 24th September, 1789. A form of a writ of error was designed by the judges of the Supreme Court in pursuance of this act, and transmitted to the clerks of the respective circuits by the clerk of the Supreme Court. And writs of error to state courts are comprehended within its provisions and are to be issued from the circuit courts in the same man-

(a) West c. Barnes. 2 Ball. 401.

ner as writs of error to the circuit courts of the United States.(6)

3. Of the teste of the writ.

A writ of error ought to bear teste of the term next preceding that to which it is returnable, and a term must not intervene between the teste and return.(c) But a writ of error issued in September, may bear teste of the preceding February term of the court, and may be returnable to the next February term, notwithstanding the intervention of the August Term,(c/) and if the writ of error was in fact issued after the term preceding that to which it is returnable, it is not a sufficient objection that it is not tested of the last day of such preceding term, nor of that term at all, for the teste is amendable by the record of the court shewing the duration of the term.(e)

4. Of the citation and security.

The 22d section of the act of September 24th, 1789, requires, that there shall be annexed to, and returned with the writ of error, among other things, a citation to the adverse party, signed by a judge of the circuit court to which the writ issued, or justice of the Supreme Court, the ad" verse party having at least thirty day's notice, and eve»y justice or judge, signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good. This security when given by a defendant against whom judgment below is recovered, must be in an amount sufficient to secure the whole judgment in case the same shall be affirmed, and not merely such damages and costs as the court should adjudge on the writ of error for delay.(f)

By section 23, a writ of error, as aforesaid, shall be a *supersedeas,* and stay execution, in cases only where the

(6) Buel *v.* Van Ness. 8 Wheat. 321.

(c) Hamilton c.Moore. 3 Ball. 371.

(d) Blackwell *v.* Patten. 7 Cranch, 277.

(e) Course *v.* Stead. 4 Dal!. 25. (f) Catlett v. Brodie. 9 Wheat. 553.

writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office, where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of: until the expiration of which term often days, executions shall not issue in any case where a writ of error may be a *supersedeas,*

The act of December 12, 1794, sect. 1, reciting that doubts had arisen as to the extent of the security to be required in certain cases, provides, in sect 2, that the security to be required and taken on the signing of a citation, on any writ of error which shall not be a *supersedeas^* and stay execution, shall be only to such amount as, in the opinion of the justice or judge taking the same, shall be sufficient to answer all such costs as, upon an affirmance of the judgment, or decree, may be adjudged or decreed to the respondent in error.

Although it does not appear before the Supreme Court on the record returned with the writ of error that the judge who granted the writ of error did, upon issuing the citation, take the security required by the 22d section of the act of September 24th, 1789, yet that does not avoid the writ of error. This provision is merely directory, and the presumption is, that it has been complied with. The statute does not require the security to be returned to the Supreme Court, and it might, with equal propriety, be lodged in the court below. If any prejudice happen by the omission, the Supreme Court can grant summary relief, by imposing terms on the other party, (g-)

The original citation, signed by the judge^himself, must be returned with the record; a copy, with an affidavit of service on the defendant in error, is not sufficient.(A) If there be no original citation returned, the writ of error will be quashed,(z) or dismissed.(&) But

if it be suggested that the citation has been served, but not returned by the clerk below, with the writ of error, a *certiorari* will be granted,(l) which it seems the clerk below may return,

(g) Martinv. Hunter's lessee. 1 Wheat. 361.

(h) Wilson *v.* Daniel. 8 Dall. 401.

(i) Lloyd o. Alexander. 1 Cranch, 365.

(k) Bailiff *v.* Tipping. 2 Cranch, 406.

(I) Field *v.* Milton. *3* Cranch, 514.

under his hand and the seal of the court, by virtue of the

rule of court.(m) . .

A citation not served, is as no citation.(n) It the leme plaintiff below, intermarry after the judgment, the citation may be served on her husband.(o)

If the citation has not been served thirty days before the first day of the term, the court will not take up the cause until thirty days have expired from the time of such service, though the parties appear.(*p)* Nor will the court, in such case, even after the expiration of the thirty days, take up the cause at that term without consent.^)

By a rule of court of January term, 1824, no *certiorari* for diminution of the record shall be hereafter awarded in any cause, unless a motion therefor shall be made in writing and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit And all motions for such *certiorari* shall be made at the first term of the entry of the cause, otherwise the same shall not be granted, unless upon special cause shewn to the court, accounting satisfactorily for the delay.

5. Of the service.

Under the 23d section of the act of September 24th, 1789, a writ of error is a *supersedeas,* and stays execution, in cases only where it is served, by a copy thereo ffor the adverse party being lodged in the office of the clerk of the court, where the judgment was rendered, or decree passed, within ten days, Sundays exclusive, after the rendering of the judgment or passing the decree complained of.(r) Such lodging of a copy is a service of the writ, arid if not made till after the return day of the writ, it is void: but if the service is made before the return day, it is good, though the writ be not returned till after the court has closed its session; provided the opposite party appear: for such appearance waves all objection to the irregulari-

(m) Fennemore *v.* The United States. 3 Ball. 360, note.

(n) Lloyd *v.* Alexander. 1 Cranch, 365.

(o) Fairfax's executor?), Fairfax. 5 Cranch, 21.

(p) Lloyd v. Alexander. 1 Cranch, 365.

(q) Welsh v. Mandeville. 5 Cranch, 321.

(r) Wood P. Lide. 4 Cranch, 181.

ty of the return.(V) In Blair *v.* Miller,(t) it was held that a writ of error is a nullity, if not returned till the term next succeeding that to which it was returnable: but it does not appear which party made the objection, in that case, to the writ, nor whether there was any appearance for the opposite party.(w) The writ of error may, it seems, be taken out and served before the judgment below is signed.

Where the value does not appear on the record, and time is given to the plaintiff in error, defendant below, to prove it by affidavits, the writ of error is not a *supersedeas.(v)*

6. Of the return, assignment of error, and plea.

By the 22d section of the act of September 24th, 1789, to the writ of error must be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record, and assignment of errors, and prayer for reversal, with a citation to the adverse party, signed as therein directed. We have already treated of the return of the citation,(?0) and of the writ.(^) By rule of court,(*y)* the clerk of the court to which any writ of error is directed, may make return of the same, by transmitting a true copy of the record, and of all the proceedings in the cause, under his hand and the seal of the court: and such return is valid.(0) But the return should, it seems, purport to be an entire copy: for a certificate of the clerk below, signed " Copy teste A. B., clerk," is a defective verification of the record.(a) And the clerk below may under this rule return a *certiorari,* issued after the re-

(s) Woodu. Lide. 4 Cranch, 181. («) 4 Ball. 21.

(u) Wood *v.* Lide. 4 Cranch, 181. In Blair *v.* Miller, it seems the writ was not returned till the term succeeding that to which it was returnable: in Wood *v.* Lide, it was returned shortly after the court had closed the February session, to which it was returnable, viz. on the 18th March. See Hamilton *v.* Moore. 3 Ball. 371. (75) Williamson *v.* Kincaid. 4 Ball. 20. *(w) Ante.* Citation. *(x) Ante.* Service. *y)* 1 Cranch, xvii.

z) Martin *v.* Hunter's Lessee. 1 Wheat. 361. a) Wilson v. Baniel. 3 Ball. 401.

turn of the writ of error, on suggestion of diminution.(6) But if there be another record on which the judgment brought up by the writ of error is dependant, a *certiorari* in diminution will not ans« er to bring that up; the court will therefore direct a special *certiorari* to be framed.(c) By a rule of court of February term 1821, no *certiorari to?* diminution of the record shall be hereafter awarded, in any cause, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if

admitted by the other party, be verified by affidavit. And all motions for such certiorari shall be made at the first term of the entry of the cause: otherwise the same shall not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.(</)

The transcript of the record need not contain the names of the jurors who tried the cause, if complete in other respects.(e)

By a rule of court of February term, 1806,(f) all causes, the records in which shall be delivered to the clerk on or before the sixth day of a term, shall be considered as for trial in the course of that term. Where the record shall be delivered after the sixth day of the term, either party will be entitled to a continuance. In all cases where a writ of error shall be a *supcrsedeas* to a judgment rendered in any circuit court of the United States, (except that for the District of Columbia,) at least thirty days previous to the commencement of any terms of this court, it shall be the duty of the plaintiff in error to lodge a copy of the record with the clerk of the court, within the first six days of the term. And if he shall fail so to do, the defendant in error shall be permitted afterwards to lodge a copy of the record with the clerk, and the cause shall stand for trial in like manner as if the record had come up within the first six days; or he may, on producing a certificate from the clerk, stating the cause, and that a writ of error has been sued out, which operates as a *supersedeas* to the judgment, have the said writ of error docketed and dismissed. This rule is to apply to all judgments rendered by the court for the

(6) Fennimore *v.* The United States. 3 Ball, 360. note.

(c) Barton *v.* Pettit. 7 Cranch. 288.

(d) 9 Wheat. Pref.

(e) Owens *v.* Hannay. 9 Cranch, 180, (f) 3 Cranch, 239.

District of Columbia, at any time prior to a session of this court. But, though the transcript be not filed within the first six days of a term, agreeably to this rule, yet if it be filed during the term, before a motion is made to dismiss the writ of error, it is good.(^)

By a subsequent rule of court made at February term,

1821, *in all cases* where a writ of error or an appeal shall

be brought to this court, from any judgment or decree

rendered thirty days before the term, to which such writ

of error or appeal shall be returnable, it shall be the duty

of the plaintiff in error, or appellant, as the case may be,

to docket the cause, and file the record thereof with the clerk of this court, within the first six days of the term: on failure to do which, the defendant in error, or appellee, as the case may be, may docket the cause, and file a copy of the record with the clerk, and thereupon the cause shall stand for trial in like manner as if the record had been duly filed within the first six days of the term: or, at his option, he may have the cause docketed, and dismissed, upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal had been duly sued out and allowed.(A)

In respect to the assignment of errors and plea, a rule of court made at February term, 1806, provides,(z) that, in cases not put to issue at the August term, it shall be the duty of the plaintiff in error, if errors shall not have been assigned in the court below, to assign them in this court at the commencement of the term, or so soon thereafter as the record shall be filed with the clerk, and the cause placed on the docket. And if he shall fail to do so and shall also fail to assign them when the cause shall be called for trial, the writ of error may be dismissed at his cost: and if the defendant shall refuse to plead to issue, and the cause shall be called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case. In practice, a specific assignment of errors has never

(*g)* Bingham v. Morris. 7 Cranch, 99. (A) 6 Wheat, vi. (i) 3 Cranch, 239.

been insisted on as a preliminary to the argument or decision of the cause.(j)

7. Appearance.

By a rule of court made at August term, 1801,(k) in every cause where the defendant in error fails to appear, the plaintiff may proceed ex parte,(l) subject however, it would seem, to the rules afterwards made.(m) By another rule made at February term, 1803,(n) where the writ of error issues within thirty days before the meeting of the court, the defendant is at liberty to enter his appearance, and proceed to trial; otherwise the cause

must be continued. Where there is no appearance for the plaintiff in error, the defendant in error may have the plaintiff in error called, and dismiss the writ of error, or may open the record, and pray for an affirmance; and costs go of course.(o) If there is no appearance on the docket for either party, nor counsel appearing, the Court will order the parties to be called, and if neither appear, will dismiss the writ of error.(p) The effect of appearance in waving objections to the service of the citation, and the irregularity of the return of the writ, has been already noticed in treating of the citation and service.

8. Death of party.

If either die pending the proceedings on the writ of error in the Supreme Court, the writ of error is not thereby abated, whether it be in a real or personal action, and, by the practice of the court, whether there has been an assignment of errors or not.(^) The representatives in the personalty or realty may voluntarily become parties, or

(J) Green v. Watkins. 6 Wheat. 263.

(k) I Cranch, xviii. See *ante* Service, &c.

(I) See Hazlehurst v. The United States. 4 Ball. 6 Stewart v. Nigle. 9 Wheat. 526.

(m) See *ante.* 83.

(n) 1 Cranch, xviii.

(o) Montalet *v.* Murray. 3 Cranch, 248. See *ante,* 82, 83.

(p) Rodford *v.* Craig. 5 Cranch, 289.

(q) Green *v,* Watkms. 6 Wheat. 260. See Macker's heirs v. Thomas. 7 Wheat. 530,

be compelled to become parties agreeably to the following rule of court, which was made in consequence of the above case.

This rule of court was adopted at February term, 1821, and provides, that whenever pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty, of the deceased party, according to the nature of the case, may voluntarily come in, and be admitted parties to the suit, and thereupon the cause shall be heard and determined as in other cases: and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order, that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed: and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the same reversed if it be erroneous. *Provided,* however, that a copy of such order shall be printed in some newspaper at the seat of government, in which the laws of the United States shall be printed by authority, three successive weeks,

at least sixty days before the beginning of the term of the Supreme Court, then next ensuing.(r)

9. Argument.

By a rule of court of February term, 1795,(V) the court gave notice to the gentlemen of the bar, that hereafter they will expect to be furnished with a statement of the material points of the case, from the counsel on each side of the cause. The court expect them from both sides, and unless they are furnished the cause will be dismissed or continued.(V) And in one case the cause was dismissed, because the appellant had not furnished the points of the case, but was afterwards reinstated by consent.^) By a rule made at February term, 1821,(.r) after

fr) 6 Wheat, v.

(*) 1 Cranch, xviii.

(t) Peyton c. Brooke. 3 Cranch. 93.

(w) Schooner Catherine e. The United States. 7 Cranch, 99.

{*) 6 Wheat v.

that term no cause standing for argument will be heard by the court, until the parties shall have furnished the court with a printed brief or abstract of the cause, containing the substance of all the material pleadings, facts, and documents, on which the parties rely, and the points of law and fact intended to be presented at the argument.(y)

By a rule of court made at February term, 1812,(Y) only two counsel are permitted to argue for each party, plaintiff and defendant, in a cause: and the rule is inflexible whatever may be the number of points or parties in a cause.(a) But it has been dispensed with in a cause of great public importance, where the sovereign rights of the United States and a state were involved, and the government of the United States directed the attorney general to appear for one of the parties.(6)

Where the counsel employed had died, shortly before the term, and the cause was of magnitude, the court granted a continuance.(c)

It seems a cause may be reheard during the term at which it is decided, but not after.(</) At all events, it is too late to grant a re-hearing in a cause, after it has been remitted to the court below, to carry into effect the decree of this court, according to its mandate.(e) On Saturday of each week during the sitting of the court, motions, in cases not required by the rule of court to be put upon the docket, are entitled to preference if such motions are made before the court have entered upon the hearing of a cause upon the docket.(y)

By a rule of court of February term, 1823, no cause is to be heard until a complete record shall be filed containing in itself, without references *aliunde,* all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court.

(y) 6 Wheat v,

(z) Wheat. Dig. xiii.

(a) 7 Cranch. 1.

(6) M'Cullough v. The State of Maryland. 4 Wheat. 322.

(c) Hunter *v.* Fairfax's lessee. 3 Ball. 306.

(d) Hudson *v.* Smith. 7 Cranch.

(e) Browder v. M'Arthur. 7 Wheat. 58.

(f) Rule of court, February term, 1824. 9 Wheat, pref.

10. Matters of form and amendments.

By the act of September 24th, 1789, sect. 32, no summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any of the courts of the United States, shall be abated, arrested, quashed, or reversed for any defect, or want of form, but the said courts respectively shall proceed and give judgment, according as the right of the case and matter in law shall appear unto them, without regarding any imperfections, defects, or want of form, in such writ, declaration, or other pleading, return, process, judgment, or course of proceeding, whatsoever, except those only, in cases of demurrer, which the party demurring shall specially set down and express, together with his demurrer, as the cause thereof. And the said courts, respectively, shall and may, by virtue of the act, from time to time, amend all and every such imperfections, defects, and wants of form, other than those only which the party demurring shall express as aforesaid, and may at any time permit either of the parties to amend any defect in the process, or pleadings, upon such conditions as the said courts, respectively, shall, in their discretion, and by their rules, prescribe.

The teste of a writ of error may be amended by the record of the duration of the term, where it bears teste after the rising of the court, so as to make it during the term.(g). So, the return day may be amended by filling a blank, if the indorsements furnish something to amend by.(A) So, where the omission was made merely clerical, as where the direction was to the judges of the circuit court, holden in and for the district aforesaid, whereas no* district was previously named, it was allowed to be amended.^') The non-appearance of a power of attorney from the corporation that instituted a suit, is cured, on appeal to this court, by this section, if it could otherwise be considered an error under the usage and practice of our courts, in which the production of such powers has been dispensed with.(j)

The Supreme Court, on reversal on a writ of error, do not give directions respecting amendments, but leave such

(g) Course v. Stead. 2 Ball. 22.

(/«) Mossman v. Higginson. 4 Ball. 12.

(i) Course v. Stead. 2 Ball. 22.

(j) Osborn c. United States Bank. 9 Wheat. 830.

questions to the court below,® unless on appeal, in some cases of libel for a forfeiture.^)

11. Judgment.

The act of September 24th, 1789, sect. 23, provides for damages and costs on affirmance.(m) The 24th sect, enacts, that when a judgment or decree shall be reversed in, a circuit court, such court shall proceed to render such judgment, or pass such decree as the district court should have rendered or passed, and the Supreme Court shall do the same on reversals therein; except when the reversal is in favour of the plaintiff or petitioner in the original suit, and the damages to be assessed, or matter to be decreed are uncertain, in which case they shall remand the cause for a final decision.

If a judgment be reversed, which has been rendered on a special verdict or case agreed, the court above will proceed to give judgment.(w) But when a judgment is reversed on a bill of exceptions to instructions given to the jury, there must be a new trial awarded by the court below,(o) and the Supreme Court will direct it.(p) So, if the judgment be reversed because the special verdict is defective.(gi) And if the judgment below was for the defendant in a special action of *assumpsit,* and it is reversed on a bill of exceptions, this court will not assess the damages, and render judgment therefor in favour of the plaintiff, although the parties below, after verdict, agreed by a writing sent up with the record, that in the alternative of reversal, tha Supreme Court should assess the damages, and enter judgment therefor, (r)

If a case has been removed from the circuit court, and this court decide on the merits, reverse the decree, and

(fc) Sheehy v. Mandeville. 6 Cranch, 267. Slacum *v.* Pomery. Ib.

225.

(1) 7 Cranch, 496. 570. 9 Cranch, 244. 1 Wheat. 261. 4 Wheat.

52.

(m) See the next head, *post.*

(n) Hudson *v.* Guestier. 6 Cranch, 285, note.

(o) Ib. Lamisse v. Barker. 3 Wheat. 101.

(p) Otis v. Walter. 6 Wheat. 592.

(g) Chesapeake Insurance Company *v.* Stark. 6 Cranch, 268. Livingston v. Maryland Insurance Company. 6 Cranch, 274.

(r) Lanusse *v.* Barker. 3 Wheat. 101.

make a new decree, and issue its mandate requiring only the execution of its decree, the circuit court is bound to carry that decree into execution, and cannot entertain the question whether it has jurisdiction, although the jurisdiction of the court do not appear in the proceedings.^)

If the court below have issued an irregular writ of execution, this court will not quash it, but will direct the court below to quash it, and award restitution. But, it seems, a writ of error will not remove an execution awarded by a subsequent order of the court below; such order should be brought up by writ of error.(f)

The question before an appellate court is, whether the judgment was correct, not what was the ground on which the judgment professed to proceed. If, therefore, the judgment below, dismissing a motion for a *mandamus,* is correct in itself, but the motion was dismissed on the merits, that court deciding that it had jurisdiction, and the Supreme Court is of opinion on a writ of error brought by the plaintiff, that the court below had not jurisdiction, it will affirm the judgment with costs, and declare that as the reason.(w)

If the judgment below, on demurrer, be for the defendant, and the Supreme Court reverse the judgment, if the plaintiff in error obtain judgment in the court below, it will of course be with costs. So, in all cases of reversal, if this court direct the court below to enter judgment for the plaintiffin error, the court below will, of course, enter the judgment with the costs of that court.(w)

By sect. 24, of the act of 1789, the Supreme Court shall not issue execution in cases that are removed before them by writ of error, but shall send a special mandate to the circuit court to award execution. This is now the case in appeals also.

12. Damages and costs.

The 23d section of the act of September 24th, 1789, declares, that where upon the writ of error the Supreme Court shall affirm a judgment, they shall adjudge to the

(*) Skillern's executors v. May's executors. 6 Cranch, 267. (*) Wallen v. Williams. 7 Cranch, 278. (M) M'Clung o. Silliman. 6 Wheat. 598.

(») M'Knight *v.* Craig's Administrators. 6 Cranch, 187, Riddle *v.* Mandeville. 6 Cranch, 86.

respondent in error just damages for his delay, and single or double costs, at their discretion. These words, « at their discretion," apply as well to the damages as to the costs and the court is not bound in all cases to adjudge damages for delay.(x) It is provided by a rule of court adopted at February term, 1803,(*y~)* that in all cases where a writ of error shall delay the proceedings on the judgment of the circuit court, and shall appear to have been sued out merely for delay, damages shall be awarded at the rate of ten per cent, per annum, on the amount of the judgment. But in such cases, where there exists a real controversy, the damages shall be only at the rate of six per cent, per annum. In both cases the interest is to be computed as part of the damages. On affirming the judgment of the circuit court, this court calculates interest on the aggregate of principal and interest, up to the time of affirmance:(z) but they will not calculate interest up to the time when their mandate is to operate, because the party may pay the money immediately.(a)

The 4th sect, of the act of March 1,1793, (since expired) provided, that there should be allowed and taxed in the Supreme, circuit, and district courts, in favour of the parties obtaining judgments therein, such compensation for their travel and attendance, and for attorney and counsellor's fees, (except in the district court in cases of admiralty and maritime jurisdiction,) as were allowed in the Supreme or Superior Courts of the respective states.(6)

Costs go of course on affirming a judgment,(6) and on dismissing a writ of error where the plaintiff in error does not appear.(c) But though they were allowed in one case where the defendant in error was defendant below, and the writ of error was dismissed because the parties did not appear on the record to be citizens of different

(a;) Jennings *v.* The Perseverance. 3 Ball. 336. See Appeal and Judgment, *ante.*

(y) \ Cranch, xviii.

(z) By a general rule, made at February term, 1807, where damages are given by the rule passed in February, 180'i, the said dcimages shall be calculated to the day of affirmance of the said judgment in the circuit court. 4 Cranch. *Adfinem.*

(a) Brown *v.* Van Braam. 3 Ball. 344.

(6) See *post.*

(fc) Montalet *v.* Murray. 3 Cranch, 247. 4 Cranch, 47.

(c) Montaletv. Murray. 3 Cranch, 247.

states,(rf) yet the general rule is, that they are not allowed where a writ of error is dismissed for want of jurisdiction in the Supreme Court.(c)

In cases of reversal, costs are not of course,(f) and though they were allowed where the judgment was reversed for want of jurisdiction, the parties not appearing on the record competent to sue and ho sued, yet the court afterwards directed, that when a judgment is reversed for want of jurisdiction, it musi be without costs.(*g}* If there be a judgment in a state court on a question involving a right set up and claimed under a treaty, and that judgment is reversed in the highest court of the state, and the Supreme Court reverse the latter, and affirm the former judgment, the costs of the whole proceedings follow the judgment in the Supreme Court.(/t) By a rule of court made at February term, 1810, upon the reversal of a judgment of the circuit court, the party in whose favour the reversaHs, shall recover his costs in the circuit court.(z)

The costs of a case printed for the use of the court, will not be allowed in affirming a decree by way of damages for delay.(&)

The United States, not being comprehended in the general words of a statute, do not pay costs under this act, and where the court below, in a case in which the United States were complainants in equity, made a decree dismissing the bill in part, with costs, the Supreme Court, affirmed the decree except as to costs, and reversed so much as awarded the United States to pay costs, and directed, that no costs should be allowed to either party in this court.(l) So, on dismissing a writ of error, in which the United States were plaintiffs in error, because it issued

(d) Winchesters*. Jackson. 3 Cranch, 515. But see Montalet c. Murray. 4 Cranch, 47.

(e) Inglee e. Coolidge. 2 Wheat. 368. Houston v. Moore. 3 Wheat 433.

/) Montalet *v.* Murray. 4 Cranch, 47. S)Ib.

h) Clerke *v.* Harwood. 3 Dall. 342. *i)* Wheat. Dig. xiii.

k) Jennings v. The Perseverance. 3 Dall. 336. This appears to have been a case stated under the 19th sect, of the act of 1789, now repealed. (Z) United States v. Hooe. 3 Cranch, 92.

improvidently, it was dismissed without costs, the chief justice stating, that the United States never pay costs.(m)

By a rule of court, made at February term, 1808, all parties in this court, not being residents of the United States must give security for the costs accruing in this court, to be entered on the record.(w)

A rule made at the same term,(o) provides, that upon the clerk of this court producing satisfactory evidence by affidavit, or the acknowledgment of the parties, or their sureties, of having served a copy of the bill of costs due by them respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively, to compel payment of the said costs. Each party is bound to pay the clerk his fees for services performed for him: and it is immaterial which party recovers judgment.(*p)*

The rule of the Supreme Court, of February term, 1825, orders, that after that term, no original record should be taken from the Supreme Court room, or from the office of the clerk of that court.

(m) United States *v.* Barker. 2 Wheat. 395. See United States *v.* La Vengeance. 3 Ball. 301. (n) Wheat. Dig. xii. (o) Ib. *{p)* Caldwellv. Jackson. 7 Cranch, 276.

CHAPTER XI.

SUPREME COURT — CRIMINAL JURISDICTION.

The act of September 24th, 1789, sect. 13, gives the Supreme Court, exclusively, all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise, consistently with the law of nations; and original but not exclusive jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul shall be a party.

The act for the punishment of certain crimes against the United States, passed the 30th of April, 1790, sect. 25 and 26, declares void any writ or process, whereby the person of any ambassador, or other public minister, their domestic, or domestic servants, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached; and subjects the parties concerned to fine and imprisonment.

No proceeding against an ambassador appears to have occurred in the Supreme Court of the United States since the period of its organization. And it may be remarked, that even if a summons be in such case sustainable, a judgment would be of little avail, as the above mentioned act of 1790 seems to take away all process of execution, civil as well as criminal, against the person or goods. It seems doubtful whether the immunity allowed by all civilized nations to foreign ministers is founded on the principle that though present in person he is, by a political fiction, supposed to be extra-territoral, or on the principle that he stands in the place of the sovereign he represents.^) If the former be the principle, then it would seem that even a summons could not be served upon him.

As to consuls, the question has not arisen in the Su-

(ffl) Exchangs v. M'Fadden 7 Cranch, 138.

preme Court, whether it has original jurisdiction in proceedings against them for offences, either in those which are above, or those which are within the grade assigned to the district court by the act of September 24th, 1789, sect. 9 and 11.(b)

Though the third article of the constitution would authorize Congress to give the Supreme Court appellate jurisdiction, by writ of error from courts of the United States, in criminal cases embraced by the grant of judicial power, yet they have not done so.(e) The only mode as we have before seen, in which the appellate power can be exercised by the Supreme Court from a circuit court in a criminal case, is by certificate, where the

opinions of the judges ofthe circuit court are opposed, under the 6th sect, of the act of 29th April, I802.(d)

(b) See United States v. Ravara. 2 Ball. 297. and *ante.* 27. Commonwealth *v*. Kosloff. 5 Serg. and Rawle. 545. Respublica *v.* Cobbett. 3 Dall. 467. 3 Yeates, 352, S. C.

(c) See United States *v.* Moore. 3 Cranch, 159. United States », La Vengeance. 3 Dall. 301.

(d) See *ante,* 68.

CHAPTER XII.

CIRCUIT COURTS — ORGANIZATION.

THE circuit courts are the principal inferior courts established by act of Congress, in pursuance of the power given by the 3d article of the constitution, (sec. 1. 1,) to establish inferior courts.

By the 4th section ofthe act of September 24th, 1789, circuit courts were to consist of any *two* justices of the Supreme Court, and the district judge of such district, any two of whom should constitute a quorum; *provided,* that no district judge should give a vote in any case of appeal or writ of error from his own decision, but might assign the reasons of such decision. But by the 1st sect, ofthe act of March 2d, 1793, the attendance of only one ofthe justices ofthe Supreme Court at the several circuit courts of the United States to be hereafter held, shall be sufficient, any law requiring the attendance of *two* of the saic justices notwithstanding: *provided* that it shall be lawful for the Supreme Court, in cases where special circumstances shall, in their judgment, render the same necessary, to assign two of the said justices to attend the circuit court or courts, and it shall be the duty of the justices so assigned, to attend accordingly. And, *provided* a&o, that when only one judge of the Supreme Court shall attend any circuit court, and the district judge shall be absent, or shall have been of counsel, or be concerned in interest, in any case then pending, such circuit court may consist ofthe said judge of the Supreme Court alone.(a)

Where the district judge does not judicially sit in a cause in the circuit court, he is considered as absent, in contemplation of law, within the foregoing section, though he be on the bench.(6)

By the act of 13th February, 1801, entitled, an act to

(a) See United States *v.* Lancaster. 5 Wheat. 434.

(b) Binghamu. Cabot. 3 Dall. 19.

provide for the more convenient organization of the courts of the United States, a new system was established, by virtue of which sixteen circuit court judges were appointed to hold the circuit courts, and the judges of the Supreme Court exercised no other jurisdiction than that vested in the Supreme Court. But by

the act of March 8th, 1802, the act of 13th February, 1801, was wholly repealed, and the system abolished. And now, under the act of 29th April, 1802, and other acts, the circuit courts are organized as follows.

From the majority of the districts of the United States are formed seven circuits, and there is holden, in each of those districts, a court called a circuit court.

1. First Circuit.

The districts of New Hampshire, Massachusetts, Rhode Island, and Maine, form the first circuit,(e) in which the circuit court consists of the justice of the Supreme Court, residing within the said circuit, and the district judge of the district where such court is holderi.(e?)

2. The *second* circuit is composed of .the districts of Connecticut, southern district of New York, and Vermont, to consist of the justices of the Supreme Court residing therein, and the district judge of the district where such court is holden.(e)

3. The *third* circuit is composed of the districts of New Jersey, and the eastern district of Pennsylvania,(f) to consist of the senior associate justice of the Supreme Court residing in the fifth circuit, (Virginia, and North Carolina,)^) and the district judge of the district where the court is holden.(/i)

4. The *fourth* circuit is composed of the districts of

(c) Act of 29th April, 1802, sect. 4. March 30, 1820.

(d) Act of March 26, 1812.

(e) Act of 29th April, 1802.

(f) Act of 29th April, 1802. April 20, and December 16, 1818. May 15, 1820.

(g) Act of 29th April, 1802. Sect. 4. *(h)* Act of March 3, 1803.

Maryland, and Delaware: to consist of the justice of the Supreme Court, residing within the said circuit, and the district judge of the district where such court is holden.(z)

5. The fifth circuit embraces the eastern district of Virginia, and the district of North Carolina, to consist of the present chief justice of the Supreme Court, and the district judge of the district where the court is holden.

6. The *sixth* circuit comprehends South Carolina, and Georgia: to consist of the junior associate justice of the Supreme Court, and the district judge of the district where such court shall be holden.

7. The *seventh* circuit is composed of the district of Kentucky, East and West Tennessee(F) and Ohio: to consist of the sixth associate judge residing in the seventh circuit, until otherwise allotted, and the district judge of the district where such court is holden.

In several districts of the United States, owing to their remoteness from any justice of the Supreme Court, there are no circuit courts held. But in these, the district court there is authorised to act as a circuit court, except so far as relates to writs of error or appeals from judgments or decrees in such district court. See *post,* District Court.

In all cases where the day of meeting of the circuit court is fixed for a particular day of the month, if that day happen on Sunday, then, by the act of 29th April, 1802, and other acts, the court shall be held the next day.

The act of 29th April, 1802, sect. 5, further provides, that on every appointment which shall be hereafter made, of a chief justice, or associate justice, the chief justice and associate justices shall allot among themselves the aforesaid circuits, as they shall think fit, and shall enter such allotment on record.

And, in case no such allotment shall be made by them,

(i) Act of 29th April, 1802.

(fc) The Act of 16th March, 1822, provides for the issuing of duplicate Writs from any one of the circuit courts of East and West Tennessee, Where defendants reside in both districts, the proceedings thereupon to be as if the case were single. The Marshal of either judicial district is to do execution as if the judgment were rendered in his own court.

at their sessions next succeeding such appointment, and also, after the appointment of any judge as aforesaid, and before any other allotment shall have been made, it shall and may be lawful for the President of the United States, to make such allotment as he shall deem proper — which allotment, in either case, shall be binding until another allotment shall be made. And the circuit courts constituted by this act shall have all the power, authority, and jurisdiction, within the several districts of their respective circuits, that before the 13th February, 1801, belonged to the circuit courts of the United States.

The act of September 24th, 1789, sect. 6, provides, that a circuit court may be adjourned from day to day, by one of its judges, or if none are present, by the marshal of the district, until a quorum be convened. By the act of May 19th, 1794, a circuit court in any district, when it shall happen that no judge of the Supreme Court attends within four days after

the time appointed by law, for the commencement of the sessions, may be adjourned to the next stated term, by the judge of the district, or, in case of his absence also, by the marshal of the district. But by the 4th sect, of the act of 29th April, 1802, where only one of the judges thereby directed to hold the circuit courts shall attend, such circuit court may be held by the judge so attending.

By the act of March 2d, 1809, certain duties are imposed on the justice of the Supreme Court, in case of the disability of the district judge to hold a district court. Sect. 1, enacts, that in case of the disability of the district judge of either of the districts of the United States, to hold a district court, and to perform the duties of his office, and satisfactory evidence thereof being shewn to the justice of the Supreme Court allotted to that circuit, in which such district court ought, by law, to be holden, and on application of the district attorney, or marshal of such district, in writing, to the said justice of the Supreme Court, said justice of the Supreme Court shall, thereupon, issue his order in the nature of a *certiorari,* directed to the clerk of such district court, requiring him for with to certify unto the next circuit court, to be holden in said district, all actions, suits, causes, pleas, or processes, civil, or criminal, of what nature or kind soever, that may be depending in such district court, and undetermined, with all the pro-

ceedings thereon, and all files, and papers relating thereto, which said order shall be immediately published in one or more news-papers, printed in said district, and at least thirty days before the session of such circuit court, and shall be deemed a sufficient notification to all concerned. And the said circuit court shall, thereupon, have the same cognisance of all such actions, suits, causes, pleas, or processes, civil or criminal, of what nature or kind soever, and in the like manner, as the district court of said district by law might have, or the circuit court, had the same been originally commenced therein, and shall proceed to hear and determined the same accordingly: and the said justice of the Supreme Court, during the continuance of such disability, shall, moreover, be invested with, and exercise all and singular the powers and authority, vested by law in the judge of the district court in said district. And all bonds and recognisances taken for, or returnable to, such district court, shall be construed and taken to be to the circuit court tn HP holden thereafter, in pursuance of this act, and shall have the same force and effect in such court, as they would have had in the district court to which they were taken. *Provided,* that nothing in this act contained shall be so construed, as to require of the Judge of the Supreme Court, within whose circuit such district may lie, to hold any special court, or court of admiralty, at any other time than the legal time for holding the circuit court of the United States in and for such district. Section 2, provides, that the clerk of such district shall, during the continuance of the disability of the district judge, continue to certify as aforesaid, all suits or actions, of what nature or kind soever, which may thereafter be brought to such district court, and the same transmit to the circuit court next thereafter to be holden in the same district. And the said circuit court shall have cognisance of the same, in like manner as is herein before provided in this act, and shall proceed to hear and determine the same. *Provided nevertheless,* that when the disability of the district judge shall cease, or be removed, all suits or actions then pending and undetermined in the circuit court, in which by law the district courts have an exclusive original cognisance, shall be remanded, and the clerk of the said circuit court shall transmit the

same, pursuant to the order of said .court, with all matters and things relating thereto, to the

district court next thereafter to be holden in said district, and the same proceedings shall be had therein as would have been had the same originated or been continued in the said district court. Sect. 3, enacts, that in case of the district judge in any district being unable to discharge his duties as aforesaid, the district clerk of such district shall be authorised and empowered, by leave or order of the circuit judge of the circuit in which such district is included, to take, during such disability of the district judge, all examinations, and depositions of witnesses, and to make all necessary rules and orders, preparatory to the final hearing of all causes of admiralty and maritime jurisdiction.^)

If the disability of the district judge terminate in his death, the circuit court must remand the certified causes to the district court.(m)

By the 1st section of the act of 3d March, 1821, in all suits and actions in any district court of the United States in which it shall appear that the jndgp nf such court is any ways concerned in interest, or has been of counsel for either party, or is so related to, or connected with either party as to render it improper for him, in his opinion, to sit on the trial of such suit or action, it shall be the duty of such judge, on application of either party to cause the fact to be entered on the records of the court, and also an order that an authenticated copy thereof, with all the proceedings in such suit or action, shall be forthwith certified to the next circuit court of the district, and if there be no circuit court in such district, to the next circuit court in the state, and if there be no circuit court in such state, to the most convenient circuit court in an adjacent state; which circuit court shall, upon such record being filed with the clerk thereof, take cognisance thereof, in like manner as if such suit or action had been originally commenced in that court, and shall proceed to hear and determine the same accordingly, and the jurisdiction of such circuit court shall extend to all such cases

(T) See Ex parte United States, 1 Gall. 337. A doubt suggested, whether Congress can, constitutionally, impose on a Justice of the Supreme Court, the authority or duty to hold the district court. See Stewartv. Laird. 1 Cranch, 309. Note to Hayburn's case. 2 Dall. 410.

(m) Ex parte United States. 1 Gall. 337.

to be removed, as were cognisable in the district court from which the same was removed.

The judges of the Supreme Court are not appointed as circuit court judges, or in other words, have no distinct commission for that purpose: but practice, and acquiescence under it for many years, were held to afford an irresistible argument against this objection to their authority to act, when made in the year 1803, and to have fixed the construction of the judicial system. The court deemed the contemporary exposition to be of the most forcible nature, and considered the question at rest, and not to be disturbed then.(w)

If a vacancy exist by the death of the justice of the Supreme Court to whom the district was allotted, the district judge may under the act of Congress discharge the official duties,(o) except that he cannot sit upon a writ of error from a decision in the district court.(p)

Congress having a constitutional authority to establish, from time to time, such inferior tribunals as they may think proper, may also transfer a cause from one to the other. They, therefore, had power to transfer a cause from a circuit court of the United States, established under the act of 13th February, 1801, to one established under the act of 29th April, 1802.(V)

By the 7th section of the act of September 24th, 1789, the clerk for each district court is also clerk of the circuit court in such district. His oath is prescribed, and he is to give bond.

Although, at one time, the practice existed, for the justice of the Supreme Court who decided the case in the circuit court, not to sit when it was brought up from such circuit court to the Supreme Court, by writ of error or appeal, yet the practice was subsequently abandoned, and the court agreed among themselves, not to excuse the judge who made the decision in the court below.(V) A general stated session of the circuit court cannot,

<n) Stuart c. Laird. 1 Cranch, 308.

(o) Pollard v. Dwight. 4 Cranch, 428. See the 5th section of the act •of 29th April, 1802, *ante.* 97.

(p) United States *v.* Lancaster. 5 Wheat. 434.

(q) Stuart v. Laird. 1 Cranch. 308.

(r) Note to Shirras v. Craig. 8 Cranch, 42.

in general, be adjourned to any other place than that in which it is by the act of Congress directed to be held.(s)

For the Power of the district judge to adjourn the ses-

sions of the circuit court to some other place, in case

of contageous sickness, see the act of February 25th,

1799.(t)

In the District of Columbia, there is also a circuit court, composed of a chief justice and two associates. This court was established by particular acts of Congress, which regulate its jurisdiction, and that of the Supreme Court of the United States, on writs of error or appeals therefrom.

(g) United States *v*. Cornell. 2 Mason, 97. *(t) Ante* Supreme Court — Organization,

CHAPTER XIII.

CIRCUIT COURTS-ORIGINAL CIVIL JURISDICTION.

THE 3d article of the constitution, (sect. 1,1.) provides that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish In pursuance of this grant, Congress have enacted, by the act of September 24th, 1789, sect. 11, that the circuit courts shall have original cognisance, concurrent with the courts of the several states, of all suits of a civil nature at common law, or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners, or an alien is party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state. But no person shall be arrested in one district for trial in another, in any civil action, before a circuit or district court. And no civil suit shall be brought before either of the said courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. Nor shall any district or circuit court have cognisance of any suit to recover the contents of any promissory note, or other chose in action, in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange.

Sect. 12, provides, that the trial of issues in fact in the circuit courts shall, in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury

By the act of 3d March, 1815, the district court of the United States shall have cognisance *concurrent* with the courts and magistrates of the several states, *and the circuit courts of the United States,* of all suits at common law where

the United States, or any officer thereof, under the authority of any act of Congress shall sue, although the debt, claim or other matter in dispute, shall not amount to one hundred dollars.

A circuit court, though an *inferior* court in the language of the constitution, is not so in the language of the common law; nor are its proceedings subject to those narrow rules, which the courts of Westminster applied to special courts, or inferior courts held by charter. It is a court of original and durable jurisdiction; analogous t*o the court of King's Bench in England, and entitled to as liberal intendments and presumptions in its favour as any Supreme Court.(a) Still, however, it is a court of *limited* jurisdiction, and has cognisance not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace,(6) and the fair presumption is, that a cause is without its jurisdiction, till the contrary appears. So that the facts and circumstances, which give it jurisdiction, must be set forth on the record; and if the fact be denied on which the plaintiff grounds his right to sue in this court, he must prove it.(c)

Unless jurisdiction in cases arisingunder the laws of the United States be conferred by act of Congress, the circuit court cannot take cognisance of them.(cT) It was therefore held, that although the constitution extends the judicial power to all cases in law and equity arising under the laws of the United States, and the Bank of the United States was a corporation created by a law of the United States, it was not therefore entitled to sue in the circuit court; even though the act enabled them to sue " in any court of record or elsewhere."(e) So, although patent

(a) Turner*. The Bank of North America. 4 Ball. 11. United States v. The Insurgents. 2 Ball. 340. Kempe's lessee D. Kennedy. 5 Cranch, 185.

(6) Turner *v.* The Bank of North America. 4 Dall. 11,

(c) Turner v. The Bank of North America. 4 Dall. 11. Maxfield's lessee r. Levy. 4 Dall. 330.

(d) Bank of the United States e. Deveaux. 5 Cranch, 85. M'Intire v. Wood. 7 Cranch, 504. Hodgson *v.* Bowerbank. 5 Cranch, 303.

(e) Bank of the United States *v.* Deveaux. 5 Cranch, 85. But by the present act, passed 10th April, 1816, sect. 7, the existing Bank may sue and be sued, in any circuit court of the United States. See 4 Wash. C. C. Rep. 108. — By the words used in this section, Congress has conferred

rights depend altogether on laws of the United States, yet to justify the jurisdiction of the courts of the United States in sustaining suits by the patentee, it was requisite expressly to recognize his right to sue, in the laws respecting them.(f) So, it was held, that a citizen of one state could not obtain an injunction in the circuit court for a violation of a patent right against a citizen of the same state, as no act of Congress then authorized such suit.(g-)

But though the courts of the United States are all of a limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them, and may in such cases be reversed, yet they are not absolute nullities, which may be totally disregarded.(A)

The original jurisdiction of the circuit court in civil cases may be considered,

1. As to the sum or value of the matter in dispute.

2. As to suits in which the United States, or any officer thereof, are plaintiffs or petitioners.

3. As to suits between citizens of different states.

4. Where an alien is party.

5. As to suits by assignees.

6. As to local actions.

7. As to the privilege of not being sued in a different state.

8. As to suits arising on the acts of Congress respect, ing patents.

on the circuit courts of the United States, jurisdiction in all suits by the Bank of the United States, and, it would seem, in all suits against it. Osborn *v.* United States Bank. 9 Wheat. 818. And the act conferring this jurisdiction is within the power given by the constitution to Congress. See 9 Wheat. 904.

(f) Bank of the United States *v.* Deveaux. 5 Cranch, 85.

(g) Livingston v. Van Inghen. 4 Hall's Law Journ. 60.

(A) Kempe's lessee o. Kennedy. 5 Cranch, 185. Livingston v. Van Inghen. 4 Hall's Law Journ. 60. M'Cormick v. Sullivan. 10 Wheat. 199.

1. As to the sum or value of the matter in dispute. By the 11th section of the act of September 24th, 1789, the matter in dispute must exceed, exclusive of costs, the sum or value of five hundred dollars, to give the circuit court jurisdiction. And by the 20th section of the same act where, in a circuit court, a plaintiff in an action originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of five hundred dollars, he shall not be allowed, but, at the discretion of the court, may be adjudged to pay costs.

In suits to recover damages for a tort, the sum laid in the declaration is, it seems, the rule for ascertaining the suvn in dispute, under the 11th section, and if, in an action of trespass, the sum laid in the declaration exceeds five hundred dollars, the court has jurisdiction, though referees should report in favour of the plaintiff less than five hundred dollars.(z)

In ejectment, it would be sufficient to fix the jurisdiction, after a verdict for the plaintiff, if the value were then proved on affidavit, or by witnesses; it is not necessary that the jury should find the value, nor will the court arrest the judgment, because the jury did not find the value.(j)

It is now held, that in ejectment the value of the land in controversy should appear by the declaration to be above five hundred dollars, otherwise the court will on motion dismiss the suit.(&)

In a writ of right, where the property demanded exceeds five hundred dollars in value, if upon trial, the demandant recovers less, he is not allowed his costs, but, at the discretion of the court, he may be adjudged to pay costs.(7)

2. As to suits of a civil nature in which the United States or any officer thereof are plaintiffs or petitioners.

(i) Hulscamp *v.* Teel. 2 Ball. 356.

(j) Den *v.* Wright. 1 Peters, 73.

(k) Lessee of Lanning *v.* Dolph. 4 Wash. C. C. Rep. 624, in which case the court dismissed the suit, notwithstanding the uniform practice in the district had been to declare without any averment. But they afterwards restored the cause, and gave leave to amend. And in ib. query; if the want of jurisdiction must not be always taken advantage of by plea?

(I) Liter *v.* Green. 8 Cranch, 220.

The first of these may, by the 11th section of the act of September 24th, 1789, be brought in the circuit court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars.

But these, it seems, do not embrace suits for penalties and forfeitures: for if an act of Congress impose *a qui tarn* penalty for an act done, (as the penalty of 2000 dollars formerly imposed by the 22d section of the act of March 22d, 1794, for fitting out a vessel for the slave trade,) without declaring in what court the suit shall be brought, the circuit court has not jurisdiction of the suit, though the sum in dispute exceeds five hundred dollars.(m) The jurisdiction in such case belongs to the district court.

It has been decided that under the 4th section of the act Of 3d March, 1815, the circuit court has jurisdiction, concurrently with the district court, of all suits at common law where any officer of the United States sues under the authority of an act of Congress, as where the postmaster general sues under an act of Congress for debts or balances due to the general post-office, (w)

The acts for the settlement of public accounts, and recovery from debtors to the United States, provide peculiar kinds of evidence and modes of proceeding, in suits brought by the United States.(o) By the act of 3d March, 1797, sect. 2, and 3d March, 1817, sect. 11, transcripts from the books and proceedings of the treasury are made evidence. By the 3d sect, of the act of 3d March, 1797, the courts, in suits by the United States against persons indebted to them, are to grant judgment at the return term, unless the defendant make a certain oath or affirmation therein prescribed. By sect. 4, no claim for a credit is to be admitted on the trial, unless under peculiar circumstances, except such as have been disallowed by the accounting officers of the treasury department; and provisions are made as to a lien and executions. By the act of May 15th, 1820, sect. 2, process by warrant and distress against a delinquent debtor or his sureties and for his im-

(m) Evans qui tarn *v.* Bollen. 4 Ball. 342. See District Court, *post (n)* Postmaster generale. Early. 12 Wheat. 146. 147. (o) See act of March 3d, 1797, as to public accounts. March 2d, 8797, sect. 89, as to duties. April 10th, 1816, sect. 23, as to the Bank «f the United States. May 11th, 1820, sect. 2, as to lands.

prisonment, is authorised to be issued by the officers of the treasury department, subject by sections 4, 5, and 6, to an injunction by the district judge, and appeal to the circuit court.(p) By the collection act of the 2d March, 1799 sect. 65, peculiar privileges are enacted in favour of the United States, and sureties of their debtors paying bonds for duties, in cases of insolvency, and it enacts that in all cases in which suits or prosecutions shall be commenced for the recovery of duties, or pecuniary penalties prescribed by the laws of the United States, the person or persons against whom the process may be issued,'shall and may be held to special bail subject to the rules and regulations which

prevail in civil suits in which special bail is required. The provisions of this act as to the modes of recovery have generally been incorporated by reference to it in the subsequent acts passed from time to time respecting trade navigation and impost.

The United States are competent to sue to enforce a contract, or recover damages for its violation, in all cases where a different mode of suit is not pointed out by law, without an act of Congress granting the authority. They may sue in their own names, whenever it appears, not only from the face of an instrument, but from all the evidence, that they alone are interested in the subject matter of the suit. They may, therefore, sue on a bill of exchange indorsed to the treasurer of the United States.^) But where an agreement in writing was made with a commissary general of the United States, whose name was not mentioned in the instrument, and it did not state whether he contracted as agent of the United States, or on his private account, nor that the consideration passed from the United States, or was intended for its use, and the only interest appearing, different from that of the commissary, was in a third person, and the evidence shewed that the contract was made by such third person, who claimed under it, it was held, that the United States could not maintain a suit under the agreement. If it even appeared, that such contract was made for the benefit of the United States, and also of a third person, a replevin could not be

{p) See the acts March 3, 1795, March 3, 1797, March 3, 1809, March 3, 1817, February 24th, 1819, May 15th, 1820. (?) Dugan *v.* The United States. S Wheat. 121.

maintained for the whole property, in the name of the United States.(r)

By the act of 20th April, 1818, sect. 8, in any suit or action which shall be hereafter instituted by the United States, against any corporate body, for the recovery of money, upon any bill, note, or other security, it shall be lawful to summon as garnishees the debtors of such corporation, and it shall be the duty of any person so summoned to appear in open court, and depose in writing, to the amount which he or she was indebted to the said corporation, at the time of the service of the summons, and at the time of making such deposition, and it shall be lawful to enter up judgment in favour of the United States, in the same manner as if it had been due and owing to the United States: *provided,* that no judgment shall have been rendered against any garnishee, until after judgment shall have been rendered against the corporation defendant to the said action, nor until the sum in which the said garnishee may stand indebted be actually due. By sect. 9, where any person, summoned as garnishee, shall depose in open court, that he or she is not indebted to such corporation, nor was not at the time of the service of the summons, it shall be lawful for the United States to tender an issue, and if, upon trial of such issue, a verdict shall be rendered against such garnishee, judgment shall be entered in favour of the United States, pursuant to such verdict, with costs of suit. By sect. 10, if any person summoned as garnishee, under the provisions of this act, shall fail to appear at the term of the court to which he has been summoned, he shall be subject to the attachment for contempt of court.

No suit can be commenced or prosecuted against the United States; the acts of Congress do not authorise it.(s) No other remedy exists for a creditor of the government than an application to Congress for payment. A lien cannot exist against the government for

advances made for the use of government.^) Nor can a person sued for a debt to the United States,

(r) United States v. Kennan. 1 Pet. 168.

' (*) Cohens *v.* Virginia. 6 Wheat. 411, 412. United States v. Barney. 3 Hall's Law Journ. 130.

(t) United Stalest). Barney. 3 Hall's Law Journ. 130. Per WINCHESTER J. See *post.*

whether he be a principal or his surety, set off against the United States at the trial, a claim for a debt due him by the United States for services or advances as an officer, which has not been previously submitted to the accounting officers of the treasury, unless prevented from so doing by one of the accidents mentioned in the act of Congress of the 3d March, 1797 sect. 3 and 4.(t)

The circuit court has not jurisdiction in cases between a state and its own citizens, or citizens of other states: the judiciary law not haying extended the jurisdiction to such cases.(u

3. As to suits between citizens of different states.

The act of September 24th, 1789, sec. 11, gives to the circuit court jurisdiction in suits of a civil nature, of a certain value, between a citizen of the state where the suit is brought, and a citizen of another state.

To vest jurisdiction under this clause, it is necessary that one of the parties should be a citizen of the state in which the suit is brought; for the circuit court has no jurisdiction where neither of the parties is a citizen of the state in which the suit is brought. As if, in a suit in the circuit court of Pennsylvania district, the plaintiff be stated to be a citizen of New York, and the defendant a citizen of New Orleans, the court has not jurisdiction.(v) The constitution extends the judicial power of the United States to controversies between citizens of different states: so that Congress might have conferred on the circuit court jurisdiction in this case;(M>) but they probably considered that where neither party was a citizen of the state in which the circuit court was held, there was no reason why the controversy might not be left to the tribunals of that state.(;r)

The word state, in this act, is not used in the sense in which it is employed by writers on general law, to mean a

(t) United States v. Giles. 9 Cranch, 312.

(M) Gale *v.* Babcock. 4 Wash. C. C. Rep. 200. Doe *v.* Babcock. Ib. 344.

(c) Shute *v.* Davis. 1 Pet. 431. (u>) White v. Fenner. Mason, 520. («) But see Ib. Remarks of STORY J.

distinct political society, but as used in the constitution where it signifies a member of the union. For this reason

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Ihis citizenship means a residence or domini;,,

If there be several plaintiffs, or several deferent* •* seems, they must all be competent to sue anfbe sued' in the circuit court; otherwise, that court has no jurldiction Ihus, where a bill in equity was filprl in f, JUIIb.aictl°n. of Massachusetts, stating thTcomplainanf:™cmt court of Massachusetts, and sSme of theP defendant, t" I ^

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sylvama, and the other a citizen of a third state b.TtTh

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(c) Corporation of New Orleans *t.* Winter.' T Wheat 94.

ed in the writ, as he was severed, and was no longer to be

considered a defendant.(d)

But a citizen of s different state, who is plaintiff, must be *bona fide* a party interested in the land, for which an ejectment is brought; for if he is not so, but a conveyance has been made to him, by a citizen of the state in which the suit is brought, which is entirely

colorable and collusive it will not give the court jurisdiction. As where on a bill of discovery filed on the equity side of the circuit court, against the lessor of the plaintiff, a citizen of Maryland, by the defendant a citizen of Pennsylvania, against whom an ejectment was brought in the circuit court of Pennsylvania, the lessor of the plaintiff admitted that he had received a conveyance of the land from a citizen of Pennsylvania, for which he had given no consideration, and that his name had been used only by way of accommodation to the grantor; the ejectment was struck oft the record, on motion, without putting the party to plead to the jurisdiction, or requiring him to resort to an injunction.(e) This decision proceeded on two grounds; first, on the equity of the 11th section of the act of September 24th, 1789, as to assignees of a promissory note, or other chose in action;(*f*) secondly, on the attempt by fraud to create a jurisdiction.(g) It does not, therefore, embrace the case where trustees, citizens of Pennsylvania, make a voluntary conveyance to the *cestui gue trust,* a citizen of New York, of his share of a large body of lands, and such grantee brings ejectment in the circuit court of Pennsylvania, against a citizen of Pennsylvania.^)

If the jurisdiction has once vested, in a suit between citizens of different states, a subsequent change of domicil by either party, *pendente lite,* does not divest the jurisdiction. Thus where after a bill filed, one of the complainants removed into, and became a citizen of the same state in which the suit was brought, and in which the defendants resided, it was held that the court had jurisdiction.0

(d) Shute «. Davis. 1 Peters, 431. See Cameron v. M'Roberts. 3 Wheat. 591. The rule in equity.

(e) Maxfield's Lessee i>. Levy. 4 Ball. 330. 2 Ball. 381.

S B^wS Lessee v. Arbuckle. 4 Ball. 338. (t) Morgan's Heirs v. Morgan. 2 Wheat. 290.

, So, if the jurisdiction has once vested, the defendant will not be allowed to withdraw his name from the suit, and thereby to deprive the court of jurisdiction though he is no longer interested. Thus where the defendant, an alien, after the institution of an ejectment against him, and while it was pending, sold the property to a third person, a citizen of the same state as tho plaintiff's lessor, and then desired to withdraw his name from the suit, by which the name of the vendee would necessarily be substituted, and the jurisdiction of the court would be taken away, the court ordered the name of the original defendant to be retained, the vendee being required to indemnify him against the costs.(&)

Executors and administrators who are averred to be citizens of different states, may sue and be sued in the circuit court, though it is not alleged that the testators or intestates were citizens of different states. This section has never been construed to apply to executors and administrators.^)

A body corporate, as such, cannot be a citizen of a state; and, therefore, if merely described as incorporated by the law of a different state, and established there, it is not sufficient to sustain a suit against them.(m) Where, however, the members of a corporation suing, are all citizens of a different state, and are so averred to be, the controversy is, substantially, between citizens of one state, suing by a corporate name,

and those of another state, and the court has jurisdiction.(w) It is necessary that all the members composing the corporation should be citizens of different states, as well as the parties competent to sue or be sued.(o)

A trustee, who is personally competent, as an alien, or citizen of a different state, may sue in the circuit court, for the benefit of a *cestui que trust,* who is a citizen of the same state with the defendant.(p) Such trustee is a real person, capable of being a citizen, or alien, having the

(k) Thomas's Lessee v. Newton. J Pet. 444. *(I)* Childress v. Emory. 8 Wheat. 668. 9. *(m)* Hope Insurance Company v. Boardman. 5 Cranch, 57. *(n)* Bank of the United States *v.* Deveaux. 5 Cranch, 61 (o) U. S. Bank *v.* Planter's Bank. 9 Wheat. 410. Kirkpatrick v. White. 4 Wash. C. C. Rep. 595.

(p} Chappedelaine v. Dechenaux. 4 Cranch, 306.

whole legal estate in himself, and competent to sue in his own right.(o) He cannot, therefore, where he is a citizen of the same state as the defendant, sue in the circuit court on the ground that the *cestui que trust* is a citizen of a different state, or an alien.(r) But a suit may be maintained there, if the real plaintiffs be competent to sue, though the nominal plaintiffs be not.(s)

This section does not apply to bail taken for appearance,^)

The rule has prevailed, that the record must state the parties to be citizens of different states.(w) It is not sufficient to describe a party as *of* a particular state,(V) or that he *resides* in a different state,(V) or, in case of a corporation sued, that they are incorporated by the laws of a state,(y) or legally incorporated by the laws of a state, and established at a place there.(z) So, if a blank be left in the declaration, for the state of which the plaintiff is a citizen, it is fatal,(«) and the Supreme Court, on error brought, will reverse the proceedings; and that, it seems, even where the plaintiff himself assigns for error this defect in his own declaration.(6)

When the proceeding in the circuit court is by petition, (agreeably to the local laws of the state on a particular subject,) and the petitioners are stated to be citizens of another state, and no adverse party is stated, but they are averred to be unknown, though believed to be citizens of the state in which the suit is brought, this is insufficient: the parties should be named, and their citizenship or alienage stated on the record. But if the respondents appear and admit themselves to be citizens of the latter state, and aver an adverse interest, no other adverse interest appearing in the case, the objection is cured.(c)

(5) Bank of the United States *v.* Deveaux. 5 Cranch, 91.

(r) Ib.

(s) Browne *v.* Strode. 5 Cranch, 303. See *post,* as to aliens.

(t) Bosbyshell *v.* Oppenheimer. 4 Wash. C. C. Rep. 485.

(u) See its propriety doubted, Abercrombie *v.* Dupuis. 1 Cranch, 343.

(») Bingham *v.* Cabot. 3 Ball. 382. Wood v. Wagnon. 2 Cranch, U

(a;) Abercrombie v. Dupuis. 1 Cranch, 343.

(y) Sullivan *v.* The Fulton Steam Boat Company. 6 Wheat. 450.

(z) Hope Insurance Company c. Boardman, 5 Cranch, 57.

(a) Turner *v.* Enrille. 4 Dall. 7.

(6) Capron *v.* Van Norden. 2 Cranch, 125. See Aliens, po&t, (c) Ex parte Biddle. 2 Mason, 472.

4. As to suits where an alien is party.

The 11th section of the act of September 24th, 1789, gives the circuit court cognisance of all suits of a civil nature, where an alien is party. But these general words must be restricted by the constitution, which gives jurisdiction in controversies between a state, or citizens of a state, and foreign states, citizens or subjects: and the statute cannot extend the jurisdiction beyond the limits of the constitution.(d) If, therefore, the plaintiff be an alien, and it be so averred, the defendant must be averred to be a citizen of a state.(e) For the same reason, where both parties are aliens, the circuit court has no jurisdiction.(f)

If the real plaintiff be an alien, and the nominal plaintiffs be merely official obligees under a statute, as where the suit was for a debt due by a testator to a British subject, and was on a bond given by the executor of such testator, for the faithful execution of the will, to the nominal plaintiffs, who were justices of the peace of a county, though the nominal plaintiffs, and the defendants be citizens of the same state, the circuit court has jurisdiction.(*g)*

A residuary legatee, and an administrator *de bonis non,* who are aliens, may bring suit in equity in the circuit court as trustees, against a citizen of the state, although the testator and the defendant were both citizens of such state.(h)

The alienage, from which the jurisdiction of the court arises, must be stated on the record.*(i)* For if a blank be ieft,(&) or there be an omission of it,(l) it is fatal. So, if •one party be averred to be an alien, the other must be averred to be a citizen of a state.(m)

(d) Mossraan *v.* Higginson. 4 Dall. 11. Hodgson *v.* Bowerbank. *5* Cranch, 303.

(e) Mossman v. Higginson. 4 Dall. 11. Hodgson c. Bowerbank. 5 Cranch, 313.

'(f) Montalet c. Murray. 4 Cranch, 46. Mossman *v.* Higginson. 4 Dall. 11.

(g) Brown *v.* Strode. 5 Cranch, 303.

(/;) Chappedelaine *v.* Dechenaux. 4 Cranch, 306.

(i) See *ante.* J14, suits between citizens of different states.

(fc) Turner *v.* Enrille. 4 Dall. 7.

(I) Course v. Stead. 4 Dall. 22. Williamson *v.* Kincaiu. 4 Dall. 20.

{m) Mossman v. Higginson. 4 Dall. 12. Hodgson *v.* Bowerbank, 5 Cranch, 303.

But an alien enemy cannot sustain a suit in the courts of the United States, if it be taken advantage of by a proper plea in abatement.(n) It seems, however, that if an alien plaintiff become an enemy after obtaining judgment in the circuit court, it is no objection, on a writ of error, to the affirmance of that judgment in the Supreme Court.(o)

5. As |o suits by assignees.

The act of September 24th, 1789, sect. 11, imposes the restriction, that no circuit or district court shall have cognisance of any suit, to recover the contents of any promissory note, or other chose in action, in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange. The obvious policy of this restriction is, to prevent the making of assignments for the purpose of giving jurisdiction to the court: foreign bills of exchange are excepted, lest it might impede their circulation.(p)

A note payable to W. P., or bearer, is not within this clause: and the bearer may sue in the circuit court, if a citizen of a different state, without shewing W. P. to be a fictitious person, or competent to have prosecuted a suit.(<7)

The act is not confined to assignable paper, though that was the principal object of the provision. Equitable, as well as legal assignments, are included. The assignee of an open account is precluded, as much as the assignee of a note.(r) Assignees by operation of law, as where the estate of an insolvent is vested in them by law, are embraced by the provision, as much as assignees in deed.(s) Therefore, the plaintiffs, though aliens, being appointed syndics of certain insolvents, who were citizens of the dis-

(n) Mumford v. Mumford. 1 Gallison, 366. See Stoughton *v.* Taylor. Nat. Int. December.

(o) Owens *v.* Hanney. 9 Cranch, 180.

(p) See it remarked on by STORY J. Bullard *v.* Bell. Mason, 251. And see Bean v. Smith, 2 Mason, 268.

(q) Ib. Bank of Kentucky *v.* Wistar. 2 Pet. S. C. Rep. 318.

(r) Sere *v.* Pitot. 6 Cranch. 332,

(s) Ib.

trict of Orleans, and being vested by law with their property, were held incompetent to sue a citizen of Orleans, for debts due the insolvents, in the district court of that territory,

(acting as a circuit court,) the insolvents themselves not having been competent to sue the defendant in that court, for these debts.(t) But, it seems, an administrator *de bonis non,* or a residuary legatee, is not considered as such assignee, and, therefore, if personally capable ofsueing, as if he is an alien, he is not prohibited by this clause, though his testator were a citizen of the same state with the defendant.(w) The indorsee of a promissory note, who is a citizen of one state, may sue the indorser, who is a citizen of another state, in the circuit court, whether the indorser could sue the maker in that court or not.(;r)

But this section only applies to suits in which the chose in action constitutes the sole cause of action, and the assignment constitutes the whole ground of the plaintiff's right: it does not apply where a mere negotiable instrument or cause of action is mixed up in a bill in equity with other ingredients of the case.(«/)

And if the plaintiff claim as assignee, it must appear by the record, that the person, under whom he claims by assignment, might have prosecuted his suit in the circuit court; otherwise the court has no jurisdiction.^)

If a suit has been instituted in a state court, and judgment recovered against a citizen of that state by a citizen of a different state, the circuit court then has jurisdiction of a suit on the judgment itself, though the original cause of action was a chose in action claimed by the plaintiff as assignee of a citizen of the same state. The chose in action has passed *in rem judicatam,* and the circuit court will only look to the immediate groundwork of the present suit, and not to any remote or collateral considerations in which it originated.(a)

(t) Sere *v.* Petiot. 6 Cranch, 332. *(u)* Chappedelaine c. Dechenaux. 4 Cranch, 306. *(x)* Young *v.* Bryan. 6 Wheat. 146. *(y)* Bean v. Smith. 2 Mason, 270.

(z) Turner *v.* The Bank of North America. 4 Ball. 8. Montalet v. Murray. 4 Cranch, 46.

(a) Bean *v.* Smith. 2 Mason, 267. Dexter c. Smith, ib. 303.

As to what facts constitute citizenship of a state, see the case of Knox *v.* Greenleaf.(6)

A bill of exchange drawn in one state on a person living in another, is a foreign bill of exchange within this clause- and, therefore, a suit against the drawer may be sustained in the circuit and district courts, by a holder deriving title from a payee who was a citizen of the same state as the drawer.(c)

By the 80th sect, of the Collection law, debentures are made assignable, and on refusal of payment by the collector, in consequence of the non-payment of the duties, the possessor or assignee may maintain in the proper circuit or district court, a suit against the original grantee of the debenture, or any indorser thereof: and judgment is to be rendered at the return term, unless in certain cases.

The United States may sue in the district court, as indorsees of a promissory note, against the maker, though the maker and payee were citizens of the same state.(J)

This section does not apply to one suing as assignee of the marshal, on a bail-bond given to the marshal.(e)

•6. As to local actions.

The jurisdiction of the circuit court is farther restricted by the nature of the action, through which a remedy is sought. Trespass *dare clausum fregit* does not lie in the circuit court, for a trespass committed by the defendant, on lands of the plaintiff, lying within the United States, but without the district in which the court is situate, though the defendant be a citizen of the state in which the suit is brought, and the plaintiff a citizen of a different state. Such an action is local, and must be brought in the court of the district where the land lies. It was, therefore, held, that the plaintiff, a citizen of Louisiana, could not sue the defendant, a citizen of Virginia, in the Circuit Court of Virginia, for a trespass on lands alleged to have been committed at New Orleans. (f)

(6) 4 Ball. 360. 4 Mason, 308.

(c) Burkner v. Finley. 2 Pet. S. C. Rep. 586.

(d) United States *v.* Greene. 4 Mason, 427.

(e) Bobyshall v. Oppenheimer. 4 Wasb. C. C. Rep. 485. (f) Livingstone. Jefferson. 4 Hall's Law Journ. 78.

7. As to the privilege of not being arrested or sued, out of the district where the defendant resides, or is found.

The act of September 24th, 1789, sect. 11, further provides, that no person shall be arrested in one district, for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought, before either of the said courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found, at the time of serving the writ.

By virtue of this act, a citizen of one state may be sued in a different state, if the process be served upon him in the latter. But in such case, the plaintiff must be a citizen of the latter state, or an alien.(g)

This clause is not a restriction of the jurisdiction of the court, but a grant of a personal privilege, that of not being served with process out of the district in which a defendant resides, or is found; and this is the case as well with regard to arrests, as to other process at law or equity. Being such personal privilege, it may be waved. — Thus, if a defendant who is served in the state where he resides, with equity process from the circuit court of another state, appear to such process, and answer without objecting to it, he thereby waves his privilege, and the court has jurisdiction.(h) But if the defendant appear, and put in a plea, claiming the benefit of the privilege, it is not a waver.(i) An appearance to the subpœna by a solicitor of the court, unaccompanied by any objection, would amount to such waver, notwithstanding at a subsequent term, a plea is put in claiming the privilege.(k) And in a question on the validity of such plea, the court will not notice the

docket entries, purporting to shew an appearance by a solicitor without objection at a preceding term. Whether the defendant gave authority to the solicitor to appear, is a matter of fact which he may deny, and can be decided only on pleadings which put it in issue.(l)

(g) Shute *v.* Davis. 1 Pet. 431.

(/<) Logan *v,* Patrick. 5 Cranch, 288.

(i) Harrison v. Rowan. 1 Pet. 449. 4 Wash. C. C. Rep. 84.

(*) Ib.

(Z) Ib. Gracie v. Palmer. 8 Wheat. 699.

The district or circuit court of one district, has no authority to issue its process into any other district, to compel the appearance of a person not residing or found within the jurisdiction of the court from which the process issued: and this is the rule in admiralty as well as other causes. The Circuit Court of Pennsylvania, therefore, discharged the defendant on habeas corpus, from the custody of the marshal, who had arrested him on process of attachment issued from the Circuit Court of Rhode Island.(m) And though a district or circuit court has jurisdiction against a thing, and as to that its sentence is conclusive, and may be carried into effect in another district, yet if such decree be against the person, it cannot be the foundation of a suit in another district, against such person, if he was not a party to the first proceeding.

In consequence of this clause, a foreign attachment will not lie in the circuit court, against a person as defendant, who is an inhabitant of another state: and if brought, the court will quash it, with costs.(n) But it seems, if the defendant appear by entering special bail, it is a waver of all objections to non service™of process, and the court has jurisdiction.(o) A foreign attachment, however, may be issued in a circuit court against an alien as defendant,(p) where the state laws recognize that mode of proceeding. If a citizen of one state sue in the circuit court of that state a corporation established by another, the objection that the latter is not an inhabitant is waved by appearance.^)

8. Jurisdiction respecting patents.

The 10th section of the act of February 21st, 1793, provides a mode of proceeding before the judge of the district court, by rule to shew cause, in order to procure the repeal of a patent obtained surreptitiously, or upon false suggestion.(r) The 5th section provided for the damages to be recovered in an action on the case, but it was repealed by the 4th section of the act of April 17th, 1800,

(m) Ex parte Graham. 4 Wash. C. Rep. 211.

(n) Holhngsworth *v.* Adams. 2 Ball. 396.

(o) Pollard v. Dwight. 4 Cranch, 421.

(p) Fisher c. Consequa. Serg. on Attach. 44.

(q) Flanders v. ^Etna Insurance Company. 3 Mason, 158.

(r) See District Court.

and supplied by the third section of that act, by which it is provided, that where any patent shall be, or shall have been granted, pursuant to this act, or the above mentioned act, and any person, without the consent of the patentee, his or her executors, administrators, or assigns, first obtained in writing, shall make, devise, use, or sell the thing, whereof the exclusive right is secured to the said patentee by such patent, such person so offending shall forfeit and pay to the said patentee, his executors, administrators or assigns, a sum equal to three times the actual damage sustained by such patentee, his executors, administrators, or assigns, from or by reason of such offence, which sum shall and may be recovered by action on the case, founded on this and the above mentioned act, in the circuit court of the United States having jurisdiction thereof.

The 6th section of the act of February 21st, 1793, contains also a provision, which is still in force, that the defendant in such action shall be permitted to plead the general issue, and give this act, and any special matter, of which notice in writing may have been given, to the plaintiff or his attorney thirty days before the trial, in evidence tending to prove, that the specification filed by the plaintifFdoes not contain the whole truth relative to his discovery, or that it contains more than is necessary to produce the described effect, which concealment or addition shall fully appear to have been made for the purpose of deceiving the public, or that the thing thus secured by patent was not originally discovered by the patentee, but had been in use, or had been described in some public work, anterior to the supposed discovery of the patentee, or that he had surreptitiously,obtained a patent for the discovery of another person: in either of which cases, judgment shall be rendered for the defendant, with costs, and the patent shall be declared void.

It was held by the Supreme Court of New York, in the year 1810, that the state courts had no jurisdiction in actions brought for the infringement of patent rights, granted by the United States; inasmuch as the above act of 17th April, 1800, declares, that such suits shall be brought in the circuit court of the United States, and the act of the 21st February, 1793, enacts that in certain cases,

where judgment shall be rendered for the defendant, the court shall have power to declare the patent void.(s) It is even doubted, whether a person claiming by virtue of such patent, can set it up in a state court as a defence to a suit brought by one to whom the state had granted an exclusive right, as the acts of Congress have vested the courts of the United States with exclusive cognisance of all infringements of patent rights, and the party should go into"one of them to test the validity of his patent, and procure redress.(if)

A late act of Congress passed on the 15th February, 1819, further provides that the circuit courts shall have original cognisance, as well in equity as at law, of all actions, suits, controversies, and cases, arising under any law of the United States, granting or

confirming to authors, or inventors, the exclusive right to their respective writings, inventions, and discoveries, and, upon any bill in equity filed by any party aggrieved, in any such cases, shall have authority to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors, secured to them by any of the laws of the United States, on such terms and conditions as the said courts may deem fit and reasonable. *Provided, however,* that from all judgments and degrees of any circuit courts, rendered in the premises, a writ of error, or appeal as the case may require, shall lie to the Supreme Court of the United States, in the same manner, and under the same circumstances, as is now provided by law in other judgments and decrees of such circuit courts.(w)

(s) Parsons *v.* Barnard. 7 Johns. 144.

(f) Livingston v. Van Inghen. 9 Johns. 507.

(w) See Writs of Error and Appeals.

CHAPTER XIV.

CIRCUIT COURT — REMOVALS FROM STATE COURTS.

FURTHER to secure the right of recourse to the tribunals of the United States, in controversies to which the judicial power is extended by the constitution; the act of September 24th, 1789, gives, in certain cases, the right of removing a suit instituted in a state court, from such state court to the circuit court of the district.

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

ment, had it been rendered by the court in which the suit

commenced.

As all suits against an alien are not embraced by the constitution, but only suits between an alien and a state, or a citizen thereof, it seems, this act must be restrained

accordingly.(a)

Though the act of Congress speaks ot a suit commenced " *against* an alien," yet an ejectment commenced in a state court, technically against the casual ejector, but substantially against the tenant in possession, is, if the landlord be an alien and he be admitted to defend, within the act, though the tenant be a citizen of the state; and if such landlord be let in to defend after judgment against the casual ejector, he is then in season to petition the court that his cause may be removed.(b)

If it be made to appear to the satisfaction of the state court, that the sum in dispute exceeds five hundred dollars, exclusive of costs, and thereupon the case is removed to the circuit court, and the plaintiff declares for 1000 dollars, he cannot, by afterwards releasing part of his demand, and thereby reducing it below 500 dollars, oust the circuit court of its jurisdiction.(c)

But it has been held that in an action for a libel, the court will not, on the defendant's petition, allow a removal to the circuit court of the United States, notwithstanding he is an alien, and makes affidavit that the matter in dispute exceeds the value of five hundred dollars, exclusive of costs, because the act of Congress is intended for matters of property, where the value of the thing in controversy can be satisfactorily ascertained, and is not applicable to torts or vindictive suits.(c/)

But, it seems, the defendant's petition to the state court for removal, must be actually filed at the term when his appearance is entered.(e) If he suffer the term at which

(a)Mossman v. Higginson. 4 Ball. 11. Hodgson *v.* Bowerbank. 5 Cranch, 303. *See ante.* 115.

(6) Jackson e. Stiles. 4 Johns. Rep. 493.

(c) Wright *v.* Wells. 1 Pet. 220. See the case.

(d) Rush v. Cobbett. Carey «. Cobbett. Sup. Co. Pennsylvania, 2 Yeates, 275, 277. It does not appear that any declaration had been filed in these cases.

(e) Gibson v. Johnson. 1 Pet. 44.

the suit is brought, and at which he appeared, and the next succeeding term, to pass over without filing his petition, a petition afterwards filed, will not give the circuit court jurisdiction, although the state court agree to consider the petition as filed of the proper term when the appearance was entered, *nunc pro tunc.(f^)* And if a cause is improperly removed, it is the duty of the circuit court to remand it to the court from which it came, and on error from the circuit court to the Supreme Court, the latter would, in such case, be bound to remand it(g-)

The petition for removal filed at the time of entering special bail is in season, though the bail may have been excepted to.(^)

The petition and affidavit on which the defendant prays a removal to the circuit court from the state courts, on the ground that he is a citizen of another state, ought to show that fact expressly: an averment that he is a resident in another state is not sufficient.^')

The defendant after removing the cause to the circuit court and appearing there, cannot object that the circuit court has not jurisdiction, because being an inhabitant of the United States, the process of foreign attachment, by which the suit was commenced, was served in a district of which he was not an inhabitant, and in which he was not found: for, by appearing to the action, he places himself precisely in the same situation as if process had been served upon him, and waves all objections to the non-service of process.(&)

The Supreme court of Pennsylvania decided in the year 1798, that an action of debt, founded on a recognisance for good behaviour, alleged to be forfeited, brought in that court by the commonwealth of Pennsylvania against an alien, was not such a suit as the defendant was entitled to remove from that court to the circuit court, under the foregoing provision of the act of September 24th, 1789, because it was a proceeding of a criminal nature, and be-

(f) Gibson v. Johnson. 1 Pet. 44.

(g) Pollard v. D wight. 4 Cranch, 421.

(A) Argo v. Monteiro. 1 Caines, 209. '

(i) Corp *v.* Vermilye. 3 Johns. Rep. 145.

(k) Pollard v. D wight. 4 Cranch, 421. See Patterson v. United States. 2 Wheat 221. Hollingsworth v. Adams. 2 Dall. 396, and *vnte.* 119. *'*

cause the act of Congress did not contemplate such a removal of a suit brought by a state.(7)

It was held in the Supreme Court of Appeals of the state of Virginia, that if an inferior court refuse to allow the defendant to remove a cause which is within the purview of the act of Congress, to the circuit court, on his complying with the terms prescribed by the act, such inferior court may be compelled to allow it, by mandamus from the superior court of the state, not from the circuit

court.(m)

It seems, however, that a bill of exceptions will not lie to the opinion of a state court, rejecting an application by the defendant for a removal, where such rejection is owing to the court's not being satisfied that the matter in dispute exceeded 500 dollars exclusive of costs.(n)

If there be two defendants in the state court the cause cannot be removed into the circuit court on the petition of one of the defendants, nor if one of the defendants is a citizen of the same state with the plaintiff.(o) And if a state be a party to the suit below, which has been removed into the circuit court from the state court, the court will remand it, though it may appear the state was made a party to defeat the jurisdiction of the circuit court.(p)

*2. Of removals from a state court, by parties claiming titles to land, under grants of different states.

By the constitution, art. iii. sect. 2, 1, The judicial power shall extend to controversies between citizens of the same state, claiming lands under grants of different states. By a clause of the 12th section of the act of September 24th, 1789, it is enacted, that if, in any action commenced in a state court, the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear

(I) Respublica v. Cobbett. 3 Dall. 467. 2 Yeates, 352, S. C. See Rush v. Cobbett. 6 Yeates, 275.

(m) Brown *v,* Coppin and Wise. 4 Hen. and Munf. 173.

(n) Carey *v.* Cobbett. Sup. Co. Penn. 2 Yeates. 277. See the case of Rush v. Cobbett, *ante,* 124.

(o) Beardsley v. Torrey. 4 Wash. C. C. Rep. 286.

(p) Doe ex. dera. State of New Jersey *v.* Babcock. Ib. 344.

to the satisfaction of the court, either party, before the trial, shall state to the court, and make affidavit, if it require it, that he claims, and shall rely upon a right or title to the land, under grant from a state, other than that in which the suit is pending, and produce the original grant, or an exemplification of it, except where the loss of records shall put it out of his power, and shall move that the adverse party inform the court, whether he claims a right or title to the land under a grant from the state in which the suit is pending; the said adverse party shall give such information, otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he informs that he does claim under any such grant, the party claiming under the grant first mentioned may then, on motion, remove the cause for trial, to the next circuit court to be holden in such district. But if he is the defendant, he shall do it under the same regulations as in the before mentioned case of the removal of a cause into such court by an alien. And neither party removing the cause shall be allowed to plead, or give evidence of, any other title than that by him stated as aforesaid, as the ground of his claim.

Where the plaintiffs claimed under a grant from the state of Vermont, and the defendants under a grant from New Hampshire, which latter grant was made at the time when New Hampshire comprehended the whole territory of Vermont, it was contended that the case did not come within this clause of the constitution, because the states were not different at the time of the defendants' grant, but it was made as much by Vermont as by New Hampshire. But the court held, that the grants arose under different states within the letter and meaning of the constitution.^) And the law is the same where both parties claim under grants made by different states, although the inceptive titles, as for instance, the warrants and locations thereon, in pursuance of which the grants took place, were derived from one and the same state, before its separation into two states. The constitution and laws look to the *grants* as the foundation of jurisdiction, and not to any equitable title previous thereto.(r)

(q) Town of Pawlet *v.* Clark. 9 Cranch, 292. *(r)* Colson *v.* Lewis. 2 Wheat. 378. There seems a mistake in the case, in stating the complainants to be cituens of Virginia.

CHAPTER XV.

CIRCUIT COURT — MANDAMUS.

NOTWITHSTANDING, by the 11th section of the act of September 24th, 1789, the circuit courts have original cognisance of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs; and by the 14th section of the same act, they have power to issue all writs necessary for the exercise of their jurisdiction, and agreeable to the principles and usages of law, yet they have not power to issue a mandamus to a ministerial officer or agent of the United States, commanding him to do an act, which the party alleges ought to be done for his benefit, under the laws of the United States.

For though, by the constitution, the judicial power of the United States extends to all cases arising under the laws of the United States, yet the authority over all such cases by mandamus is not given to the circuit court by the acts of Congress. The power to issue a mandamus is confined, exclusively, to cases in which it may be necessary for the exercise of a jurisdiction already existing; as, for instance, if the court below refuse to proceed to judgment, there a mandamus in nature of a procedendo may issue. It was, therefore, held, that a mandamus could not be issued by the circuit court of the United States, to the register of a land office in Ohio, commanding him to issue a final certificate of purchase to the plaintiff, for certain lands in that state, to which the plaintiff laid claim under the laws of the United States.(a) Nor will the circumstance, that the parties are citizens of different states, and

(a) M'Intire v. Wood. 7 Cranch, 504. M'Clung *v.* SilHman. 6 Wheat. 598. It appears that in one case, the writ was issued by the circuit court of South Carolina, to the collector of Charleston, commanding him to grant a clearance to a vessel. Ex parte Gilchrist *v.* The Collector of Charleston. 1 Hall's Law Journ. 249. But it seems, it issued by consent. M'Intire *v.* Wood. 7 Cranch, 506.

therefore of a description of persons competent, to sue and be sued in the circuit court, make any difference. The proper remedy for the party is, an action against the officer for damages, or to recover the specific property, according to circumstances, in courts of competent jurisdiction.^) r

(6) M'Clung *v.* Silliman. 6 Wheat. 598.

CHAPTER XVI.

CIRCUIT COURT — CRIMINAL JURISDICTION.

BY the act of September 24th, 1789, sect. 11, the circuit court shall have exclusive cognisance of all crimes and offences cognisable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognisable therein.

Under this act, the circuit court has jurisdiction in an indictment against a consul from a foreign power where the punishment is beyond the grade assigned to the district court(a)

. The jurisdiction of the circuit court in criminal cases is final, unless on points in which the opinions of the judges are opposed.(6) The jurisdiction of the circuit courts in criminal cases is confined to offences committed within the district for which those courts respectively sit where they are committed on land.(c)

(a) United States *v.* Ravara. 2 Ball. 297. See *ante,* 27, and Common Law Jurisdiction, *post.*

(V) United States *v.* More. 3 Cranch, 171. See *ante,* 69.

(V) United States *v.* William Wood, circuit court U. S. at Philadelphia, June, 1818.

Though the district court, by the act of September 24th, 1789, has cognisance of all penalties and forfeitures incurred under the laws of the United States, yet where the law declares an act to be an offence, and treats it as a criminal act, it must be prosecuted criminally in the circuit court, either by indictment, or, if given by the act, by information.(d) And the distinction ought to be preserved, because penalties and forfeitures may be remitted by the secretary of the treasury: but crimes and offences can be remitted only by the President, under his pardoning power vested by the constitution.(e)

But military offences are not included in the act of September 24th, 1789, conferring jurisdiction on the circuit and district courts. They never are cognisable in common law courts. Courts martial are the proper tribunals for their decision: and, therefore, the acts of Congress punish offences of this kind by courts martial, as well when committed by the militia of the United States, as by the army and navy.(f) And if an act of Congress vest the jurisdiction over military offences in a court martial, when necessary, without

specifying by what authority it is to be held, the jurisdiction is not exclusive of a state court martial, organised under a state law.(g)

As the criminal jurisdiction vested by this act in the circuit and district courts, is expressly exclusive, and embraces all crimes and offences cognisable under the authority of the United States, the state courts cannot entertain jurisdiction in any such cases, unless it be expressly vested in them by an act of Congress, which, so far, expressly or impliedly repeals the act of September 24th, 1789. Hence it is, that the act of 24th February, 1807, concerning forgery of the notes of the bank of the United States, contains a proviso, saving to the courts of the several states jurisdiction under state laws, over offences made cognisable by that act. A similar proviso is to be found in the act of the 21st April, 1806, concerning counterfeiters of the current coin of the United States.(h)

(d) United States *v* Mann. 1 Gall. 3. 177. United States v. Tyler. Ib. and 7 Cranch, 285. See District Court.

(e) United States v. Mann. 1 Gall. 177. (f) Houston v. Moore. 5 Wheat. 23.

(g) Ib. (h) Ib. 26.

' There are other acts of Congress which permit jurisdiction over the offences described in them to be exercised by state courts and state magistrates^') And in all these cases where the jurisdiction of the two courts is concurrent, the sentence of either court, whether of acquittal or conviction, may be pleaded in bar to a prosecution in the other for the same offence; as in civil cases, may be the judgment of either.(/')

By the 5th sect, of the act of 24th September, 1789, the circuit courts have power to hold special sessions for the trial of criminal causes at any other time, at their discretion, or at the discretion of the Supreme Court.

By the 3d section of the act of March 2d, 1793, the Supreme Court, or where the Supreme Court shall not be sitting, any one of the justices thereof, together with the judge of the district, within which a special session, as hereafter authorised, shall be holden, may direct special sessions of the circuit courts to be holden, for the trial of criminal causes, at any convenient place within the district, nearer to the place where the offences may be said to be committed, than the place or places appointed by law for the ordinary sessions. The clerk of such circuit court shall, at least thirty days before the commencement of such special session, cause the time and place for holding the same to be notified, for at least three weeks successively, in one or more of the newspapers published nearest to the place where the sessions is to be holden. All process, writs, and recognisances of every kind, whether respecting juries, witnesses, bail, or otherwise, shall be considered as belonging to such sessions, in the same manner as if they had been issued and taken in.reference thereto. Any special sessions may be adjourned to any time or times, previous to the next stated meeting of the circuit court. And all business, depending for trial at any special court, shall, at the close thereof, be considered as of -course removed to the next stated term of the circuit court.

This section, it seems, *is* to be applied to cases not capital; for the 29th sect, of the act of September 24th,

(t) *See post.* Jurisdiotion of State Courts and Magistrates. *(j)* Houston v. Moore. 5 Wheat. 31. See also The People v. Lynch. 11 Johns. Rep. 549.

1789, directing that in cases punishable with death, the trial should be had in the county where the offence was committed, or when that cannot be done without inconvenience twelve petit jurors at least shall be summoned from thence, vests in the judges a power of holding a special court in the proper county. At any rate, though the word used in the act of 1793, is *nearer,* the court could hold the session in the county itself.(k) It is doubtful, however, whether indictments for treason, found at a regular circuit court, could be transferred to a special court; and whether, after indictments found, and plea pleaded, in the regular circuit court, the trial being thus commenced, they can be determined elsewhere.(l) It is also doubtful, whether, if a special court were to be appointed previously to the stated court, both could be in session at the same time: or, whether two grand juries could be impannelled at the same time, for the same district, and both be qualified to present all offences committed within their jurisdiction. It is also doubtful, whether a special court can be appointed at a distant period, to overleap the session of the stated court.(m) But, at all events, the court will not grant a special court, for the trial of prisoners charged with treason, in the county where the offence was committed, if it has recently been in a state of insurrection, which required an armed force to quell, and where the judiciary would need the aid of a military force to enable it to discharge its functions.(w)

Query, whether the above clause of the 29th sect, of the act of Congress, of the 24th of September, 1789, was meant to apply to crimes committed in any fort ceded to and within the exclusive jurisdiction of the United States, as, strictly speaking, such places are not within the body of a county.(o)

Query, also, how far the act of 1789, is repealed or modified by the act of 1793. If, however, its clauses above mentioned are in force, the appointment of a special court under the clause of the 5th sect, is discretionary: and

(fc) United States v. Insurgents. 3 Call. 513. *(I)* Ib. United States *v.* Hamilton. 3 Dall. 17. (TO) United States *v.* Insurgents. 3 Dall. 513. United States v. Cornell. 2 Mason, 100. (n) Ib. (o) United States e. Cornell. 2 Mason, 96.

though the language of the 29th sect, uses the imperative " shall," yet it leaves the case to be judged of in the discretion of the court, upgn considerations of inconvenience;(/>) nor are the court bound to order a special sessions unless upon motion of some party.(§>)

An indictment however, found in a circuit court sitting at one place, where the stated general session of that court is fixed by act of Congress, may be continued to and tried at the place where the next ensuing stated general session of the circuit court is to be held, if such place is provided by act of Congress, and a motion is made for that purpose.(r)

Where the defendant is under recognisance to appear in the circuit court, and answer an information under an act of Congress, the court will not discharge the bail, on the ground that the defendant has been arrested, and is in custody, in another county, under process from a state court. Perhaps, it may continue the information, and respite the recognisance. Nor has the court authority to issue a *habeas corpus,* to bring up such defendant, in order to surrender him in discharge of the bail, who had entered into recognisance for his appearance in such circuit court, to answer an information for a misdemeanor, under an act of Congress.(Y)

By the act of the 30th March, 1802, and other acts relative to the Indians, jurisdiction is vested in the circuit, district, and territorial courts, over offences committed in violation of their provisions, and in case of a crime punishable with death, a commission of Oyer and Terminer may, in certain cases be issued by the president, or governor of a territory.

It has also jurisdiction over crimes committed within any place situated in the district in which it sits, which has been ceded to the United States, with the consent of the legislature of the state, for the purpose of erecting forts, &c.(;)

(p) United States *v.* Cornell. 2 Mason, 99. 3 Dall. 17. 513.

(q) Ib.

(r) Ib.

(*) United States *v.* French. I Gall. 1.

(<) United States v. Cornell. 2 Mason, 95.

CHAPTER XVII. CIRCUIT COURT — APPELLATE JURISDICTION.

THE appellate jurisdiction of the circuit court, may be considered,

1. As to writs of error to judgments of the district court, in civil cases at common law.

2. Appeals from the district court, in cases of admiralty and maritime jurisdiction.

3. *Certiorari, procedendo, &c.*

1. Of writs of error from the circuit to the district court.

The 11th section of the act of September 24th, 1789, provides, that the circuit courts shall also have appellate jurisdiction from the district courts, under the regulations and restrictions hereinafter provided.

By the 22d section, final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court holden in the same district, upon a writ of error, whereto shall be annexed and returned therewith at the day and place therein mentioned, an authenticated transcript of the record and assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge of such district court, or a justice of the Supreme Court, the adverse party having at least twenty

days notice.

But there shall be no reversal on such writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact. And writs of error shall not be brought but within five

years after rendering or passing the judgment or decree complained of; or, in case the person entitled to such writ of error be an infant, *non compos mentis,* or imprisoned, then within five years, as aforesaid, exclusive of the time of such disability .And every justice or judge signing a citation or any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff'in error shall prosecute his writ to effect, and answer all damages and costs, if he fail to make his plea good.

By sect. 23, a writ of error as aforesaid shall be a *supersedeas,* and stay execution, in cases only where the writ of error is served, by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of. Until the expiration of which term of ten days, executions shall not issue, in any case where a writ of error may be a *supersedeas.* And where, upon such writ of error, a circuit court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error, such damages for his delay, and single or double costs at their discretion.

By the act of 12th December, 1794, the security to be required and taken, on the signing of a citation on any writ of error, which shall not be a *supersedeas,* and stay of execution, shall be only to such amount as, in the opinion of the justice or judge taking the same, shall be sufficient to answer all such costs as, upon an affirmance of the judgment or decree, may be adjudged or decreed to the respondent in error.(a)

The 5th section of the act of 20th April, 1802, provides, that in all cases which by appeal or writ of error,, are, or shall be removed from a district to a circuit

court judgment shall be rendered in conformity to the opinion of the Judge of the Supreme Court presiding in such district.

As the district Judge cannot sit in the circuit court on a writ of error to the district court, there can be no opposition of opinion under the 6th section of the act of 29th April, 1802, and, therefore, in such case, no removal to the Supreme Court can take place by certificate.^) So that the decision of the circuit court is final. Nor does a

(a) For the construction of these acts see *ante,* 78.

(6) United States *v.* Lancaster. *5* Wheat. 434, *ante, 68.*

writ of error lie from the Supreme to the circuit court, to remove a judgment rendered upon a writ of error from the district court.(c) The issue of *nul tiel* record is an issue *of fact,* although triable by the court; and therefore the judgment of the district court on such issue that the party failed to produce the record, cannot, under the 22d section, be reversed by the circuit court on a writ of er-

ror.(d)

A writ of error does not lie from a circuit to a district court in an admiralty or maritime cause.(e)

The 24th section of the act of September 24th, 1789, enacts, that where a judgment or decree shall be reversed in a circuit court, such court shall proceed to render such judgment or pass such decree, as the district court should have rendered or passed. And the Supreme Court shall do the same on reversals therein, except where the reversal is in favor of the plaintiff or petitioner in the original suit, and the damages to be assessed, or matter to be decreed are uncertain, in which case they shall remand the cause for a final decision.

This exception is confined to reversals in the Supreme Court, and does not apply to reversals in the circuit court. The circuit court, on a reversal in favor of the plaintiff, is not obliged to remand the cause in all cases. And if the defendant below plead three pleas, on two of which issues in law are joined, and on the third an issue in fact, and the court below give judgment for the defendant on the issues in law, and the issue in fact be not tried, and the circuit court on error reverse the judgment, it may award a *venire facias de novo,* and try the issue at the bar of the circuit court.(f)

If a case is reversed upon a special verdict, or case agreed, the circuit court will proceed to give judgment. But where a verdict in favor of the plaintiff is reversed, on a bill of exceptions to instructions given to the jury, a new trial may be awarded by the circuit court.(g) And it

(e) United States v. Ten Brock. 2 Wheat. 242, and cases cited, *ante,* 40.

(d) United States *v.* Cook. 2 Mason, 22.

(e) United States *v.* Wonson. 1 Gall. 5. (f) United States *v.* Sawyer. 1 Gall. 86.

(g) lb. Hudson *v.* Guestier, note. 6 Cranch, 285.

would seem, if the special verdict, or case, should be defective, a *venire facias dc novo* may be awarded. *(Ji)*

Error lies to the district court on a judgment given there in a *scire facias,* to repeal letters patent, under the act of 21st February, 1793, sect. 10.(z)

2. Appeals from the district court.

Appeals to the circuit court take place generally in civil causes of admiralty or maritime jurisdiction.

The act of September 2ith, 1789, sect. 21, provided, that from final decrees in a district court in cases of admiralty and maritime jurisdiction, where the matter in dispute exceeded the sum or value of three hundred dollars, exclusive of costs, an appeal should be allowed to the next circuit court to be held in such district. And the 20th section declared that where a libcllant upon his own appeal recovered less than the sum of three hundred dollars, he should not be allowed, but at the discretion of the court, might be adjudged to pay costs. • But by the act of March 3d, 1803, sect. 2, it is enacted, that from all final judgments or decrees in any of the district courts of the United States, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars, shall be allowed to the circuit court, next to be holden in the district where such final judgment or judgments, decree or decrees may be rendered. And the circuit courts are thereby authorised and required, to hear and determine such appeal.(j) As by the 21st section of the act of September 24th 1789, appeals from the district court must be prosecuted at the next circuit court after pronouncing the decree, on failure of the appellant, claimant in a prize cause, to enter and prosecute his appeal, the appeal may be pronounced to be deserted, and the principal cause remitted to the court below for final proceedings. In such case the taxation of the costs may be retained in the circuit court, or be directed to be made in the court below. Or, the appellee may produce the record, and have the principal cause retained in the circuit

(h) United States v. Sawyer. 1 Gall. 86.

(i) Stearns *v.* Berrett. Mason, 153.

(j) See United States «. Wonson. 1 Gall. 5, as to Security, &c.

court, and upon a hearing *ex parte* claim an affirmance

with costs.(k)

The appeal is confined to civil causes of admiralty and maritime jurisdiction; it does not lie from the district to the circuit court in common law suits: the proper remedy in such suits is by writ of error. The word *judgment,* in the act of March 3d, 1803, is not used in contradistinction to *decree,* but as explanatory and equivalent. Even supposing an appeal lay, yet if the cause has been tried by a jury in the district court, it cannot again be tried by jury in the circuit court.(l) Nor, on the other hand, does a writ of error lie from a circuit to a district court, in an admiralty or maritime cause: not even on the judgment entered on the bond given by a claimant, to restore the goods, under the 89th section of the collection law.(m)

Where the original proceedings are on the admiralty side of the district court, an appeal lies to the circuit court from a decree of the district court on a petition for a proportion of the fund brought into court by such proceedings: but not if such fund were brought in by proceedings on the common law side of the court.(n)

An appeal in an admiralty and maritime cause, removes the whole proceedings, and opens the facts as well as the law, to re-examination.(o) It suspends the sentence: and it is not *res adjudicate* till the final sentence of the appellate court.(p) This has been the constant practice, not only in appeals from the district to the circuit court, but in the Supreme Court also.(^)

The circuit court may grant amendments, in the various causes that come before them by appeal: they will grant them in informations *in rem,:* and such informations are not criminal proceedings.(r) The 22d section of the act of September 24th, 1789, allowing amendments, extends as well to the exercise of the appellate, as the original ju-

(k) Privateer Montgomery *v.* Schooner Betsey. 1 Gall. 416.

(T) United States v. Wonson. 1 Gall. 5. See 1 Mason, 166.

(m) M'Lcllanc. United States. 1 Gall. 227. See ib. 149.

(n) Westcott v. Bradford. 4 Wash. C. C. Rep. 496.

(o) United States v. Wonson. 1 Gall. 5. The San Pedro. 2 Wheat. 132. Yeaton *v.* The United States. 5 Cranch, 280. 3 Ball. 88. 113. 1 Gall. 24.

(p) Yeaton v. The United States. 5 Cranch, 280.

(q) Ib. see *ante,* 50.

(r) Anon. 1 Gall. 22, and cases cited.

risdiction of the circuit court.(s) And an amendment will be allowed, though it introduce a new count, containing a new substantive offence: or though it may affect sureties. But not if the statute of limitations has run against it.(Y)

But the circuit court can sustain an appeal, in an admiralty and maritime cause, only from the final decree of the district court. If such decree be not appealed from, no appeal lies upon the subsequent proceedings of the district court, on the summary judgment rendered in a bond for the appraised value, or upon an admiralty stipulation, taken in the cause. Such proceedings, and the awarding of execution by the district court, are incidents exclusively belonging to it. If the decree is appealed from, the bond follows the cause into the circuit court, and on affirmance, may be there enforced.*(u)*

By an appeal from the district to the circuit court, tho latter becomes possessed of the cause, and executes its own judgment, without any intervention of the former. The property, or its proceeds, in proceedings *in rem,* follow the appeal into the circuit court, and are subject to its order alone. But if a further appeal take place, to the Supreme Court, the property, or its proceeds, remain in the circuit court; because the Supreme Court does not execute its own judgments, but sends a special mandate to the circuit court. After appeal from the district to the circuit court, the district court can make no order for the disposition of the property.(w) After affirmance by the Supreme Court, and remanding for final proceedings, the circuit court may make orders as to the disposition of the property remaining in the circuit court, on application by petition. (#)

The act of September 24th, 1789, sect. 23, provides, that until the expiration often days, (Sundays exclusive,) after rendering judgment or passing a decree, execution

(*) Ib. See *ante,* 56, 87.

(<) Schooner Harmony. 1 Gall. 123.

(w)Brig Hollen and cargo. Mason, 431. M'Lellan v. The United States. 1 Gall. 227.

(o) The Collector. 6 Wheat. 194. The Grotius. 1 Gall. 503, where the inconveniences of the rule are stated. See Jennings *v.* Carson. 4 Cranch, 2.

(x) The St. Lawrence. 2 Gall. 19-

shall not issue in any case where a writ of error may be a *supersedeas,* in order to give time to take out a writ of

error.

The 30th section of the act of September 24th, 1789, after directing that the mode of proof, by oral testimony and examination of witnesses in open court, shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law, and prescribing the terms and notification as to taking depositions in civil causes, enacts, that in causes of admiralty or maritime jurisdiction, or other cases of seizure, when a libel shall be filed, in which an adverse party is not named, and depositions of witnesses circumstanced as aforesaid shall be taken, before a claim be put in, the like notification as aforesaid shall be given, to the person having the agency or possession of the property libelled at the time of the capture

or seizure of the same, if known to the libellant.(y) And also, that in the trial of any cause of admiralty and maritime jurisdiction, in a district court, the decree in which may be appealed from, if either party shall suggest to, and satisfy the court, that probably it will not be in his power to produce the witnesses there testifying, before the circuit court, should an appeal be had, and shall move that their testimony may be taken down in writing, it shall be so done by the clerk of the court: and if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the court, which shall try the appeal, that the witnesses are then dead, or gone out of the United States, or to a greater distance than as aforesaid, from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity, or imprisonment, they are unable to travel and appear at court; but not otherwise.*(z)*

If the civil authority at a foreign place prevent the execution of a commission, directed to commissioners there in the usual form, to take the depositions of witnesses, issued out of the district court, the circuit court, after appeal, will issue letters rogatory, according to the form

(y) See the whole section, *post.* Circuit Court — Practice. (z) See *ante.*

and practice of the civil law, and, if executed, the deposition may be read in evidence.(a) On depositions so taken, it seems, some relaxation of the ordinary rule, requiring a strict performance of the duty assigned to the commissioners, and of the ordinary rules of evidence will be allowed.(6)

There is one equity case where, by the the special provision of an act of Congress, an appeal lies to the circuit court from the decision of the district judge, on refusing or dissolving an injunction to stay proceedings by warrant and distress, issued against a debtor to the United States, or his sureties, by the authority of the officers of the treasury, by virtue of the act of the 3d of March, 1820, sect. 6. This section prescribes that the same proceedings shall be had upon such injunction in the circuit court on such appeal, as are prescribed to the district court, and subject to the same conditions.(e)

3. By *certiorari, procedendo, Sfc.*

No act of Congress authorises a circuit court to issue a *certiorari,* or compulsory process to the district court, to remove a cause before final judgment or decree. Where, therefore, the circuit court, in an action of debt instituted in the district court, on a bond, in which a declaration was filed, and appearance entered, and defence taken, issued a *certiorari,* in pursuance of which the proceedings were removed to the circuit court, it was held, that the district court might have refused obedience to the writ, and either party might have moved the court for *aprocedendo,* or might have pursued the cause in the district court, notwithstanding the writ. But if, instead of taking advantage of the irregularity, atthe proper time, and in a proper manner, the defendant makes defence, and pleads to issue, it is too late after verdict to object. The suit will be considered as an original one in the circuit court, made so by consent of parties, and that, although no new declaration be filed; for

(a) Nelson c. The United States. 1 Pet. 237.

(6) Ib. See the form, and also Hall's Practice and Jurisdiction of tho Admiralty Courts, 37 to 43. (c) See *ante,* 107,

the declaration sent from the district court will be considered, in such case, in the same light.(cT)

The circuit court has not at present jurisdiction under the act of September 24th, 1789, sect. 14, or any other law, upon habeas corpus, to discharge from confinement any'person committed by warrant from the governor or magistrate of a state, whatever may be the character or privileges of such person under the constitution or laws of the United States, or laws of nations. Where, therefore, the Spanish secretary of legation was arrested and in custody under the warrant of the governor of Pennsylvania, on a criminal charge, and was brought up by a habeas corpus issued from the circuit court of that district, the court refused to enquire into his right to relief, and remanded him.(e)

(d) Patterson v. The United States. 2 Wheat. 221. (c) Ex parte Cabrera. 1 Wash. C. C. Rep. S32.

CHAPTER XVIII.

CIRCUIT COURT — PRACTICE.

THE 14th section of the act of September 24th, 1789, provides, that all the courts of the United States, shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

By the principles and usages of law here referred to, are to be understood, those general principles, and those general usages, which are to be found, not in the legislative acts of any particular state, but in that generally recognised and long established law, (the common law,) which forms the *substratum* of the laws of every state.(a) This section gives the court power in a criminal case, to devise the process for bringing any person before it, who has committed an offence of which it has cognisance, and does not refer the court to the state law for that purpose.

This section must also be understood as giving to the courts of the United States a power to issue executions on their judgments.(^) And their power in this respect is not restricted to such only as were authorised by the common law. Writs of execution in use in the state courts at that time, other than such as

were conformable to the usages of the common law, such, for instance, as those under which lands were sold, might be issued in those states by the courts of the United States.(c)

By the 17th section of the same act, all the courts of the United States shall have power, to make and establish

(a) Per, MARSHALL, C. J. United States *v.* Burr, Appendix, 2d part, 186.

(6) Wayman *v.* Southard. 10 Wheat 24. United States Bank *v.* Halstead. Ib. 55.

(c) United States Bank *v.* Halstead. 10 Wheat. 56.

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.

This section is confined to business actually transacted in court, and does not contemplate proceedings out of

court.(d)

By the act of May 8th, 1792, sect. 1, all writs and processes issuing from the circuit court, shall bear teste of the chief justice of the Supreme Court, (or if that office shall be vacant,) of the associate justice next in precedence: which said writs and processes shall be under the seal of the court from whence they issue, and signed by the clerk thereof. The seals shall be provided at the expense of the United States.(e) By sect. 2, the forms of writs, execution 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 court, in pursuance of the act of the 29th of September, 1789, except so far as may have been provided for by the act of the 24th of September, 1789, subject however to such alterations and additions as the said court shall in its 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 court concerning the same: *provided,* that on judgments in any of the cases aforesaid, where different kinds of executions are issuable in succession, a *capias ad satisfaciendum* being one, the plaintiff shall have his election to take out a *capias ad satisfaciendum* in the first instance.

Under this section, and the act of September 29th, 1789, which it refers to, it has been decided,

1. That whatever forms of writs were in force in the Supreme Courts of each state on the 29th September, 1789, were adopted in the courts of the United States there by these acts, as also the modes of proceeding, or in other words the effect and operation of mesne or final process^/)

(d) Wayman *v.* Southard. 10 Wheat. 26.

(e) See *ante.* 29.

(f) United States Bank c. Halstead. 10 Wheat. 56. Wayman v. Southard. 10 Wheat. 1.

2. A process of execution not then authorised by a law of the state, but subsequently enacted, might be adopted by the courts of the United States, under the power given them by acts of congress to mould their own process. Where, therefore, on the 29th September, 1789, land in the state of Kentucky could not be taken and sold on an execution, but shortly afterwards a law was passed by that state subjecting land to execution, it was held that the circuit court of the United States for that district might issue and enforce an execution for the sale of lands there in the same manner.(g-)

3. State laws regulating the service of executions passed subsequently to the year 1789, not adopted by the courts of the United States or act of congress, do not affect executions issued out of the courts of the United States. The acts of the legislature of Kentucky, therefore, requiring the plaintiff to endorse on the execution that bank notes of the state of Kentucky, or notes of the bank of the commonwealth of Kentucky would be received in payment, or the defendant might replevy the debt for two years, were not applicable to executions on judgments in the circuit court of that state.(/i)

By the act of March 2d, 1793, sect. 7, it is lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts, directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in the vacation. And otherwise in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts respectively, as shall be fit and necessary to the advance of justice, and especially to that end to prevent delays in proceedings.

By the act of 19th May, 1820, it is also provided that the forms of mesne process, except the style, and modes of proceeding in suits in the courts of the United States, held in those states admitted into the union *since the 29th September,* 1789, in those of common law shall be the same

(g) Ib. 10 Wheat. 1, 51.

(A) Wayman e. Southard. 10 Wheat. 1.

in each of the said states respectively as are now used in the highest court of original and general jurisdiction, of

the same — in proceedings in equity according to the

principles, rules and usages which belong to courts of equi-

ty — and in those of admiralty and maritime jurisdiction

according to the principles, rules and usages which belong to courts of admiralty as contradistinguished from courts of common law, except so far as theymay have been otherwise provided for by acts of Congress; subject, however, to such alterations and additions as the said courts of the United States respectively shall in their discretion deem expedient, or to such regulations as the Supreme Court of the United States shall think proper from time to time, by rules to prescribe to any circuit or district court concerning the same.(z')

The act of September 24, 1789, sect 17, gives power to all the courts of the United States, to impose and administer all necessary oaths or affirmations, and to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority, in any case or hearing before the same.(A;)

Where by the laws and practice of a state, the court, on a judgment by default, might assess the damages, the circuit court there may do the same.(f) So where by the local laws and practice of a state, questions of fact in civil cases were tried by the court, unless either of the parties demandeda jury, the interest upon anoriginaljudgrnent in another state, on which the present suit is brought, may be computed and make a part of the judgment in the present suit, without a writ of enquiry and the intervention of a jury.(m)

As however at an early period after the organization of the courts of the United States, the Judges of the circuit courts had, by a rule, adopted the practice of the state courts, at a time when the English practice prevailed, they will not now depart from it in a special case, be-

(i) Sec 4. excepts the State of Louisiana from the provisions of the law.

(/c) See *ante,* 38.

(Z) Brown *v.* Van Braam. 3 Ball. 344. See Renner *v.* Marshall, 1 Wheat. 215.

(m} Mayhew v. Thatcher. 6 Wheat. 129.

cause the state practice is changed, without first altering the general rule.(w)

Under the power given by law, the circuit court will not countenance the issuing of a writ inconsistent with the state practice, and the truth of the record, and operating injuriously to a party in the suit. Thus, where a *capias* had issued in the circuit court of the Pennsylvania district, returnable to April term, 1792, against three defendants, and only one was arrested, who gave bail, and a declaration was filed against him, on which issue was joined, and the cause was continued till August, 1796, it was held, that an *alias capias* could not be then issued against another of the three defendants, returnable to October Term, 1796, bearing teste of April term, 1792.(o) Qwery, Whether such an *alias* would be good, if regularly taken out, returnable to the succeeding term, and continued from term to term.(p)

So, in a joint action of debt against two, the plaintiff, cannot proceed to obtain a judgment against one who alone appears, until he has proceeded against the other as far as the law of the state in which the circuit court sits will authorise, unless the law also dispenses with the necessity of proceeding against the other defendant beyond a certain point, to force an appearance. Thus, in Pennsylvania, if the sheriff return *non est inventus* as to one defendant, the plaintiff may proceed against the other on whom the writ was served, stating in his declaration the return of the writ as to his companion. But in Virginia, the plaintiff in such case may take out an *alias* and *pluries* or *testatum capias,* or, at his election an attachment against the estate of the defendant, or upon the return of *a. pluries* not found, the court may order a proclamation to issue, warning the defendant to appear on a certain day, and if he fail to do so, judgment by default may be entered against him. Or, if the other defendant be no inhabitant oif Virginia, and the sheriff so return, the law would have

(n) ----------~v. Craig. 1 Peters, 1. (1803.) By the act of May

26th, 1824, the practice of the courts of the United States in Louisiana is made conformable to that of the state courts there. And by the act of the 19th May 1828, the state of Louisiana is excepted from the provisions of that act.

(o) United States t\ Parker et al. 3 Dall. 373.

(f) Ib.

abated the writ as to him and proceedings might go on as to the other. But where neither course is pursued a judgment obtained against the one is irregularly)

But it is not every practice existing m the state courts at the passage of the act of May 8th, 1792, that is embraced by that act. Thus, under the process of attachment issued by the practice of the courts of Connecticut, their acts of assembly required a *mittimus,* previous to the officers committing the party to prison. But it was held, where an attachment issued out of the district court of the United States in that state directing the marshall, in default of estate, to arrest the party, and him safely keep, he might commit him to prison, as a proper mode of safekeeping, without a *mittimus:* that being considered as not adopted by the acts of Congress, but as a peculiar municipal regulation, affecting the state officers only.(r)

Operation of the state laws.

The 34th section of the act of the 24th of September, 1789, provides, that the laws of the several states, except where the constitution 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.

It seems, that this section is confined to civil proceedings, and that the laws of the several states are not to be regarded as rules of decision in trials for offences against the United States; and that the words " trials at common law" apply to civil suits, as

contradistinguished from criminal prosecutions, as well as to suits at common law, as contradistinguished from those which come before the court, sitting as a court of Equity or Admiralty.^)

A case in equity must be governed by those rules and principles which prevail in equity.(if)

An act of assembly passed by a state, for the limitation of the time within which suits for mariner's wages should be brought, would not apply to a suit brought

(q) Barton v. Pettit and Bayard. 7 Cranch, 194. See *ante* 111. *(r)* Palmer *v.* Allen. 7 Cranch, 350. See Wayman *v.* Southard. 10 Wheat. 37.

(*) United States «. Burr, Appendix, 2d part, 185. <*) M'Farlanec. Griffith. 4 Wash. C. C. Rep. 587.

for such wages in the district court of the United States, as a court of admiralty; and in no other cases than trials at common law, can state regulations or limitations govern the courts of the United States, unless they fall within the principles of universal law, which direct and limit the application of the *lex loci.(u)*

This section, moreover, has no application to the practice of the court, or the conduct of its officer, in the service of an execution. It only governs the court in the formation of its judgment on a question regularly brought before it. The practice and modes of proceeding in the courts of the United States, are regulated by other acts of Congress, which have provided specially for theni.Qc)

But parties entitled to sue in the courts of the United States, are, *in general,* entitled to pursue in such courts all the remedies for the vindication of their rights, which the local laws of the state authorise to be pursued in its own courts. Thus the Circuit Court of Massachusetts has jurisdiction in a case between citizens of different states, to sustain a petition for a partition, according to the statutes of Massachusetts, for partition of lands amongst tenants in common.(y)

But though the state laws as to rights, furnish rules of decision for the courts of the United States, under certain qualifications, yet as to remedies they have no binding force: and that this is every days' practice.(r) Thus, as in some states, there is no court of Equity, and in some of these states, courts of law recognise and enforce equity principles, and in others, all equitable claims are regarded as mere nullities at law, a construction that would adopt the state practice in all its extent, would extinguish, in some states, the exercise of equitable jurisdiction. The remedies, therefore, in the courts of the United States at common law and in equity, are to be, not according to the practice of the state courts, but according to the principles of common law and equity, as distinguished and de-

(u) Jones *v.* Brown. 2 Gall. 481. Willard v. Dorr. 3 Mason, 91.

(x) Wayman *v.* Southard. 10 Wheat. 24. United States Bank c. Halstead. Ib. 54. See *ante.*

(y) Ex parte Biddle and others. 2 Mason, 472.

(z) Campbell *v.* Claudius. 1 Pet. 494. See Bail, *post.* See United States v. Wonson. 1 Gall. 18.

fined in the English code.(a) So, where the state in which the circuit court is, has no chancery, and the case is proper for a court of chancery to enforce an account and take an account, though by the state laws a suit may be sustained by peculiar process, still, if the remedy in chancery is more complete, it may be obtained in the circuit court in equity.(b) Where, however, the statutes of a state, recognise an equitable title as a legal one, or declare a title which otherwise would be a legal one, void, under certain equitable circumstances, in both these cases, the question of title is a legal question, and may be entertained in a suit at law in the courts of the United States, as fully as it would be in a state court. But though such question be a legal one, yet, if the question arise, not under the laws of such state, but of another, under which it is a mere equitable question, it cannot be entertained in a court of common law of the United States.(c) The circuit courts of the United States have a chancery jurisdiction in every state, and the same chancery powers and rule of decision.(d)

Although the rules of practice in the circuit court, conform to the state practice, as it existed at the passage of of the act of September 24th, 1789, and not to the practice as it may since have been altered in the state courts, it is not so as to the operation of state laws, as rules of decision under the 34th section: for the state laws passed from time to time since then, are embraced by this section, as well as those which were in force at that period. Indeed, Congress cannot constitutionally impair the obligation of laws passed by the states, by setting up a different rule of decision in relation to contracts, property real and personal, &c., when such state laws are not repugnant to the constitution and laws of the United States. The powers vested in Congress are limited, and were not intended, nor can they be construed, to interfere with these powers, as vested in the state governments.(*e)*

In cases depending on the acts of the legislature of a state, and in construing those acts, especially in questions

a) Robinson *v.* Campbell. 3 Wheat. 221.

6) United States *v.* Rowland. 4 Wheat. 108.

c) Id. 4 Wheat. 115.

d)Ib.

«) Golden v. Prince. 5 Hall's Law Journ. 502.

respecting titles to land, the courts of the United States are governed by the construction adopted by the state tribunals, when that construction is settled and ascertained^/) And the same rule has been extended to other cases, growing out of the common law, when applied to the title of lands, as for instance, in relation to the construction of a devise,

where the question is, whether the estate passed by the will is an estate tail, or a defeasible estate in fee. And this is considered indispensable to preserve uniformity in the decisions of the United States and state tribunals.(g-)

Service of process.

By the 27th section of the act of September 24th, 1789, the marshal is to execute, throughout the district, all lawful precepts directed to him and issued under the authority of the United States, and power is given to him to command all necessary assistance in the execution of his duty, and to appoint one or more deputies.(/i)

Affidavits and Bail.

By the 10th section of the act of May 8, 1792, it shall and may be lawful for the clerks of the district and circuit courts, in the absence, or in case of the disability of the judges, to take recognisances of special bail *de bene* me, in any action depending in either of the said courts. And by the 1st section of the act of February 20th, 1812, it shall be lawful for the circuit court of the United States to be holden in any district in which the present provision by law for taking bail and affidavits in civil causes (in cases where such affidavits are by law admissible) is inadequate, or, on account of the extent of such district inconvenient, to appoint such and so many discreet persons in different parts of the district as such court shall deem necessary, to take acknowledgments of bail and affidavits; which acknowledgments of bail and affidavits shall have the like force and effect, as if taken before any judge of

(f) Polk *v.* Wendell. 9 Cranch, 98. Thatcher *v.* Powell. 6 Wheat. 119. Jackson *v.* Chew. 12 Wheat. 168. *(g)* Ib. 12 Wheat. 162. 167. *(h)* See Marshal, *post.*

said court; and any person swearing falsely in and by any such affidavit, shall be liable to the same punishment as if the same affidavit had been made or taken before a judge of said court. And by the 2d section, the like fees shall be allowed for taking such bail and affidavit, as are allowed for the like services by the laws of the state in which any such affidavit or bail shall be taken.

In respect to the effect given by the circuit court to discharges under state insolvent laws, and how far they will discharge on common bail, it seems, a discharge on common bail will be allowed, where the party is discharged by the insolvent law of the state where the debt was contracted, or made payable, and the plaintiff had notice of the defendants intention to take the benefit of the law, and was assignee under it. Thus, where the debt was contracted in Pennsylvania, and the defendant was there discharged under the insolvent law, notice being given to the plaintiff, of the defendant's intention to take the benefit of the law, and the plaintiff being an assignee of the defendant's effects under the law, the court, on motion, in a suit brought in the Pennsylvania district, discharged the defendant on common bail.(?) But where the debt is contracted and payable beyond seas, and the plaintiffs are residents beyond seas, the defendant will not be entitled to appear on common bail by virtue of a discharge under a state insolvent \a,w.(k) And it seems in general, that a discharge on common bail will not be directed by the circuit court, on the

ground of a discharge under an insolvent law of a country where the parties do not reside, and in which the contract was not made, or to be performed. The courts of the state where the discharge is given may be bound to discharge on common bail, no matter where the debt was contracted; but the courts of the United States, or of other states, are under no such obligation, and they ought riot, on the ground of comity, to give it effect in their courts.(7) A discharge therefore in Maryland, of a debt contracted in Virginia, will not be regarded in a suit in a circuit court ofVirginia.(m)

(i) Read *v.* Chapman. 1 Pet. 404, 484. (fc) Campbell *v.* Claudius. I Pet. 484.

(I) Ib. Banks v. Greenleaf, cited. Ib. See also Bankrupt Law *post.*

(m) Banks *v.* Greenleaf, cited. 1 Pet. 74. 484. See Hayton c Wil-

The United States are not affected by state insolvent laws, which profess to discharge the person of their debtors, *(n)*

By the act of March 2d, 1799, sect. 1, in all cases where a defendant, who hath procured bail to respond to the judgment in a suit brought against him in any of the courts of the United States, shall afterwards be arrested in any district of tho United States, other than that in which the first suit was brought, and shall be committed to a goal, the use of which shall have been ceded to the United States for the custody of prisoners, it shall be lawful for, and the duty of any judge of the court, in which the suit is depending, wherein such defendant hath procured bail as aforesaid, at the request, and for the indomnifirationof the bail, to order and direct, that such defendant be held in the gaol to which he shall have been committed a prisoner, in the custody of the marshal within whose district such gaol is; and, upon the said order duly authenticated being delivered to the said marshal, it shall be his duty to receive such prisoner into his custody, and him safely to keep, and the marshal shall be thereupon chargeable as in other cases for an escape. And the said marshal, thereupon shall make a certificate, under his hand and seal, of such commitment, and transmit the same to the court from which such order issued, and shall also, if required, make a duplicate thereof, and deliver the same to such bail, his, or their agent, or attorney. And, upon the said certificate being returned to the court which made the said order, it shall be lawful for the said court, or any judge thereof, to direct, that an *exoneretur* be entered upon the bail piece, where special bail shall have been found, or otherwise to discharge such bail. And such bail shall, thereupon, accordingly be discharged. Sect. 2, enacts, that, the marshal, or his deputy, serving such order as aforesaid, shall therefor receive the same fees and allowances as for the service of an original process, commitment thereon to the gaol, and return thereof. Sect. 3, enacts, that in every case of commitment as aforesaid, by virtue of such order, the person so committed shall, unless sooner discharged

kinson. 1 Hall's Law Journ. 260. Gill *v.* Jacobs. 6 Hall's Law Journ. 117. See 4 Wash. C. C. Rep. 476. (n) Glenn v. Humphreys. 4 Wash. C. C. Rep. 424.

by law, be holden in gaol until final judgment shall be reii" dered in the suit 'in which be procured bail as aforesaid, and sixty days thereafter, if such judgment shall be rendered

against him, that he may be charged in execution, which may be directed to, and served by the marshal in whose custody he is. *Provided always,* that nothing in this act contained shall affect any case wherein bail has been already given.

The marshal, however, is not liable for the escape of a prisoner from the custody of the keeper of a state gaolT to which he had committed him under process, the use of such gaol having been ceded to the United States by an act of assembly, in pursu^e of the resolution of Congress of the 23d Sepfpniber, 1789. Such keeper is neither in fact nor law the deputy of the marshal: nor is such prisoner in the custody of the marshal, or controllable by him. The keeper becomes responsible, and may make himself liable to the pains and penalties of the law.(o)

It seems, the circuit court has no authority to issue a *liabeas corpus* to bring up a defendant who is confined in a state gaol by civil process under state authority, in order to surrender him in the circuit court in discharge of his bail, who were bound in recognisance in the circuit court for his appearance there; nor will they discharge the defendant from his recognisance.(p)

Appearance.

The appearance of the defendant by attorney, cures all irregularity of process. A deputy marshal, therefore, cannot appear, and crave oyer of the writ, and plead in abatement that the writ was not directed to a disinterested person, &c., as directed by the 28th section of the act of 1789. It seems, however, he might appear *iupropria persona,* and directly plead in abateiaeut.(g')

Consolidation.

The act of 22d July, 1813, provides, that whenever cau-

(o) Randolph *v.* Donaldson. 9 Cranch, 76.

(p) United States *v.* French. 1 Gall. 1.

(q) Knoxu. Summers. 3 Cranch, 496, See *ante,* 81. 120,

ses of like nature or relative to the same question shall be pending before a court of the United States, or of the territories thereof, it shall be lawful for the court to make such orders and rules concerning proceedings therein, as may be conformable to the principles and usages belonging to the courts, for avoiding unnecessary costs or delay in the administration of justice: and accordingly, causes may be consolidated as to the court shall appear reasonable.^)

Money paid into court.

It was enacted by the act of April 18th, 1814, sect. 1, that upon the payment of any money into any district or circuit court of the United States, to abide the order of the court, the same should be deposited in such incorporated bank as the court may designate, and there remain, until it should be decided to \vhom it of right belonged. *Provided,* that if in any judicial district there should be no incorporated bank, tlio <^uvt might diit^l am.li money to be deposited, according to its discretion. *Provided also,* that nothing therein should be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court. By the act of March 3d, 1817, sect. 1, it shall be the duty of the judges of the circuit and district courts of the United ^States, within sixty days from and after the passing of this act, in all districts in which a branch of the Bank of the United States is or shall be established, to cause and direct all moneys remaining in said courts respectively, or being subject to the order thereof, to be deposited in said branch bank, in the name and to the credit of the court, and a certificate thereof from the cashier of said bank, stating the amount and time of such deposit, to be transmitted within twenty days thereafter to the secretary of the treasury. And in districts in which no such branch is or shall be established, such deposits shall be made in like manner, and within the same time in some incorporated state bank, and a certificate thereof in like manner and within the said time as aforesaid, transmitted to the secretary of the treasury. By sect. 2, all moneys which shall

(r) See Costs, *post.*

be hereafter paid into said courts or received by the offi. cers thereof, in cases pending therein, shall be immediately deposited in the branch bank within the district, if there be one, otherwise in some incorporated state bank within the district, in the name and to the credit of the court. By sect. 3, no money deposited as aforesaid, shall be drawn from said banks, except by order of the judge or judges of the said courts respectively in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk: and every such order to state the cause in, or on account of which it is drawn. By sect. 4, if any clerk of such court, or other officer thereof having received any such moneys as aforesaid, shall refuse or neglect to obey the order of such court, such clerk or other officer shall be forthwith proceeded against by attachment for contempt. And by sect. 5, at each regular and stated session of said court, the clerks thereof shall present an account to said court, of all moneys remaining therein, or subject to the order thereof, bUUiug paiiioularly uii ao^uunt of what causes faaid moneys are deposited, which account and the vouchers thereof shall be filed in court. *Provided nevertheless,* that if in any district there shall be no branch of the Bank of the United States, nor any incorporated state bank, the courts may direct moneys to be deposited according to their discretion as heretofore.

The 2d section of the act of March 1st, 1793, allowed the clerk of the district court in admiralty and maritime proceedings, on all money deposited in court, one and a quarter per cent.

Money deposited in a bank under a decree of the court, and subject to its order, is "money deposited in court," within the meaning of the act of March 1st, 1793, sect. 2, as much so as if in the possession of an officer of the court: the clerk is therefore entitled to the

commission of one and a quarter per cent, allowed by that act in such case in admiralty proceedings.(s)

This section of the act of March 1st, 1793, was continued by the 3d section of the act of 28th February, 1799. But by the act ot 18th April, 1814, sect. 1, the clerks of the district and circuit courts of the United States shall be

(s) Ex parte Prescott. 2 Gall. 146, decided in 1814.

entitled to one half of one per centum, and no more, on money deposited in court, any law to the contrary notwithstanding.

If money proceeding from the sale of a vessel and cargo condemned as prize by the circuit court, be paid into bank to the credit of the circuit court, the district judge cannot in vacation order it to be drawn out and distribute it: and if he does, the circuit court will on motion grant a rule upon the persons receiving the money under such order, to return the same to court, or on failure, that an attachment shall issue.(t)

Judgment by default, &c. on Specialty.

By sect. 26th, the act of September 24th, 1789, in all causes before either of the courts of the United States, to recover the forfeiture annexed to any articles of agreement, covenant, bond or other specialty; where the forfeiture, breach, or non-performance shall appear by the default or confession of the defendant, or upon demurrer, the court before whom the action is shall render judgment therein for the plaintiff, to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury.

Notice to produce Books or Writings.

The 15th section of the act of September 24th, 1789, provides, that all the said courts of the United States shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. And if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit. And if a defendant shall fail to comply with such order to pro-

(t) The Ariadne. * 1 Pet, 455.

duce books or writings, it shall be lawful for the courts respectively, on motion as aforesaid, to give judgment against him or her by default.

This provision was intended to prevent the necessity of instituting suits in equity, merely to obtain from an adverse

Sarty the production of deeds and papers relative to the tigated issue. The act does not designate to whom the notice shall be given, whether the party himself, or his attorney. But the court will always keep the cause under its controul for the purposes of substantial justice, and never suffer either party to be entrapped. If, for instance, the notice is served on an attorney whose client lives at a great distance, this will always be deemed a sufficient reason to postpone the trial, till a full opportunity has been afforded for the attorney's communicating the rule to the client. If, likewise the court find that the deeds are actually on record, they will not indulge the party with a rule for producing them merely as a cheap mode of procuring evidence. If the originals are necessary, for a special reason, that reason must be assigned to the court. Therefore, where the defendant's counsel offered to refer the other party to the pages where the deeds were recorded, to produce which notice had been given to the defendant's attorney, the court declared, that put an end to the matter: but added, thatif it were not satisfactorily done, they would not allow the cause to be brought to trial.(w)

Subpoenas and Witnesses.

The 6th section of the act of March 2d, 1793, enacts, that subpœnas for witnesses, who may be required to attend a court of the United States, in any district thereof, may run into any other district: *provided,* that in civil causes the witnesses living out of the district in which the court is holden, do not live at a greater distance than one hundred miles from the place of holding the same. By the 6th section of the act of February 28th, 1799, the compensation to witnesses in the courts of the United States shall be as follows, to wit: to the witnesses summoned in any court of the United States, the same allowance as is provided for jurors, namely, to each witness,

{«) Geyger's les«eei>. Geyger. 2 Ball. 332.

for each day he shall attend in court, one dollar and seventy-five cents, and for travelling, at the rate of five cents per mile, from their respective places of abode to the place where the court is holden, and the like allowance for returning.

Where on motion to postpone the trial, it was suggested on behalf of the defendant, in an indictment for a misdemeanor, as an excuse for the non attendance of witnesses, who had been subpoensed to attend the circuit court, that they were Associate Judges of the court of common pleas of a state, and were attending- the Judges of the supreme court, then holding a court of *Nisi Prius* in the county, PATERSON, J. said, we pay no respect to persons; the law operates equally upon all, the high and the low, the rich and poor. If we issue a subpœna to a justice or judge, and it is not obeyed, we should be more strict in our proceedings against them than others, whose office did not so strongly point out to them their dnty.(a:) So where the defendant was indicted for a libel on the President, and applied to the court for a letter to be addressed by them to several members of Congress, (which was then in session,) requesting their attendance as witnesses on his behalf, and the practice in Pennsylvania to that effect, in relation to members of assembly, was

referred to. CHASE J. refused it, on the ground, that members of Congress were not exempted from the obligation to obey a *subpcena.* Whether an attachment could issue for non attendance pursuant to it, was not derided, PETERS J. was for agreeing to the motion, on the ground of the Pennsylvania practice, but it was refused.(j/) In another case, a subpœna had been served on Mr. Madison, then-secretary of state of the United States, and others, to appear andtestifyon behalf of the defendant, and they did not attend. A tender had been made to Mr. Madison at the time of serving the *subpœna* for his expenses, and on motion for an attachment against him, the opinions of the judges of the circuit court, (PATERSON and TALMADGE);vere opposed. One of them being of opinion, that the absent witness should be laid under a rule to shew cause, why an attachment should not be issued against him. The other judge was

(x) United States v. Caldwell. 2 Ball. 333, *note, (y)* United States *v.* Cooper. 4 Ball. 341.

of opinion, that neither an attachment in the first instance, nor a rule to shew cause ought to be granted.(z) It is to be observed, that on a motion for postponement of trial previously decided, in which the court required the defendant to state the facts which these witnesses were to prove, the court were of opinion that their evidence was not material: and tnat Mr. Madison, and two others, heads of departments, offered to give their testimony on a commission if issued by consent.(a) So, on a rule upon the defendant the Secretary of State, to shew cause why a *mandamus* should not issue against him, commanding him to cause to be delivered to the plaintiffs, their several commissions of justices of the peace in the district of Columbia, the court ordered the clerks in the office of the Secretary of State, who had been summoned to attend the court, and who had declined giving a'voluntary affidavit, to be sworn, and their answers taken in writing as to the commissions having existed, but informed them that when the questions were asked they might state their objections to answering each particular question if they had any.(6) The court also thought that Mr. Lincoln, who was at the time when the transaction happened, acting as Secretary of State, ought to answer questions, as to the fact whether such commissions had been in the office or not: a fact which all the world had a right to know. But he was not bound to disclose any thing communicated to him in confidence, nor which would criminate himself.(c) So it seems, a *subpcena* may issue to procure the attendance of the President, on behalf of a defendant charged with a crime, (c?)

A *subpcena duces tecum* ought to issue if there exist any reason for supposing that the evidence may be material, and ought to be admitted;(e) and a *subpcena duces tecum* may issue on behalf of a person who stands charged with an offence directed to the President of the United States, to compel the production of a letter addressed to him, and

(«) United States *v.* Smith and Ogden.

(a) See however, United States v. Burr, 184, remarks upon this case.

(6) Marbury *v.* Madison. 1 Cranch, 137.

(c) Ib.

(d) United States v. Burr. 17?, 189 (e)Ib. 116.

his answer thereto, if it appear by a general affidavit of the person charged, that the testimony may be material for him, and the court be of opinion it is desired for the real purpose of defence.(f) For where the *subpcena duces tecum* is to be issued to those who administer the government of this country, such an affidavit is required, as will furnish probable cause to believe, that the testimony is desired for the real purpose of defence.(f) To obtain the production of orders issued to the land and naval officers of the United States by the President, the *subpcena duces tecum* should be directed to the heads of the departments in whose custody the orders are.(g-) Copies of such documents, certified under the acts of Congress, would not be sufficient: the party is entitled to the original.(A) So, a *subpcena duces tecum* may issue to the attorney-general of the United States, for a paper in his possession.(z) Letters addressed to the President, are most usually retained by himself, and do not belong to any of the heads of departments.^) If such papers contain any thing not essential to the defence and requiring concealment, that must appear on the return of the *subpcena.(l)*

The President has a privilege to withhold private letters of a certain description: but not such as are written to him in consequence of his public character and may relate to public concerns, for these seem to partake of the character of an official paper. With respect to these, if on the return of a *subpwna duces tecum* addressed to him for the production of such a letter, on the affidavit of the person accused that it may be material in his defence, the President object to its production and state his reasons, the court would not proceed further without such an affidavit as would clearly shew the paper to be material and essential to the justice of the case. But, if the President has sent such letter to the attorney of the United States prosecuting on their behalf, and submit it to his discretion whether to produce it or not, without subjecting it to any restrictions or stating that in his judgment the public in-

(f) United States *v.* Burr.

(g) Ib. 179, 180.

(A) Ib. 187.

(0 Ib.

(fc) United States *v.* Burr. 187

(0 ib. 188,

terest required that certain parts of it should be kept secret, and reserving them accordingly, the certificate of such attorney in return to a *suhpcena duces tecum* served upon him, furnishing a copy, excepting such parts as in his opinion are not material for the purposes of justice for the defence of the accused or pertinent to the issue, the parts excepted beinf confidentially communicated to the President, and he having devolved on such attorney of the United States the exercise of that discretion which constitutionally

belonged to himself, and;ilso that those parts contain a communication of the opinion of the writer concerning certain persons about which opinion or the fact of his having communicated it, the writer if a witness before the court could not be legally examined, and about which no evidence could be legally received from other persons, is not sufficient, but the court will on motion on behalf of the accused, order that the paper be produced or tho cause be conliiiued.(wi)

The court will not prohibit the accused from seeing the letter: but if thought proper will order that no copy of it be taken for public exhibition, and that no use shall be made of it but what is necessarily attached to the case. After the accused has seen it, it will be a question still whether it shall go to the jury or not, of which the court will judge on seeing the passages specified. If it should be necessary to debate the paper in public, the court may direct those who take notes not to insert any part of the arguments on that subject.(m)

An attachment will not be granted against non-attending witnesses, though material, who have not been *subpcenaed* in the cause in which it is applied for, though they were *subpœnaed* in other causes to the same term.(n)

It seems^ that unfair practices towards a witness who was to give testimony in the circuit court, or oppression under colour of its process, though acted in another district, would be punishable by attachment, (after a rule to shew cause,) provided the person, who had acted therein* came within the jurisdiction of the court(o) And an attachment for not attending pursuant to a *subpcena,* must be

(m) United States v. Burr. 2 Vol. 513. 533. 537. (») United States *v.* Caldwell. 2 Dull. 333. (o) United States *v.* Burr. 365.

served by the marshal, as it is the process of the court, regularly issuing for the administration of justice.(/>)

The circuit court will discharge a witness attending on *mbpcena,* from arrest made under process from a state •court.*(y)

Death of party.

The 31st section of the act of September 24th, 1789, declares, that where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party, who was plaintiff, petitioner, or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment. And the defendant or defendants, are hereby obliged to answer thereto accordingly, and the court, before whom such cause may be depending, is hereby empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator as the case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the court where such suit is depending, twenty days beforehand, shall neglect or refuse to become a party to the suit,

the court may render judgment against the estate of the deceased party, in the same manner, as if the executor or administrator had voluntarily made himself a party to the suit. And the executor or administrator, who shall become a party to the suit, as aforesaid, shall, upon motion to the court where such suit is depending, be entitled to a continuance of the same, until the next term of the said court. And if there be two or more plaintiffs or defendants, and one or more of them shall die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not abate, but such death being suggested vipon the record, the action shall proceed, at the suit of

(p) United States c. Burr. 3G5.

(q) Hurst's case 4 Dall. 387. See act of 1789, sect. 17, authority to administer oaths, and punish for contempts.

the surviving plaintiff or plaintiffs, against the surviving defendant or defendants.

In case of the death of parties before judgment, all personal actions, by the common law abated; and it required the aid of some statute, like the foregoing section, to enable the action to be prosecuted by, or against, the personal representative of the deceased, when the cause of action survived. In real actions, the like principle prevailed for still stronger reason, for, by the death of either party, the right descends to the heir, and a new cause of action springs up, and the plea is not, therefore, in the same condition as it was, in the life time of the party.(r)

This statute embraces all cases of death before final judgment, and, of course, is more extensive than the statutes of 17 Car. 2, and 8 and 9 W. 3. The death may happen before, or after plea pleaded, before or after issue joined, before or after verdict, or before or after interlocutory judgment: and in all these cases, the proceedings arc to be exactly as if the executor or administrator were a voluntary party to the suit.(s)

The executor or administrator may come in *instanter,* voluntarily, and, in such case, a *scire facias* is not necessary. It is done on motion, by order of the court, and he may immediately proceed to trial, though, if he pleases, he may have one continuance. The other party is not entitled to a continuance in such case, nor to any delay. (t) But the other party may insist on the production of his letters testamentary, before the order of the court permitting him to be a party: if, however, the order be made, it is then too late for the opposite party to contest the fact of his being executor, or to require oyer of the letters testamentary, unless it has taken place improperly, and by surprise on the court.(w)

If the administratrix of the plaintiff, in whose name the suit had been revived by *scire facias,* upon the death of the intestate after issue joined, intermarry, and such intermarriage be pleaded *puts darri en continuance,* the *scire facias* is thereby abated, but not the original suit, and a new *scire*

(r) Green *v.* Watkins. 6 Wheat. 262.

(*) Hatch *v.* Eustis. 1 Call. 164.

(t) Wilson v. Codman's executors. 3 Cranch, 193

(M) Ib.

facias may issue, under the above section, to revive the original suit, in the name of the husband and administratrix, as the personal representative of the intestate, in order to enable her to prosecute the suit to final judgment.^)

If the defendant die after verdict for the plaintiff, but before final judgment, and his administrator become a party, and judgment is rendered against him, and execution issue thereon, which is returned unsatisfied, on *scire facias*_ against the administrator, he may plead *pkne administravit,* no assets, or insolvency of the intestate/?/) It seems, that execution could not regularly issue till' after judgment on the second *scire facias.(z)*

But, as the foregoing section of the act of 24th September, 1789, is confined to personal actions, the power to prosecute and defend being given to the executor or administrator of the deceased party, and not to the heir or devisee, the death of either party before judgment, in a real action, abates the suit. It was, therefore, held, that if the defendant in a writ of right die after a summons served upon him, without having appeared to the suit, the action cannot be revived as to the heirs of the defendant, by rule of court, and order thereon: and that if this be done, a judgment taken against the heirs by default, will be reversed, on error brought.(a)

Juries.

By the 29th section of the act of September 24th, 1789, jurors in all cases, to serve in the courts of the United States, shall be designated by lot, or otherwise, in each state respectively, according to the mode of forming juries therein *now* practised, so far as the laws of the same shall render such designation practicable by the courts, or marshals of the United States. And the jurors shall have the same qualifications, as are requisite for jurors by the laws of the state of which they are citizens, to serve in the highest courts of law of such state, and shall be returned, as

{x) M'Coul o. Lecamp. 2 Wheat. 111.

(y) Hatch *v.* Eustis. 1 Gall. 160.

(*) Ib.

(a) Macker's heirs v. Thomas. 7 Wheat. 530.

there shall be occasion for them, from such parts of the district, from time to time, as the court shall direct, so as shall be most favourable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burthen the citizens of any part of the district with such services. And writs *of venire facias,* when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in his proper person, or by his deputy, or, in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as the court shall especially appoint for that purpose, to whom they shall administer an oath or affirmation, that he will *truly and impartially serve and return such writ.* And when, from challenges or otherwise, there shall not be a jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court where such defect of jurors shall happen, return jurymen *de talibus circumstantibus,* sufficient to complete the pannel, and when the marshal or his deputy are disqualified, as aforesaid, jurors may be returned by such disinterested person as the court may appoint. By the 6th section of the act of February 28th, 1799, the compensation to jurors in the courts of the United States shall be as follows, to wit: to each grand, and other juror, for each day he shall attend in court, one dollar and twenty-five cents: and for travelling, at the rate of five cents per mile, from their respective places of abode, to the place where the court is holden, and the like allowance for returning. This act applies to juries in civil cases, as well as in criminal.(A) By the act of May 13th, 1800, sect. 1, jurors to serve in the courts of the United States, shall be designated by lot or otherwise, in each state or court respectively, according to the mode of forming juries to serve in the highest courts of law therein, *now* practised, so far as the same shall render such designation practicable by the courts and marshals of the United States. But, by the 30th section of the act of April 29th, 1802, no special juries shall be returned by the clerks of any of the said circuit courts: but in all cases, in which it was the duty of the said clerks to return special juries, before the passing of that act, it shall be the duty of the marshal for the district where such circuit court

{I) Ex parte Lewis and others. 4 Cranch, 443.

may be held, to return special juries, in the same manner and form, as by the laws of the respective states the said clerks were required to return the same.

In a suit for land, in which the defendant pleads that the land lies in another state, the court of which has jurisdiction, and issue is joined on this plea to the jurisdiction, it is not a good cause of challenge to the array, that the marshal, who returned the jury, is a citizen of the state in which the suit is brought. But if the jury be arrayed by a deputy marshal, who is interested in the same tract of land, for part of which the action is brought, under colour of the same title as the plaintiff's, the court will quash the array, (c)

On a proceeding by petition, in which the petitioners claimed their freedom, a juror being challenged for favour, on examination before the triers, appeared to have formed and expressed no particular opinion on the case, but, on being questioned further, avowed his detestation of slavery to be such, that in a doubtful case he would find a verdict for the plaintiffs, and that he had so expressed himself in regard to this cause, and added, that if

the testimony were equal, he should certainly find a verdict for the petitioners. The court instructed the triers, that he did not stand indifferent: and it was held, that the court exercised a sound discretion, in not permitting the juror to be sworn.(c/)

It seems, the alienage of a juror, in a civil cause in the circuit court, may be a cause of challenge before such juror is sworn: but advantage cannot be taken of it after verdict.(e)

Under the 29th section of the act of September 24th, 1789, the court may award a *tales,* for a special as well as a common jury.(f) But an exception to the qualification of a *talesman,* as a juror, on the ground of his not being an inhabitant of the county, must be taken before he is sworn on the jury. It is too late afterwards.(g)

(c) Fowler *v.* Lindsey. 3 Ball. 411. *d}* Mima and child *v.* Hepburn. 7 Cranch, 290. *e)* Hollingsworth o. Duane. 4 Call. 354. /) Anon. 2 Dall. 382.

g) Mima and child *v.* Hepburn. 7 Cranch, 290. See further as to juries, *post.* Proceedings in Criminal Cases. By act of 26th May,

Evidence and Depositions.

The 30th section of the act of September 24th, 1789, provides, that the mode of proof by oral testimony, and examination of witnesses in open court, shall be the same in all the courts of the United States, as well in the trial of causes, in equity, and of admiralty and maritime jurisdiction, as of actions at common law. And, when the testimony of any person shall be necessary in any civil cause, depending in any district, in any court of the United States, who shall live at a greater distance than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, or is ancient, or very infirm; the deposition of such person may be taken *de bene* me, before any justice or judge of any of the courts of the United States, or before any chancellor, justice, or judge of a Supreme or Superior court, mayor, or chief magistrate of a city, or judge of a county court, or court of common pleas, of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause: *provided,* that a notification from the magistrate, before whom the deposition is to be taken, to the adverse party, to be present at the taking of the same, and to put interrogatories if he think fit, be first made out and served on the adverse party, or his attorney, as either may be nearest, if either is within one hundred miles of the place of such caption, allowing time for their attendance after being notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles travel. And every person, deposing as aforesaid, shall be carefully examined and cautioned, and sworn or affirmed to testify the *whole truth,* and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be

done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate, until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate of the reasons as afore-

1824, particular provision is made as to juries, in civil and criminal cases, in the district of Louisiana.

said of their being taken, and of the notice, if any, given to the adverse party, be by him the said magistrate sealed up, and directed to such court, and remain under his seal, until opened in court.

And any person may be compelled to appear and depose as aforesaid, in the .same manner as to appear and testify in open court.

And unless it shall be made to appear, on the trial of any cause, with respect to witnesses whose depositions may have been taken therein, that the witnesses are then dead, or gone out of the United States, or to a greater distance than as aforesaid, from the place where the court is sitting, or that by reason, of age, sickness, bodily infirmity, or imprisonment, they are unable to travel and appear at court, such depositions shall not be admitted or used in the cause.

Provided, that nothing herein shall be construed to prevent any court of the United States from granting a *dcdimus potestatem* to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice, which power they shall severally possess; nor to extend to depositions taken *inperpetuam rei memoriam,* which, if they relate to matters that may be cognisable in any court of the United States, a circuit court on application thereto made, as a court of equity, may, according to the usages in chancery, direct to be taken.

By the act of February 20th, 1812, in any cause depending before a court of the United States, it shall be lawful for such court, in its discretion, to admit in evidence any deposition taken in *perpctuam rei memoriam,* which would be so admissable in a court of the state, wherein such cause is pending, according to the laws

thereof.

By the act of 1st March, 1817, the commissioners who are now, or hereafter may be, appointed by virtue of the act of February 20th, 1812, (to take affidavits and bail in civil causes,)^) shall and may exercise all the powers that

a justice or judge of any of the courts of the United States may exercise, by virtue of the 30th section of the act of September 24th, 1789, above-mentioned.

There are two modes of taking depositions under these

(h) See ante 151.

acts. By the first, notice in certain cases is not necessary, but the forms prescribed must be strictly pursued. By a subsequent part of the section, depositions may be taken by *dedimus potestatcm,* according to common usage. The state laws, in the latter case, are to be referred to on the subject of notice, and if they do not authorise notice to be given to the attorney at law, a deposition taken under such notice cannot be read in evidcnce.(i) And depositions taken under a *dedimus potestatcm* are not, under any circumstances, considered as taken *dc bene esse,* but are absolute, whether the witness reside beyond the process of the court or within it. The 30th section of the act of September 24th 1789, relating to depositions, is confined to those taken under its enacting part. Therefore, where a commission is issued by consent, both parties naming commissioners, and filing interrogatories, the depositions taken under it are evidence, though the witnesses reside only thirty-three miles from the place of holding the court.(/c)

Query, If such commission issue without consent, whether the other party is bound to object at the time, or during the term when the rule is entered, or may object afterwards^/)

The court has authority to allow interrogatories or commissions to be filed at any time, on shewing a proper case: but will, if the circumstances require it, order the interrogataries to be filed previous to issuing the commission, and direct otherwise specially, the manner of executing the commission.(m)

It is a sufficient execution of a commission, if all the interrogatories are substantially, though not formally answered.^) If a commission be directed to four commissioners abroad jointly, it cannot be executed by three of them, though two of them be of the nomination of the party objecting.(o) So, where a commission was directed to five persons at Buenos Ayres,or any of them, three of whom

(i) Buddicum *v.* Kirk. 3 Cranch, 297.

(k) Sergeant *v.* Bidclle. 4 Wheat. See, however, 3 Wash. C. C, Hep. 408, and 4 ib. 725, this case explained.
(I) Ib.

(m) Cunningham v. Otis. 1 Gall. 166. *(n)* Nelson *v.* United States. 1 Pet. 237. (o) Guppy *v.* Brown. 4 Ball. 410,

were nominated by the plaintiffs, and two by the defendant, and was executed by one of those persons in conjunction with the American consul, the latter of whom certified, that all the persons named in the commission but one were dead or removed, and that the commission was delivered to him, and that he convoked the remaining commissioner and

the witness before him, and that the examination of the witness was taken by himself and the commissioner, the deposition was held inadmissible, because the examination was taken in conjunction with a person not named in the commission, who voluntarily and unnecessarily intruded himself into the business.(p)

A deposition taken *de bene esse* cannot be read on the trial of a common law suit, unless it appear that the witness has been served with a *subpœna,* and from some sufficient cause cannot attend, though it appear by the certificate of the judge who took the deposition, that the witness resides three hundred miles from the place where the court is sitting, and that the adverse party was notified and attended.(^)

In all cases where there is an attorney of record, notice of depositions, *de bene esse,* to be taken by the adverse party, should be given to such attorney, though the place of taking be more than one hundred miles from the place where the court, in which the cause is depending, sits. And in all causes in which the United States are a party, if there is an attorney of the United States residing within one hundred miles of the place of caption, notice must be given to such attorney of the taking of depositions to be used in such causes.(r)

The circumstance that the witness lives at the distance of more than one hundred miles from the place of trial, and therefore his deposition might have been taken *de bene esse,* under these acts, is not a sufficient reason for the other party to force the cause on to trial, in the absence of the witness, if he be material, has been sick, and promised to attend the trial, though the suit be ejectment, in which the verdict is not conclusive, and though the facts which the witness is to prove are not disclosed.(V)

(p) Willingse. Consequa. 1 Pet. 309.

(q) Browne's lessee c. Galloway. 1 Pet. 294.

(r) The Argo. 2 Gall. 314.

(«) Syrne's lessee p. Irvine. 2 Da!!. 383

Where a deposition, taken *de bene esse,* was opened by the clerk out of court, supposing it to be a letter, it was held a fatal objection to it being read in evidence.(Y)

If depositions have not been taken in conformity with the acts of Congress, and the rules of the circuit court, they cannot be read in evidence, though they were taken according to the practice prevailing in the state courts; unless the parties expressly wave the objection, or, by previous consent, agree to have them taken, and made evidence.(w)

By the act of Congress of the 24th January, 1827, sect. 1, it is now enacted, that whenever a commission shall be issued, by any court of the United States, for taking the testimony of a witness or witnesses, at any place within the United States, or the territories thereof, it shall be lawful for the clerk of any court of the United States for the district or territory within which such place may be, and he is thereby enjoined and required, upon the

application of either of the parties in the suit, cause, or action, or proceeding, in which such commission shall have been issued, his, her, or their agent or agents, to issue a subposna or subpœnas for such witness or witnesses residing or being within the said district, or territory as shall be named in the said commission commanding such witness or witnesses to appear and testify before the commissioner or commissioners in such commission named at a time and place in the subpcena to be stated, and if any witness after being duly served with such subposna, shall refuse or neglect to appear, or, after appearing, shall refuse to testify, (not being privileged from giving testimony,) such refusal or neglect being proved to the satisfaction of any judge of the court, whose clerk shall have issued such subpœna or subprenas, he may thereupon proceed to enforce obedience to the process, or to punish the disobedience in like manner as any court of the United States may do in case of disobedience to process *of subpcena ad testificandum* issued by such court, and the witness or witnesses in such cases shall be allowed the same compensation as is allowed to witnesses attending the courts of the United States; *provided* that no witness shall be required to attend at any place out of the county in which he may reside,

(0 Beale *v.* Thompson. 8 Cranch, 71. {«) Evans v. Eaton. 7 Wheat. 426.

nor more than forty miles from his place of residence to give his or her deposition under this law.

Section 2, enacts that whenever either of the parties in such suit, cause, action, or proceeding, shall apply to any judge of a court of the United States in the district or territory of the United States in which the place of taking such testimony may be, for a *subpcena duces tecum,* commanding the witness therein to be named to appear and testify before the said commissioner or commissioners at the time and place in the said subpœna to be stated, and also to bring or carry with him or her, and produce to such commissioner or commissioners, any paper, writing, o.r written instrument, or book or other documents supposed to be in the possession or power of such witness, such judge being satisfied by the affidavit of the person applying or otherwise, that there is reason to believe that such paper, &c. is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of the court of which he is a judge to issue such *subpcena duces tecum* accordingly, and if such witness, after being duly served with such *subpcena duces tecum* shall fail to produce any such paper, &c. being in the possession or power of any such witness and described in such *subpcena duces tecum* before, and to such commissioner or commissioners at the time and place in such subpœna stated, such failure being proved to the satisfaction of said judge, he may proceed to enforce obedience to the said process of *subpcena duces tecum,* or to punish the disobedience in like manner as any court of the United States may do in case of disobedience to a like process issued by such court, and when any such paper, &c. shall be produced to such commissioner or commissioners, he or they shall at the cost of the party requiring the same, cause to be made a fair and correct copy thereof, or of so much thereof as shall be required by either of the parties; *provided,* that no witness shall be deemed guilty of contempt for disobeying any subposna directed to him by virtue of this act, unless his fees for going to and returning

from and one day's attendance at the place of examination shall be paid or tendered to him at the time of the service of the subpo3iia.

New Trial and Stay of Execution.

By the 17th section of the act of September 24th, 1789, all the said courts of the United States, (Supreme, circuit and district,) shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. And by sect. 18, when in a circuit court, judgment upon a verdict in a civil action shall be entered, execution may on motion of either party, at the discretion of the court, and on such conditions, for the security of the adverse party, as they may judge proper, be stayed forty two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial. And if such petition be there filed, within said term of forty two days, with a certificate thereon, from either of the judges of such court, that he allows the same to be filed, which certificate he may make, or refuse, at his discretion, execution shall, of course, be further stayed, to the next session of said court. And, if a new trial be granted, the former judgment shall be thereby rendered void.

Special Demurrer and Amendments.

The 32d section of the act of September 24th, 1789, declares, that no summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any of the courts of the United States shall be abated, arrested, quashed, or reversed, for any defect or want of form, but the said courts respectively shall proceed and give judgment according as the right of the cause and matter in law shall appear unto them, without regarding any imperfections, defects, or want of form in such writ, declaration, or other pleading, return, process, judgment, or course of proceeding whatsoever, except those only, in cases of demurrer, which the party demurring shall specially set down and express together with his demurrer as the cause thereof. And the said courts respectively shall and may by virtue of this act from time to time, amend all and every such imperfections, defects, and wants of form, other than those only which the party demurring shall express as aforesaid, find may at any time permit either of

the parties to amend any defect in the process or pleadings, upon such conditions as the said courts respectively shall in their discretion and by their rules prescribe.

The circuit court may grant leave to amend, after a cause has been remanded by the Supreme Court for a new trial.(;r) So, after the cause has been remanded, the inferior court may receive additional pleas, or admit any any amendment in

those already filed, although the Supreme Court has decided those pleas to be bad on demurrer to them.(*y~)* For the Supreme Court will not give directions for amendments, but leave them to the court below.(z)

Costs.

The 20th section of the act of September 24th, 1789, declares, that where in a circuit court, a plaintiff in an action originally brought there, other than the United States, recovers less than the sum or value of five hundred dollars, he shall not be allowed, but at the discretion of the court, may be adjudged to pay costs.(et)

If the plaintiff' recover in an action at common law, or in one arising under the constitution or laws of the United States, less than five hundred dollars, he is not entitled to costs, but at the discretion of the court may be adjudged to pay them.(6)

By the 4th section of the act of March 1st, 1793, there shall be allowed and taxed in the Supreme, circuit, and district courts, in favour of the parties obtaining judgments therein, such compensation, for their travel, and attendance, and for attorneys and counsellor's fees, (except in the district courts, in cases of admiralty and maritime jurisdiction,) as are allowed in the Supreme or Superior courts of the respective states.(c)

By the 1st section of the act of 22d July, 1813, whenever there shall be several actions, or processes, against

(a;) Pollard v. Dwight. 4 Cranch, 42 J.

(y) Marine Insurance Company *v.* Hodgson. 6 Cranch, 206.

(z) Sheehy v. Mandeville. 6 Cranch, 253. But see *ante,* 57. 87.

(a) See *ante,* 106.

(b) Kneass *v.* The Schuylkill Bank. 4 Wash. C. C. Rep. 106.

(c) This act seems to have expired on the 3d March, 1799. See *post.* Fees.

persons who might legally be joined in one action or process, touching any demand, or matter in dispute, before a court of the United States, or of the territories thereof, if judgment be given for the party pursuing the same, such party shall not thereon recover the costs of more than one action, or process, unless special cause for several actions or processes shall be satisfactorily

shewn on motion in open court. By sect. 3, whenever causes of like nature, or relative to the same question, shall be pending before a court of the United States, or of the territories thereof, it shall be lawful for the court to make such orders and rules, concerning proceedings therein, as may be conformable to the principles and usages belonging to courts, for avoiding unnecessary costs or delay in the administration of justice; and accordingly, causes may be consolidated, as to the court shall appear reasonable. And, if any attorney, proctor, or other person admitted to manage and conduct causes, in a court of the United States, or the territories thereof, shall appear to have multiplied the proceedings in any case before the court, so as to increase costs unreasonably and vexatiously, such person may be required, by order of the court, to satisfy any excess of costs so incurred.

Judgments.

By the act of 19th May, 1828, sect. 2, it is provided, that in any one of the United States where judgments are a lien upon the property of the defendant, and where by the laws of such state defendants are entitled in the courts thereof to an imparlance of one term, or more, defendants in actions in the courts of the United States holden in such state, should be entitled to an imparlance of one term.(c?)

Executions.(e)

The act of May 8th, 1792, sect. 2, provides, that the forms of executions and other process in suits at common law, except their style, shall be the same as were then

(d) The State of Louisiana is excepted, sect. 4.

(e) See New Trial and Stay of Execution, *ante,* 174.

used in pursuance of the act of 29th September, 1789, except so far as may have been provided for by the act of 24th September, 1789, subject to such alterations and additions as the circuit or Supreme Court may make.(f) Provided, that on judgment 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. The act of September 24th, 1789, sect. 23, provides, that until the expiration of ten days, (Sundays exclusive,) after rendering judgment or passing a decree, executions shall not issue in any case where a writ of error may be a *supersedeas,* in order to give time to take out a writ of error.

By the 8th section of the act of March 2d, 1793, where it was then 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 same. 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 the appraisers shall be entitled to the like fees as in case of appraisement under the laws of the state. And if the appraisers, being duly summoned under the laws of the state, shall fail to attend and perform the duties required of them, the marshal may proceed to sell such goods without an appraisement.(g-)

By the 6th section of the act of 3d March, 1797, all writs of execution, upon any judgment obtained for *the use of the United States,* in any of the courts of the United States, may run, and be executed in any other state, or in any of the territories of the United States, but shall be issued from, and made returnable to the court where the judgment was obtained, any law to the contrary notwithstanding.

(f) See *ante,* beginning of this Chapter, (ff) See 10 Wheat. 36.

By the act of May 7th, 1800, sect. 3, whenever a marshal shall sell any lands, tenements, or hereditaments, by virtue of process from a court of the United States, and shall die or be removed from office, or the term of his commission expire, before a deed shall be executed for the same by him to the purchaser, in every such case the purchaser or plaintiff'at whose suit the sale was made may apply to the court from which the process issued, and set forth the case, assigning the reason why the title was not perfected by the marshal who sold the same, and, thereupon, the court may order the marshal for the time being, to perfect the title, and execute a deed to the purchaser, he payingthe purchase money and costs remaining unpaid. And when a marshal shall take in execution any lands, tenements, or hereditaments, and shall die, or be removed from office, or the term of his commission expire, before sale or other final disposition made of the same, in every such case, the like process shall issue to the succeeding marshal, and the same proceedings shall be had, as if such former marshal had not died, or been removed, or the term of his commission had not expired. And the provisions in this section contained, shall be extended to all the cases respectively, which may have happened before the passing of this act.

All writs of execution upon any judgment or decree, obtained in any of the district or circuit courts of the United States, in any one state which shall have been, or may hereafter be divided into two judicial districts, may run and be executed in any part of

such state: but shall be issued and made returnable to the court where the judgment was obtained.(/i)

By the act of 19th May, 1828, sect. 3, it is enacted, that writs of execution, and other final process, issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each state respectively, as are now used in the courts of such state, saving to the courts of the United States in those states in which there are not courts of equity with the ordinary

(A) Act of 20th May, 1826.

equity jurisdiction, the power of prescribing the mode of executing their decrees in equity by rule of court — *Provided, however,* that it shall be in the power of the courts, if they see fit in their discretion, by rules of court so far to alter final process in said courts, as to conform the same to any change which may be adopted by the legislatures of the respective states for the state courts.(i)

(i) The state of Louisiana is excepted from this act, sect. 4.

CHAPTER XIX.

CIRCUIT COURT — EQUITY JURISDlCTION.(a)

The acts of Congress give the circuit court jurisdiction in the cases prescribed,(6) in equity suits, as well as in common law suits. The district court has no equity jurisdiction, except as to injunctions.

By the 16th section of the act of September 24th, 1789, suits in equity shall not be sustained in either of the courts of the United States, in any case where plain adequate and complete remedy may be had at law. This, it seems, was the rule independently of .the act ofCongress.(c)

By the act of March 2d, 1793, writs of *ne exeat* and injunctions may be granted by any judge of the Supreme Court, in cases where they might be granted by the Supreme or circuit court: but no writ *ofnc exeat* shall be granted, unless a suit in equity be commenced, and satisfactory proof shall be made to the court or judge granting the same, that the defendant designs quickly to depart from the United States. Nor shall a writ of injunction be granted, to stay proceedings in any court of a state; nor shall such writ be granted in any case, without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same.

A circuit court cannot enjoin proceedings in a state court, though the bill was filed in a state court of chancery and removed into the circuit court.(W)

A circuit court may issue an injunction to stay proceedings on a judgment in the same court, between the same parties, and if the *subpœna* be served out of the district,

(a) See *ante,* Circuit Court — Practice, 150, 151, See also *ante,* 29, 330,31.

(6) Seethe 11th section of the act ofSeptember 24th, 1789,anfe 103.

(c) New York v. Connecticut. 4 Ball. 6. PATEKSON J. See Georgia v. Brailsford 2 Ball. 406.

<d) Diggs *v.* Wolcott. 4 Cranch 178.

and the defendant files an answer to the bill, without objecting to the service of process, the court has jurisdiction.^)

The notice required by this act, extends to applications to the Supreme or circuit court for injunctions, as well as to those which are made to a single judge. A shorter notice, however is considered reasonable, in the case of an application to a court than would generally be required in most cases of application to a single judge. Where, therefore, a bill was filed in the Supreme Court of the United States, praying an injunction, to restrain the defendants from proceeding in ejectments brought in Connecticut, for lands alleged to lie in the territory of New York, notices that the injunction would be moved for, delivered on the 25th and 26th July, when the term was to commence on the 5th, and did commence on the 6th August ensuing, were held reasonable.(f)

Where a circuit court made a decree in an equity case, in the year 1804, and the defendant in the year 1805, filed a bill of review, the court has not power over its own decree, so as to set the same aside, on motion of one of the defendants, after the expiration of the term in which it was rendered.(g)

If there be several defendants in a suit in equity, in the circuit court, some of whom appear by the pleadings to be citizens of a different state from that of the plaintiff, and others are not so stated, ifajoint interest vested in all the defendants, the court has no jurisdiction over the cause. If a distinct interest vested in the one who is named a citizen of a different state, so that substantial justice (so far as he was interested,) could be done, without affecting the other defendants, the jurisdiction of the court ought to be exercised as to him alone.(A)

If citizenship be properly averred in a bill in equity the defendant cannot controvert it by general answer, but must except by plea.(z')

By the act of February 13th, 1807, the judges of the district courts of the United States shall have as full pow-

(e) Logan v. Patrick. 5 Cranch, 288. (f) New Yorkc. Connecticut *et al. 4* Ball. 1. <#) Cameron *v.* M'Roberts. 3 Wheat. 591. (A) Cameron v. M'Roberts. 3 Wheat. 591. <i) Dodge i>. Perkins. 4 Mason, 43S.

er to grant writs of injunction, to operate within their respective districts, as is now exercised by any of the judges of the Supreme Court of the United States, under the same rules regulations and restrictions, as are prescribed by the several acts of Congress establishing the judiciary of the United States, any law to the contrary notwithstanding.

Provided, that the same shall not unless so ordered by the circuit court, continue longer than to the circuit court then next ensuing; nor shall an injunction be issued by a district judge, in any case where the party has had a reasonable time to apply to the circuit court for the writ.

The circuit court had always an equitable jurisdiction in suits respecting patent right, where the character of the parties gave it jurisdiction, but not otherwise. It could not, therefore, 'grant an injunction on behalf of a citizen of the state in which the court sat, against a citizen of the same state, although it was to protect a patent right granted under the laws of the United States; for the acts of congress did not allow it in such case, to take cognisance as a court of equity, of suits between citizens of the same state, though they did as a court of law. If it became necessary, in an action at law regularly before a court, for either party to resort to the equity side, in aid, or in defence of that action, such application might, perhaps, have been proper.(j)

But now, by the act of 15th, February, 1819, its jurisdiction is extended. The 1st section provides, that the circuit court of the United States shall have original cognisance, as well in equity, as at law, of all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to authors or inventors, the exclusive right to their respective writings, inventions, and discoveries; and upon any bill in equity filed by any party aggrieved, in any such cases, shall have authority to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors, secured to them by any laws of the United States, on such terms and conditions as the said courts may deem fit and reasonable: *provided however,* that from all judgments and decrees of any circuit courts rendered in the premises, a writ of error or appeal,

(j) Livingston ?). Van Inghen. 4 Hall's Law Journ. 50. 7 Cranch, 27.

as the case may require, shall lie to the Supreme Court of the United States, in the same manner and under the same circumstances, as is now provided by law, in other judgments and decrees of such circuit court.(&)

The 30th section of the act of 24th September, 1789, enacts, that the mode of proof by oral testimony and examination of witnesses in open court, shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law.

By the act of 29th April, 1802, sect. 25, in all suits in equity, it shall be in the discretion of the court, upon the request of either party, to order the testimony of the witnesses therein to be taken by depositions, which depositions shall be taken in conformity to the regulations prescribed by law, for the court of the highest original jurisdiction in equity, in cases of a similar nature, in that state in which the courts of the United States may be holden. *Provided, hoivevcr,* that nothing herein contained shall extend to the circuit courts which may be holden in those states in which testimony in chancery is not taken by deposition^/)

The 30th section of the act of September 24th, 1789, provides, that nothing therein shall be construed to extend to depositions in *perpetnam rei memoriam,* which, if they relate to matters that may be cognisable in any court of the United States, a circuit court, on application thereto made as a court of equity, may, according to the usages in chancery, direct to be taken.(m)

It has been held, that a circuit court of Tennessee could not as a court of equity, award a writ of *habcre facias possessionem,* to enforce its decree, by which it vested in the complainant lands of which the defendant retained possession.^)

In a chancery suit, the circuit court being always competent to award costs in that court, may do so after reversal in the Supreme Court and mandate, and may issue execution therefor, where the decree of the Supreme Court

(k) See *ante* Writ of Error, Practice and Appeals. *(f)* See *ante.*

(m) See act of 20th, February, 1812, *ante, (n)* Wallen *v.* Williams. 8 Cranch, 602.

directs payment of the money and interest, and such execution and proceedings in the same as, according to equity and justice and the laws of the United States, ought to be had.(o) Although it may be the practice in the state courts of chancery, to have the facts in an equity suit found by a jury, yet the circuit court sitting in such state will not adopt that practice, but the court will determine the facts as well as the equity of the case.(p)

If a suit in equity in the circuit court of one state, involve the naked question of title to lands lying in another state, the suit is local and the circuit court has no jurisdiction. Thus, if a suit in equity in the circuit court of Kentucky for the purpose of obtaining a conveyance of lands lying in the state of Ohio, or damages for not conveying, be in its character a suit brought to establish a prior title originating under the land law of Virginia against a person claiming under a senior patent, and is therefore to be considered as a substitute for a *caveat* introduced by the peculiar circumstances attending those titles, it is a local action, and must be confined to the courts sitting in Kentucky. But in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable, wherever the person may be found, although lands not within the jurisdiction of that court may be affected by the decree. If, therefore, a suit in equity in the circuit court of Kentucky in the case above mentioned, shew a breach of contract express or implied, or any species of *malafides,* which will in equity convert the defendant into a trustee for the complainant, the circuit court of Kentucky has jurisdiction, and may decree respecting the title to the

lands.(^)

A bill in equity to enjoin a judgment lies in the circuit Court where the judgment is given, though the original plaintiff resides in and is a citizen of another state.(r)

(o) M'Knight v. Craig's administrator. 6 Cranch, 187. *(p)* Massie *v.* Watts. 6 Cranch, 150. See *ante,* 148. *(q)* Watts c. Massie. 6 Cranch, 148. (r) Dunlap *v.* Sletson, 4 Mason, 349.

CHAPTER XX.

DISTRICT COURT-ORGANIZATION.

THE District courts compose another class of inferior courts established by Congress, in conformity to the power given by the constitution.

For the purpose of their organization, the United States are divided into districts, in each of which is a court, called a District Court, which, by the 2d, and 3d sections of the act of September 24th, 1789, is to consist of one judge, who is to reside in the district for which he is appointed, and to hold annually four sessions. By subsequent acts of Congress the number of annual sessions in particular districts, is sometimes more and sometimes less, and they are to be held at various places in the district.

These districts are at present as follows: Southern district of New York. Northern district of New York. New Jersey. Connecticut.

Eastern district of Pennsylvania. Western district of Pennsylvania. Delaware. Massachusetts. Maine. Maryland. Georgia. New Hampshire. Eastern district of Virginia. Western district of Virginia. Kentucky.

Eastern district of South Carolina. Western district of South Carolina.

North Carolina. Rhode Island. Vermont. East Tennessee. West Tennessee, Ohio.

Eastern district of Louisiana. Western district of Louisiana. Indiana. Mississippi. -Illinois.

Northern district of Alabama. Southern district of Alabama. Missouri. East and West Florida.

There is also one district court for the District of Columbia, held by the chief justice of the circuit court of that district.

A class of these courts exercises the powers of a circuit court, under the same regulations as they were formerly exercised by the District Court of Kentucky, which was the first of the kind. By the act of September 24th, 1789, sect. 10, the district court in Kentucky district was, besides the usual jurisdiction of a district court, vested with jurisdiction of all other causes, except of appeals and writs of error, therein after made cognisable in a circuit court, and writs of error and appeals were to lie from decisions therein to the Supreme Court, and, under the same regulations; and by the 12th section, cases might be removed from a state court to such court, in the same manner as to a circuit court. Of this description at present are the district courts of,

The Northern district of New York.

The Western district of Pennsylvania.

The Western district of Virginia.

Louisiana.

Indiana.

Mississippi.

Illinois.

Alabama.

Missouri.

East and West Florida.

The same powers of a circuit court were given by the 10th and 21st sections of the act of September 24th, 1789, to the judge of the district court of Maine, but writs of error and appeals were to lie from that court to the circuit court of Massachusetts. A circuit court having been since established in Maine, the only court of this description afterwards in existence was the district court of the Northern district of New York, from which writs of error and appeals lay to the circuit court in the Southern district of New York.(a)

But this is now altered by the act of 22d May 1826, by which appeals and writs of error lie from the district court of the Northern district of New York when exercising the powers of a circuit court to the Supreme Court; and a provision is made for causes that had been removed from that court to the circuit court of the Southern district of that state.

The 7th section of the act of September 24th, 1789, gives the district courts power to appoint clerks; and the clerk of the district court is to be clerk of the circuit court. By the 3d section the records are to be kept at the place of holding the court, where there is only one place: and where there are two, at the place appointed by the district judge. Subsequent Jaws designate the place of holding the court in some districts.

As to the cases in which a writ of error or appeal lies from the district courts acting as circuit courts, to the Supreme court of the United States.(i)

By the 3d section of the act of September 24th, 1789, the district judge has power to hold special courts at his discretion, in the same place as the stated courts, or in districts that have two, at either of them, at the discretion of the judge, or at such other place in the district, as the nature of the business and his discretion shall direct.

By the 6th section of the act of September 24th, 1789, a district court, in case of the inability of the judge to attend at the commencement of a session, may, by virtue of a written order from the judge, directed to the marshal of the district be adjourned, by the

said marshal, to such day antecedent to the next stated session of the said court, as, in the said order shall be appointed; and in case of the

(a) Act of 9th April, 1814, and 3d March 1823. *(bj* See *ante,* 37, 49.

death of said Judge, and his vacancy not being supplied, all process, pleadings, and proceeding, of what nature soever, pending before the said court, shall be continued of course until the next stated session after the appointment and acceptance of the office by his successor. .The 11th section of the act of May 8th, 1792, provides, that in alt suits and actions in any district court of the United States, in which it shall appear that the judge of any such court is any way concerned in interest, or has been of counsel for either party, it shall be the duty of such judge on application of either party to cause the fact to be entered on the minutes of the court, and also to order an authenticated copy thereof, with all the proceedings in such suit or action, to be forthwith certified to the next circuit court of the district, which circuit court shall thereupon take cognisance thereof, in like manner, as if it had been originally commenced in that court, and shall proceed to hear and determine the same accordingly. By the act of March 26th, 1804, sect. l,in case of the inability of the judge of any district court to attend on the day appointed for holding a special or an adjourned district court, such court may, by virtue of a written order from the judge thereof, directed to the marshal of the district, be adjourned by the marshal to the next stated term of said court, or to such day prior thereto, as in the said order shall be appointed. By the 1st section of the act of December 18th, 1812, the district and territorial judges must reside within the district and territories for which they are appointed: and it shall Hot be lawful for any judge, appointed under the authority of the United States, to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law. And any person offending against the injunction or prohibition of this act. shall be deemed guilty of a high misdemeanor.

For the power of the district judge to adjourn the session of the district and circuit courts to some other place in case of contagious sickness, see the act of February 25th, 1799.(V)

The act of March 2d, 1809, provides for the transfer of •causes into the circuit court, in case of the disability of the district judge.(t/)

(c) Ante, 22.

(d) Ante, 98.

By several acts of Congress, special authorities are vested in the district judges, and duties.required, not included in the foregoing heads.

1. By the act of 20th of July, 1790, he is empowered, (or in case of his non-residence at the place, some justice of the peace,) on complaint made on behalf of seamen, that a ship or vessel is leaky, or otherwise unfit to proceed to sea, to appoint commissioners to examine, and, on their report, make a determination.

2. By the 2nd and 4th sections of the act of March 1st, 1792, a certificate of the list of votes for president and vice president, is to be forwarded to the district judge of the district, who is required, if a list does not reach the seat of government by a certain day, on application by special messenger from the secretary of state, to transmit the same to the seat of government.

3. The act of 3d March, 1797, provides, that whenever any person or persons, 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 the laying, levying, or collecting any duties or taxes, — or by force of any present or future act concerning the registering and recording of ships or vessels — or any act concerning the enrolling and licensing ships or vessels employed in the coasting trade, or fisheries, and for regulating the same — shall prefer his petition to the judge of the district in which such fine, penalty, forfeiture, or disability shall have accrued, truly and particularly setting forth the circumstances of the case, and shall pray that the same may be mitigated or remitted, the said judge shall inquire, in a summary manner, into the circumstances of the case, first causing reasonable notice to be given to the person or persons claiming such fine, penalty, or forfeiture, and to the attorney of the United States for such district, that each may have an opportunity of showing cause against the mitigation or remission thereof, and shall cause the facts which shall appear upon such inquiry to be stated and annexed to the petition, and direct their

transmission to the secretary of the treasury of the United States, who shall thereupon have power to mitigate or remit such fine, forfeiture, or penalty, or remove such disability or any part thereof, if in his opinion the same shall have been incurred without wilful negligence, or any intention of fraud in the person or persons incurring the same; and to direct the prosecution, if any shall have been instituted for the recovery thereof, to cease and be discontinued, upon such terms and conditions as he may deem reasonable and just. Section 3, provides, that nothing therein contained, shall be construed to affect the right or claim of any person to that part of any fine, penalty, or forfeiture incurred by the breach of any of the laws aforesaid, which such person shall or may be entitled to by virtue of the said laws, in cases where a prosecution has been commenced, or information has been given, before the passing of this act, or any other act relative to the mitigation of such fines, penalties, or forfeitures: the amount of which right and claim, shall be assessed and valued by the proper judge or court, in a summary manner.

The 2d section of this act, vests in the judicial courts of the several states to whom jurisdiction is given by the acts referred to, authority to exercise the same powers, for the purpose of obtaining mitigation or remission. The acts of Congress since passed, from time to time, imposing penalties and forfeitures, usually vest the same powers in the district judge, or state courts, respectively, that are given by this act.(e)

4. The act of 6th January, 1800, authorised the judge of the district court, or commissioners appointed by him, under certain circumstances, to discharge from imprisonment an insolvent debtor, imprisoned on process of execution issuing from any

court of the United States, in civil actions, except at the suit of the United States, or any such person against whom judgment is recovered, after the expiration of thirty days from such judgment, though no execution may be sued out.(f) The authority to dis-

(e) See the act of 8th March, 1806, sect. 2. March 3,1815, sect. 3. (f) As to administering the oath, see act of January 7th, 1824. The .actof22d April, 1824, makes other provisions.

charge such persons imprisoned on execution, for a debt due to the United States, (excepting for any fine, forfeiture, or penalty, incurred by any breach of any law of the United States, or for moneys had and received by any officer, agent, or other person for their use,) is by the act of June 6th, 1798, vested in the secretary of the treasury. And where the case is such as does not authorise his discharge by the secretary of the treasury, the president, by the act of March 3d, 1817, may order his discharge, under certain provisions.(g)

5. Certain authorities in relation to officers and soldiers claiming pensions, are to be executed by the district judge, or other judge or court of record, under the acts of April 10th, 1806, March 18th, 1818, and other acts.

6. The district judge, in case of persons having purchased lands sold for the non-payment of the direct tax, where, from the death or removal of the collector, or other cause, the deed could not be made, may, on application to him by petition, and due proof, order the marshal to execute a deed, by virtue of the act of May 11th, 1820, sect. 2.

(g) Before this act, it was usual to do it by act of Congress.

CHAPTER XXI.

DISTRICT COURT — JURISDICTION.

The portion of jurisdiction given to the district courts by the acts of Congress, will be treated of under the following heads.

1. Its admiralty and maritime jurisdiction.

2. Its jurisdiction over seizures on land under the laws of the United States, and in suits for penalties and forfeitures, incurred under the laws of the United States.

3. In causes where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States.

4. In suits by the United States.

5. In suits by and against Consuls.

6. In proceedings to repeal patents.

7. Equity jurisdiction, *habeas corpus,* &c.

»

1. The admiralty and maritime jurisdiction embraces,

1. The ordinary jurisdiction.

2. That expressly vested.

1. The ordinary jurisdiction comprehends,

1. Prize suits.

2. Salvage.

3. Torts and injuries. '

4. Contracts, such as seamen's wages, materials, pilotage, bottomry, ransom, foreign judgments, &c.

2. That expressly vested embraces, 1. Seizures under laws of impost, &c.

2. Captures, within the jurisdictional limits of the United States.

1. Of the ordinary admiralty and maritime jurisdiction of the district court.

By the act of September 24th, 1789, sect. 9, the district court shall also have exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction.

The district court has the whole original jurisdiction in admiralty and maritime causes, including prize, as well as other causes of a maritime nature. The words " all causes of admiralty and maritime jurisdiction," include all maritime causes, whether peculiarly of admiralty jurisdiction or not.(a) The English distinction between an instance, (which is, strictly, an *admiralty* court,) and a prize court, does not apply, because a question of prize is clearly of a " maritime" nature. If the district court do not possess this authority, the constitution and laws do not vest it.(6) The word "maritime," it would seem, was inserted for the purpose of vesting a jurisdiction larger than that which under the statutes of 13th and 15th Richard II, was alleged to belong to the admiralty of England, and of making that jurisdiction dependent, not on the limits of place, but on the nature of the cause.(c) These statutes are considered as not extending to the courts of the United States, or as limiting their jurisdiction in admiralty and maritime affairs.(</)

The admiralty and maritime jurisdiction, vested by the constitution, is necessarily exclusive of all state authority. It is only in those cases where, previous to the formation of the constitution, state tribunals possessed jurisdiction independent of national authority that they can now con-

(«) Penhallow *v.* Doane. 3 Dall. 54. Glass *v.* Schooner Betsey. 3 Ball. 6. Browne. The United States. 8 Cranch, 137. (&) Penhallow *v.* Doane. 3 Dall. 54. 97.

(c) De Lovio *v.* Boit. 2 Gull. 398. The Sandwich. Peter's Rep. 233, *note.* See 6 Hall's Law Journ. 557. 1 Hall's Law Journ. 419.

(d) De Lovio *v.* Boit. 2 Gall. 473. The Sandwich, Pet. Adm. Dec. 235. The Judges of the Supreme Court of Pennsylvania in their report to the Legislature on the English statutes which had been extended to Pennsylvania do not include these statutes among them. See 3 Binn. Rep. Appendix.

stitutionally exercise a concurrent jurisdiction.. Admiralty and maritime'causes enter into the national policy, affect the national rights, and may compromit the national sove-

reignty.(e)

This jurisdiction being exclusively vested in the United

States courts by the constitution and laws, and as no foreign power can of right institute or erect any court of judicature of any kind within the United States, but such only as may be warranted by, and be in pursuance of treaties, the admiralty jurisdiction that had been exercised in the United States by the consuls of France, not being so warranted, was declared by the Supreme Court of the United States, not to be right.(f)

As the jurisdiction is dependent on the subject matter, the district court has jurisdiction to carry into effect the decree in a prize cause of the court of appeals, instituted under the old confederation: and that, though the appeal was from a court of admiralty of a different state from that in which the district court is.(g) And such decree is conclusive, and its merits cannot be enquired into in a proceeding on it in the district court.(/t) So, it seems, its jurisdiction exists in admiralty or maritime causes, although an ambassador or consul be a party.(i')

The cession of cases of admiralty and maritime jurisdiction by the constitution is no cession of the waters on which these cases may arise. The waters themselves remain the territory of the state in which they lie: and its general jurisdiction remains as a portion of sovereignty not given away, subject to the grant of power in Congress, to pass all laws for the full and unlimited exercise of admiralty and maritime jurisdiction. Cessions of territory and exclusive jurisdiction are regulated by the 8th section of the 3d article of the constitution, and not by the article describing the judicial power.(&)

(e) Martin *v.* Hunter's lessee. 1 Wheat. 337.

(f) Glass *v.* Schooner Betsey. 3 Ball. 6. See Letter of Mr. Jefferson to Mr. Morris, 16th August, 1793. 1 Waits State Papers, 144.

167. *(g)* Penhallowc. Doane. 3Dall. 54. Jennings *v.* Carson, 4 Cranch,

2. United States *v.* Peters. 5 Cranch, 145.

(A) Ib.

(i) Cohens *v.* Virginia. 6 Wheat. 397. See United States c. Bright, opinion of WASHINGTON J. 3 Hall's Law Journ. 225. *(k)* United States v. Bevans. 3 Wheat. 388, 389.

The United States courts have cognisance of all cases of admiralty and maritime jurisdiction on all the rivers of the United States, which are navigable to the sea for boats often tons burthen and upwards. It was therefore, held, that where the supercargo or agent for the owners of a steam boat, bound from New Orleans to Louisville in Kentucky, on the death of the captain during the voyage, by the consent of the captain and crew took charge as captain, paid the hands, hired a new crew in the place of those that died, and made repairs, before reaching the limits of Kentucky, he had a remedy in the district court of the United States of Kentucky, for these expenses; that that they were a lien on the boat, which might be enforced by libel *in rem;* and a decree was made for the sale thereof.^)

So where a crew was shipped at Cincinnati in Ohio, a regular port of entry and deposit, in a vessel of upwards often tons burthen, and proceeded with her to Pittsburg, in Pennsylvania, also a regular port of entry and deposit, where the freight and cargo were discharged, without payment of the wages of the crew, upon a libel filed by them against the vessel in the district court of the western district of Pennsylvania, the court after an elaborate examination of the subject, determined that it had jurisdiction, and decreed a sale of the vessel for payment of the wages due.(m) This case involved the admiralty and maritime jurisdiction of the courts of the United States on all the public navigable rivers in the interior.

In this case the question of the jurisdiction of the court was raised on behalf of the defendant, and was fully and elaborately examined by the court. The jurisdiction was sustained, in the first place oh the ground that it was an ancient and accustomed branch of admiralty jurisdiction as itformerly existed in England, and that the statutes of 13 and 15 Richard II, abridging that jurisdiction, did not extend to this country, in conformity with the opinions by Judge Winchester in Stephens *v.* the Sandwich, 1 Pet. Ad. Rep. 235, and by Judge Story in the Jerusalem, 2 Gall.

(I) Savage v. The Steamboat Buffaloe, district court of Kentucky, 1819, before TKIMBLE, district judge. It is understood a similar prin. ciple has been decided in Pennsylvania and Virginia.

(m) Sheckler and others *v.* The Geneva Boxer, before WAIKEB, J. decreed July 6th, 1829, M. S.

348, and De Lovio *v.* Boit, 2 Gall. 400,(n) the jurisdiction ofthe admiralty in matters of contract depending on the subject matter, viz: whether maritime or not; and in matters of tort on the *locality,* viz: whether done on the high seas or in ports and havens within the ebb and flow ofthe tide or not. Such maritime courts governing themselves by the general principles of maritime law, are necessarily national courts, and are essential to the proper execution of the authority delegated to Congress by the constitution, to regulate commerce with foreign nations, the several states, and with the Indian tribes. In the next place, the word maritime is used in the constitution, in addition to the word admiralty, in

vesting the jurisdiction of the courts of the United States, and has a broader and more extended meaning, a meaning long known and practised under in the colonies, as appears by the commissions granted to the judges of the vice-admiralty courts of the provinces before the revolution. And lastly, that the constitution having given to the judicial power ofthe United States " cognisance of all cases of admiralty and maritime jurisdiction," the act of 24th September, 1789, sect. 9 has given to the district court of the United States cognisance of all civil causes of admiralty and maritime jurisdiction, including seizures under laws of impost navigation or trade of the United States where the seizures are made on waters navigable from the sea by vessels of ten or more tons burthen within their respective districts, as well as upon the high seas." Now if the constitution did not embrace this jurisdiction Congress could not give it: and yet it has been settled by repeated decisions, and after full argument, to be constitutionally granted.(o)

But in the year 1825, this subject came before the Supreme court, who determined that where the voyage not

(n) Judge Walker also remarks " These opinions are much fortified by the deliberate act of the judges ofthe Supreme Court of Pennsylvania, in repudiating these statutes in their report to the legislature. It will be found, by a recurrence to the report ofthe judges under a resolution of the judges of this state, ofthe 7th April, 1807, requiring them to examine and report to the ne\t legislature, which of the English statutes are in force in this commonwealth, that these statutes were not considered as forming any part of tho laws of this country." See this report. 3 Binn. appx.

(o) See the Betsy, &c

only in its commencement and termination, but in all its intermediate progress, was several hundred miles above the ebb and flow of tide, (the voyage in this case being from Shippingport, in Kentucky, up the river Missouri and back again to the port of departure,) the district court of Kentucky had no jurisdiction. To bring the case of contracts with seaman, within the admiralty jurisdiction, the service must have been substantially performed or must have been contemplated to be substantially performed on the sea or waters within the ebb and flow of tide. The mere circumstance ofthe commencement or termination of the voyage beyond the reach of tide will not deprive the district court of jurisdiction. In all such cases there is no doubt the jurisdiction exists.(^) Whether under the power to regulate commerce between the states, Congress may not extend the remedy by the summary process ofthe admiralty, to the case of voyages on the western waters was not determined.^)

1. Of Prize suits.

Under the act of September 24th, 1789, the district court has as full jurisdiction of all prize causes as the admiralty of England. This jurisdiction is an ordinary inherent branch of the powers of the court of admiralty, and not an extraordinary power delegated or called into action at the breaking out of a war. And though this jurisdiction, in all cases of capture of goods and vessels brought within the United States, and of damages for unreasonable captures, was, by the prize act of June 26th, 1812, expressly vested in the district courts, yet, it seems, it exists in full force in such court, without the special provision of an act of Congress.(r) Such jurisdiction does not depend on locality, but on

the subject matter. The admiralty takes cognisance, not only of all captures made at sea, and in creeks, havens, and rivers, but also of all captures made on land by a naval force, or by a co-operation of a naval force.(Y) Whether the admiralty has ju-

(p) Steamboat Thomas Jefferson. 10 Wheat. 420. (?) Ib-

(r) Brown v. United States. 8 Cranch, 137. The Amiable Nancy. 3 Wheat. 546. {*) Brown r. United States. 8 Cranch, 137.

risdictiontotake cognisance of captures made on land by land forces only, and whether a seizure by a non-commissioned captor on land of property liable to seizure and condemnation in war, ought to be proceeded against as prize or by a process applicable to municipal forfeitures,

query.(f)

A public vessel of war belonging to a foreign nation at

peace with the United States, coming into our ports, when open for her reception and not interdicted, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the district or other courts of the United States, under the existing authority vested in them. And if such vessel be arrested by process, these facts may be disclosed to the court, by the suggestion of the attorney for the United States, on behalf of the United States, and the court will act upon the facts thus stated, if not denied.(«) A libel, therefore, cannot be sustained in the district court against a national armed vessel belonging to such foreign nation found in our waters, and proceeded against by an individual claiming title to such vessel.(a:) Nor has the district court jurisdiction on a libel for damages, for the capture of a vessel as prize by the commissioned cruizer of a belligerent power, although the captured vessel is alleged to belong to citizens of the United States, and the capturing vessel and her commander be found and proceeded against within the jurisdiction of the court, the captured vessel having been carried *infra pmsidia* of the captors.(?/) Nor is other property of the captor, such as the captured vessel, which is in the power of the court, liable to be applied by the district court to the redress of alleged torts committed on the high seas, on the property of our citizens.(2)

But the district courts have jurisdiction over captures made by foreign vessels of war of the property of our citizens, or of other nations, with whom the United States are at peace, where such vessels are equipped, or their

(f) 8 Cranch, 137.

(M) Ib. See also the case of the Cassius, *3* Dall. 4. Livingston *v.* Dor-

genois. 7 Cranch, 597. *Ante,* 40.

(x) The Exchange *v.* M'Faddon. 7 Cranch, 116.

(y) United States *v.* Peters. 3 Dall. 121. Case of the Cassius.

(z) The Invincible. 1 Wheat. 238.

force augmented in this country, in violation of the laws of the United States, and of our neutrality.(a) Therefore, on a libel by a neutral against a belligerent Cruizer for restitution of a vessel captured by the latter on the high seas as prize, and brought into the United States, the district court is competent to inquire and decide, whether restitution ought to be made in whole or in part: that is, whether it can be made consistently with the laws of nations, and the treaties and laws of the United States,(6) and in the absence of any act of Congress on the subject, the courts of the United States would have authority to decree restitution of property captured in violation of their neutrality, under a commission issued within the United States, or under an armament, or any augmentation of an armament or crew of the capturing vessel within the same.(c) And it makes no difference, whether the capturing vessel, which thus violates our neutrality, be a public ship of war or a privateer, for in either case the district court may decree restitution of the property if brought within its jurisdiction.^) But their jurisdiction for this purpose extends only to restitution of the specific property, when voluntarily brought within their jurisdiction, with costs and expenses during the pendency of the suit, and not to the infliction of vindictive damages, as in ordinary cases of marine torts. But whether, when a prize has been taken by a vessel fitted out in violation of our neutrality, the vessels of the United States have power to re-capture the prize on the high seas, and bring it into our ports for adjudication, *query.(e)* To justify restitution in any case, however, the fact of a violation of our neutrality must be clearly made out: if it be doubtful, the court ought not to exercise its jurisdiction.(f)

Query, Whether the court has power to inquire into the regularity of the commission of the capturing cruizer, or

(a) Ib. Talbot v. Jansen. 3 Dall. 133. Moodie *v.* The Betsy. 3 Dall. 288, *note.* Brig Alerta. 9 Cranch, 359.

(b) Glass *v.* Schooner Betsy. 3 Dall. 6. United States v. Peters. 3 Dall. 121. Talbotv. Jansen. 3 Dall. 133.

(c) The Estrella. 4 Wheat. 298.

(d) The Santissima Trinidad. 7 Wheat. 283.

(e) L'Arnistad de Rues. 5 Wheat. 385. Stoughton *v.* Taylor. District Court of New York. Nat. Intell. Dec. 3 and 5,1818.

(f) L'Amistad do Rues. 5 Wheat. 885.

of the expiration of its term, when the captured property is brought within the jurisdiction of the court, so as to adjudge the capture piratical ?(g)

In the case of a capture made by a cruizer illegally fitted out or whose force is augmented in the United States, the national character of the captor is immaterial. But in regard to citizens of the United States, there is a further restriction: for if a citizen, the owner and commander of an armed vessel, cruize under a commission from one foreign belligerent against another, when we are at peace with both, contrary to treaty and to the neutrality act, and the captured property be brought into the United States, such captor is not

entitled to the property, but it will be restored to the owners. Such citizens of the United States may not be liable as pirates, but their acts are unlawful, and no title is derived under them to the property captured.(7Q

Whether the jurisdiction of the district court, as a court of admiralty and maritime jurisdiction, is exclusive of the courts of common law in marine trespasses, depends not on the place, but on the nature of the case. It has exclusive jurisdiction where the question is prize or no prize; because such question is to be decided by the laws of nations. But where it is not a question of prize, where the rights of the parties are to be determined by the municipal law, and not by the law of nations, it seems, the courts of common law have a concurrent jurisdiction. Thus where a vessel was fitted out, and a commission put on board of her in the United States, for the purpose of cruizing against Spain, with which the United States were then at peace, and such vessel during her cruize, captured an American vessel, sailing under Spanish colours to avoid capture by the British, (the United States being then at war with Great Britain,) and took possession of and detained her, it was held, by the Supreme Court of New York, in an action of trover brought by the owners of the American vessel against the owners of the cruizer, that this was not a case of prize or no prize, and therefore exclusively of admiralty jurisdiction, but that trover would lie at common law, as the capture was illegal by the mu-

(g) The Altera. 9 Cranch, 359.

(A) The Bello Corunnes. 6 Wheat. 152. *See post,* Piracy.

nicipal law, the capturing vessel having violated the act of Congress, arid her commission being void.(«)

As the cognisance of ransom bills necessarily involves the question of prize or no prize, of the legality of the capture, and of the regularity of the commission and conduct of the captors, and may also involve questions as to the prize ordinances of foreign governments, practice and regulations of courts of prize, and the rights and duties of neutrals, it belongs exclusively to the admiralty. Such cognisance may be in the courts of the captors, or in any country where the person or property can be found. Whether a foreign court is bound on principles of comity to enforce such ransom without inquiring into the legitimacy of its origin or whether it will remit the parties to their own forum to settle that point, or whether it will examine and decide, *query.* But a suit on a bill of exchange given as a collateral security for the ransom money, instead of a hostage, lies in a court of common law, and it must be taken in such suit that the capture was lawful and the ransom regular, because a court of common law cannot inquire into matter of prize. If the capture was unlawful or the ransom irregular, redress might be had in an admiralty court: and the common law court might under circumstances calling for inquiry suspend its judgment, or a court of equity might grant an injunction, till the inquiry took place in the proper prize tribunal.(k)

2. Salvage.

As a court of admiralty the district court has, under the the constitution and laws, exclusive original cognisance in cases of salvage;(l) and, as a consequence, it has power to determine, to whom the residue of the property, after deducting the salvage, belongs. Therefore, after decreeing salvage to neutrals, who bring in a deserted vessel found at sea, which had been captured by one belligerent from another, it may decide, to which of them the residue shall go.(m)

(i) Hallet *v.* Novion. 14 Johns. 273. SPENCER and YATES J. diss.

(fc) Maisonnaire *v.* Keating. 2 Gall. 325.

(I) Martin «. Hunter's lessee. 1 Wheat. 335.

(m) M'Donough *v.* Dannery. 3 Ball. 183.

It is doubted whether an admiralty court has jurisdiction as to salvage where the parties are aliens; but, it seems consent may, in such case, give jurisdiction.^)

The act of March 3d, 1800, provides for salvage in the cases of vessels or goods belonging to persons resident in, or under the protection of the United States, or to the United States, or to persons in amity with the United States, taken by enemies and retaken, before condemnation, by the public or private vessels of the United States. In some of these cases, it is fixed by treaties. In other cases, the proportion allowed for salvage is settled by the court, according to the general principles of maritime

law.

There appears to be no act of Congress on the subject of shipwreck; though it may come before the district court incidentally in questions of salvage. The necessity of some regulations on the subject induced Congress in the year 1782, during the existence of the articles of confederation, to recommend to the several legislatures of the United States to provide by law for vesting persons in the neighbourhood of the sea coast with power to secure shipwrecked property in the most effectual manner.

3. Torts and Injuries.

The district court has jurisdiction over all torts and injuries committed upon the high seas, and in ports or harbours within the ebb and flow of tide. Such causes are within the jurisdiction of the district court, by virtue of the delegation of jurisdiction in all civil causes of admiralty and maritime jurisdiction: and are independent of the prize act.(o) A father may sue in the admiralty for tortious abduction or seduction of his minor son on a voyage on the high seas.(p) The admiralty has jurisdiction of personal torts and wrongs committed on a passenger on the high seas by the master of the ship.(</)

But it seems that for certain marine torts, as for exam-

(ri) Mason *v.* Ship Blaireau. 2 Cranch, 249.

(o) Martin *v.* Hunter's lessee. 1 Wheat. 304. The Amiable Nancy. 3 Wheat. 546. De Lovio v. Boit. 1 Gall. 398. Burke *v.* Trevitt. Mason, 96.

(p) Plummer v. Webb, 4 Mason, 380.

(q) Chamberlain v. Chandler. 3 Mason, 242.

pie, negligently running down a vessel at sea, a court of common law has concurrent jurisdiction with a court of admiralty.(r)

4. Contracts.

The district court as a court of admiralty has jurisdiction, concurrent with the common law, over all maritime contracts wheresoever the same may be made or executed, or whatever the form of the contract. And such cases are within the jurisdiction of this court by the grant of jurisdiction " in all civil cases of admiralty and maritime jurisdiction."^) Maritime contracts are such as relate to the business commerce or navigation of the sea: such as charter parties, affreightments, marine hypothecations, contracts for maritime service in the building, repairing, supplying, and navigating ships: contracts between part owners of ships; contracts and *qvasi* contracts respecting averages, contributions, and jettisons. A policy of insurance is also a maritime contract, and therefore the district court has cognisance of a suit upon it concurrent with the courts of common law. A court of admiralty has not jurisdiction over contracts leading to policies of insurance.^)

The contract of bottomry is one over which the admiralty exercises an undisputed jurisdiction. The admiralty is the only tribunal capable of enforcing a specific performance *in rem* by seizing into its custody the very subject of hypothecation.(«) The district court as a court of admiralty will entertain jurisdiction *in rem* in a suit upon a bottomry bond executed in a foreign country between aliens whose permanent domicil is abroad, where the subject of the hypothecation is within its jurisdiction: and that although the parties are subjects of the Ottoman empire. For its jurisdiction in matters of contracts does not depend on the character of the parties, but on the character of the contract, whether maritime or not: and it is exercised according to the law of nations or the *lex loci* as the case may require.(V)

(r) Percival *v.* Hickey. 18 Johns. 257.

(s) Ue Lovio u. Bok. 2 Gall. 398. The Jerusalem. 2 Gall. 345.

(t) Andrews c. Essex Ins. Co. 3 Mason, G.

(«) The Jerusalem. 2 Gall. 200.

(*) Ib.

The district court, as a court of admiralty, possesses a general jurisdiction in suits by material men *in rem* and *in personam.(y}* A suit *in personam* is always maintainable. But where the proceeding is *in rem,* to enforce a specific lien for material men, it is

incumbent on the plaintiff, to establish the existence of such lien in the particular case. Where repairs have been made or necessaries furnished to a foreign ship, or to a ship in the ports of a state to which she does not belong, the general maritime law gives a lien on the ship as security, and the party may maintain a suit in the district court to enforce that right. But as to repairs or necessaries furnished in the port or place to which the ship belongs, the case is governed by the local law of the state, and no lien is implied unless by that law. If the local law gives a lien it may be enforced in the admiralty.^) As, therefore, the common law, which was the law of Maryland, gave material men and mechanics furnishing repairs to a domestic ship, no particular lien for recovery of their demands, the district court could allow none.(a) A shipwright, indeed, who has possession may, like any other artist, retain it till paid: but if he once parts with the possession, or has worked upon it without taking possession, he has no claim on the ship. But still he may sue there in *personam.*^

So the district court, as a court of admiralty, has jurisdiction of a suit against the ship to recover pilotage, earned in piloting the vessel from the high seas into a port of the United States, where the contract was made on the high seas. And, it seems, it has jurisdiction as well by petition *in personam,* as by libel or information *in rem* for pilotage due for services performed on, from, or to the sea.(c) It has also jurisdiction, on the application of some of the part owners of a vessel, to compel the others, who are about sending her to sea, to give security, &c.

(y) The General Smith. 4 Wheat. 438. The Jerusalem. 2 Gall. 345. The St. Jago de Cuba. 9 Wheat. 409. But see Ramsay *v.* Allerge 12 Wheat. 614.

(*)Ib.

(a) The General Smith. 4 Wheat. 438. See Woodruffs. The Levi Dearborne. 4 Hall. Law Journ. 97.

(6) Ib.

,(c) The Anne. Mason, 508.

2. The admiralty jurisdiction expressly vested in the district court, embraces,

1. Seizures under laws of impost, &c.

1. The 9th section of the act of September 24th, 1789, enacts, that the district court shall have exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea, by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas, saving to suitors, in all cases, the right of a common law remedy, when the common law is competent to give it.

Seizures of the description here mentioned are properly civil causes of admiralty and maritime jurisdiction, and are to be tried by the district court, and not by a jury.(rf)

Congress meant to discriminate between seizures on waters navigable from the sea, and seizures on land or waters not navigable, and to class the former among civil causes of admiralty and maritime jurisdiction.(e) The reason of the legislature for putting causes of this kind on the admiralty side of the court, is said to have been, the great danger to the revenue, if such cases should be left to juries^/)

The process under this act does not in any degree touch the person of the offender, but is in nature of a libel *in* ran,(g) which in its terms and essence is an information *in rem,* and comes within the words of an act authorising proceedings by information on a seizure under a law of impost, navigation, or trade.(^) And such information is not to be construed according to the technical niceties of a common law information, but is construed liberally, and is sufficiently precise, if the offence be described in the words of the law, and so set forth, that if the allegation

(d) United States u. Betsy and Charlotte. 4 Cranch, 438. Whelan v. United States. 7 Cranch, 112. United States v. La Vengeance. 3 Ball. 297. Yeaton *v.* United States. 5 Cranch, 281. The Samuel. 1 Wheat. "9. The Octavio. 1 Wheat. 20.

(c) United States v. Betsy and Charlotte. 4 Cranch, 443.

(f) Per CHASE, J. Ib. 446, *note.*

{g) United States v. La Vengeance. *3* Dall. 297.

(h) The Samuel. 1 Wheat. 9.

be true, the offence must be within the statute.(i) The technical niceties introduced into criminal law, do not belong to proceedings in the admiralty.(k)

All objections to the regularity of proceeding usually observed in admiralty cases, are waved by the appearance of the parties interested in the property seized, and filing their claims thereto.(l)

But the information must contain a substantial statement of the facts upon which the prosecution is grounded, so that the party charged may know against what to direct his defence, and that the court may judicially see that the facts alleged amount to a violation of the law, and may discern the punishment which the law annexes to them. Nor is such defect cured by any evidence, showing, that in point of fact, the thing proceeded against is liable to forfeiture. Where, therefore, a libel of information against a vessel and cargo, alleged generally, that certain acts were committed in violation of particular sections of an act of Congress, without'stating any case which showed that the act was violated, the Supreme Court held, that the libel of information was insufficient to justify condemnation, whatever the fact might be.(m) So, where the acts which rendered a vessel liable to forfeiture, by the act of Congress of 22d March, 1794, were, that she was fitted out, or caused to sail, for the purpose of carrying on the slave trade, and the libel alleged in the alternative, that the vessel was built, equipped, loaded, or otherwise prepared, &c. or caused to sail, for the purpose of carrying on the slave trade, not positively alleging

that the vessel was fitted out or caused to sail, it was held, that the libel might be true, and yet no violation of the law had been committed, and the facts constituting such violation not being distinctly averred, the libel could not be sustained.^) Though the charge be stated in the alternative, it would be sufficient, provided each alternative constitut-

(i) Ib. The Emily and the Caroline. 9 Wheat. 386.

(k) Ib. The Merino ct al. 9 Wheat. 401.

(t) Id. 9 Wheat. 400.

(m) Schooner Hoppetand cargo o. United States. 7 Cranch, 389.

(n) Brig Caroline o. United States. 7 Cranch, 496, and *note* at the commencement of the volume. Schooner Ann *v.* United States. Ib. 572. The Samuel. 1 Wheat. 13, *note.* The Edward. Ib. 204. See the Divina Pastora. 4 Wheat. 64.

cd a violation for which the vessel would have been forfeited.(o) But in these cases the Supreme Court does not reverse the decrees of condemnation passed below, but remands the causes to the circuit court, with directions to admit the libels to be amended.(p)

The jurisdiction by proceeding *in rem* is exclusively vested in the district court by the act of September 24th, 1789: and the circuit court cannot entertain it.(^) If, therefore, general words are used in the law, the proceedings must be in the district court. Thus, proceedings by information against a vessel for a forfeiture under the nonimportation act of March 1st, 1809, which provides for a recovery of the penalties and forfeitures by action of debt in the name of the United States of America, or by indictment, or information in any court having competent jurisdiction to try the same, the vessel being seized at Newport, were regularly to be had in this court.(r) So also, on a libel for a forfeiture for an exportation of arms to St. Domingo, (commencing at Sandy Hook,) contrary to the act of 22d May, 1794;(s) of a vessel seized by the collector of Norfolk, under the slave trade act of March, 1794;(t) of a vessel seized in the port of Alexandria for violation of the act to suspend commercial intercourse with St. Domingo,(«) wherein no method of recovery is specified;*(x)* or of a vessel seized in the port of Philadelphia under the neutrality act of 5th June, 1794, against fitting out a ship for the service of a foreign state against another foreign state at peace with the United States,(y) with various others.

But where the act of congress imposes fine and imprisonment, the prosecution must take place in the circuit court, if it exceed the grade of punishment beyond the jurisdiction of the district court.(r)

(o) The Emily and the Caroline. 9 Wheat. 386. *(p)* Brig Caroline *v.* United States. 7 Cranch, 496. and *note* at the commencement of the volume.

(q) Ketland *v.* The Cassius. 2 Dall. 365.

(r) The Samuel. 1 Wheat 9.

(s) United States *v.* La Vengeance. 3 Dall. 297.

(t) United Stalest;. The Sally of Norfolk. 2 Cranch, 106.

(M) United States *v.* Betsy and Charlotte. 4 Cranch, 443.

(x) 1 Wheat, ll.arg.

(y) Ketland e. The Cassius. 2 Dall. 305.

(z) Ib. United States *v.* Guinet. 2 Dall. 321, *ante,* 129.

So, where an act of Congress, (9th January, 1809,) prohibited the attempt to export merchandise, and declared that the offenders, their aiders and abettors should, upon conviction, be adjudged guilty of a high misdemeanor, and fined a sum by the court before which the conviction was had equal to four times the value, and by a subsequent section declared, that all penalties and forfeitures incurred by force of the act, unless therein before provided for, might be prosecuted, sued for, and recovered by action of debt or by indictment, information, &c. it was held an offence against the United States, and not merely an act liable to a penalty: and that therefore it was within the original jurisdiction of the circuit court by information *in personam.(ci)*

Before judicial cognisance can attach upon a forfeiture *in rem,* under the act of Congress of September 24th, 1789, there must be a seizure: for until seizure, *the forum* cannot be ascertained.(i) It is the place of seizure, and not of committing the offence, that decides the jurisdiction, under this act.(c) Where the seizure is within the limits of a judicial district, the district court of that district has exclusive cognisance, and if brought into any other district the court will remit the property to the proper district. But the cognisance of seizures on the high seas or within the waters of a foreign nation belongs to any district court, into which the property is brought.(c?)

Unless expressly required by act of congress an authority from the collector to seize for a breach of the law need not be in writing; a verbal one is sufficient. Nor need any record or memorandum thereof be made. The seizure itself is full notice, for the possession is open and notorious.^) And when the district court has once acquired a regular jurisdiction, it seems no subsequent irregularity can avoid it. Even in case of an accidental destruction by fire the court might still protect its officers from prosecution by pronouncing, if just, a regular condemnation^/)

(a) United States *v.* Mann. 1 Gall. 3. 177.

8 United States *v.* Brig.Ann. 9 Cranch, 289. Ib. United States *v.* Betsy and Charlotte. 4 Cranch, 443. Keene v. The United States. 5 Cranch, 304.

(d) The Abby. Mason, 360. The Merino. 4 Wheat. 402.

(e) Schooner Bolina. 1 Gall. 79. (f) Ib. 83.

If a seizure of a vessel for breach of an act of Congress, be made within the territory of a foreign state, and she is brought in, seized and proceeded against by the civil officers of the United States, the proceedings under the latter seizure are valid, even if the former seizure were a trespass. The former seizure is an offence against the foreign power, and must be adjusted between their government and ours: the court cannot take cognisance of it.(g)

It is a general rule that any person may seize any property forfeited to the use of the government either by the municipal law, or by the law of prize for the purpose of enforcing the forfeiture. And it depends upon the government itself whether it will act upon the seizure. If it adopt the acts of the party and proceed to enforce the forfeiture by legal process, this is a sufficient recognition and confirmation of the seizure, and is of equal validity in law with an original authority given to the party to make the seizure.^)

Though a seizure has been made, yet if it be completely and explicitly abandoned and the property restored by the voluntary act of the seizing party, all rights under it are gone: and though judicial jurisdiction once vested, it is divested by the subsequent proceedings, and can be revested only by a new seizure.(z) Where, therefore, a revenue cutter seized a vessel bound to New York, and the collector of New Haven took possession as forfeited to the United States, but in a few days gave written orders for her release, in pursuance of directions from the Secretary of the Treasury of the United States, and returned the ship's papers to the master, and gave permission to proceed to New York. Afterwards on the same day, the district judge of the district of Connecticut allowed an information against her, and on the ensuing day, the brig and cargo were taken possession of by the marshal, it was held, that the district court had no jurisdic-

(g) Ship Richmond *v.* United States. 9 Cranch, 102.

(A) The Caledonian. 4 Wheat. 103. Schooner Bolina. 1 Gall. 75. The Rover. 2 Gall. 240. Collectors, or officers of the customs, or persons aiding them, seem to have peculiar privileges, as to probable cause, by the acts of 24th February, 1807, sect. 1, and of March 3d, 1815, sect. 7. See post, and act of March 2. 1799, sect. 89; and a person not authorised, it seems, seizes at his peril. The Rover. 2 Gall. 240.

(t) The brig Ann. 9 Cranch, 289. The Abby. Mason, 363. 27

tion.(&) But, to constitute such abandonment, there must be an intention coupled with an unequivocal act of dereliction. The evidence of it ought to be extremely strong.(Z)

When property is seized as forfeited under the revenue laws it is the duty of the seizing officers immediately to institute the proper process to ascertain the forfeiture: and this duty is enforced by the 89th section of the collection act passed March 2d, 1779, by enjoining the collector within whose district the seizure is made, or forfeiture incurred, to cause suits for the same to be commenced without delay, and prosecuted to effect.(m)

If the seizing officer refuse to institute proceedings *in rem,* the district court may, on application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure.(w) It may compel a re-delivery of the property, or its value, into the

possession of those who may be ultimately entitled to it, by way of original suit, or by a summary decretal order in a cause already before the court.(o)

Where there is a seizure for a forfeiture under the laws of the United States, the right to decide the same belongs exclusively to the district court, subject to appeal. If a sentence of condemnation be there pronounced, it is conclusive that a forfeiture has been incurred: if a sentence of acquittal, it is equally conclusive against the forfeiture.(jo) Any intervention of state authority, before the suit *in rem* is decided, which, by taking the thing seized out of the possession of the officer of the United States, might obstruct the exercise of the jurisdiction of the United States court, as, for instance, replevin, would be a violation of the act of Congress: and such court might enforce a re-delivery by an attachment, or other summary process, against the parties divesting the possession.^)

(it) The brig Ann. 9 Cranch, 289.

(I) The Abby. Mason, 363.

(m) Many of the other acts of Congress, imposing penalties and forfeitures, direct them to be proceeded for in the manner prescribed by this act.

(n) Slocum *v.* Mayberry. 2 Wheat. 1.

(o) Ib. Burke e. Trevitt. Mason, 29.

(p) Gelston *v.* Hoyt. 3 Wheat. 312. Slocum u. Mayberry. 2 Wheat. 1.

(q) Slocum v. Mayberry. 2 Wheat. 1.

If an action be commenced in a state court, while the proceedings *in rem,* for the supposed forfeiture, are pending in the district court of the United States, the pendency of the suit *in rem* may be pleaded in abatement, in the nature of a plea to the jurisdiction, with an allegation, that the jurisdiction of the question of forfeiture exclusively belongs to the district court of the district where the seizure had been made. If the action be commenced after a decree of condemnation, or after an acquittal and a certificate ghen of reasonable cause of seizure, then, in the former case, by the general law, and, in the latter case, by the special enactment of the act of Congress of the 25th April, 1810, sect. 1, the decree or certificate is a good bar to the action.(r)

If there be a decree of acquittal, and denial of such certificate, then the seizure is established conclusively to be tortious: suit lies in the state court, and the party is entitled to full damages for the injury. A plea in such case, that a forfeiture was incurred, is not good: nor is evidence admissible to prove it, by way of defence; nor in mitigation of damages, if the plaintiff claims only the actual damages sustained, and not vindictive damages.(s) But such suit will lie only in the state court, or district court. Congress have not vested in the common law tribunals of the United States, the power to decide on the conduct of their officers in the execution of their laws, unless in the Supreme Court on appeal by way of writ of error from the state court.(^)

In *Slocum v. Mayberry,(u)* a distinction seems to have been sustained, between the case of the officers seizing or detaining a *thing* not authorised by act of Congress, and his seizing or detaining a thing authorised, but on insufficient grounds: and, that in the former case, the state court has jurisdiction before final decree, but not in the latter. Where, therefore, an act of Congress directed a seizure of a *vessel* by the collector, but the collector seized and detained also the *cargo,* and the owner issued a reple-

(r) Ib. Gelston v. Hoyt. 3 Wheat. 312.

0) Ib.

(t) Gelston *v.* Hoyt. 3 Wheat. 312. Slocum *v.* Mayberry. 2 Wheat. 1. But it would seem the circuit court may have jurisdiction, if entitled % the character of the parties as citizens of different states, &c.

(u) 2 Wheat. 1.

vin for the cargo in a state court, it was held, that it lay, because the law gave no authority to detain the cargo.

But *query.(x)*

All persons having an interest or title m the subject matter are in law deemed parties to a proceeding in the district court *in rem,* for a forfeiture on a seizure under the laws of the United States. The seizing officer having an interest in establishing the title of forfeiture in such party, is bound by the decree. For some purposes, as to procure a decree of distribution after condemnation, where he is entitled to a share in the forfeiture, or to obtain a certificate of reasonable cause of seizure after acquittal, he may make himself a direct party: in all other cases, he is deemed to be present, and represented by the government. Even strangers are bound, because the decree of a court of competent jurisdiction *in rem,* is, as to the points directly in judgment, conclusive upon the whole world, whether it be a sentence of acquittal or condemnation.^)

Effect of a judgment in admiralty, in a process *in rem.*

The judgments and decrees of courts of common law and of equity, bind the subject matter as between parties and privies. In an admiralty cause, however, it is said, the whole world are parties; and therefore the whole world is bound by the decision. But the extent of this position depends on the reason which gave birth to it. Every person may make himself a party, and appeal from the sentence. But notice of the controversy is necessary, in order to become a party. When the proceedings are *in personam,* notice is served personally, or by publication: where they are *in rem,* it is served upon the thing itself: and such notice served upon the thing itself, is notice to all who have any interest in it. But those who have no interest in the thing which could be asserted in the court of admiralty, have no notice of the controversy, and are not to be considered parties so far as respects the thing proceeded against. Such persons are not precluded from re-examining the fact determined in that suit, in a subse-

(*) See Gelston v. Hoyt. 3 Wheat. 312. <y) Ib. 320.

quent suit in a court of admiralty, in which they are parties. Therefore, if in a proceeding against a vessel and cargo as prize, in the district court, the vessel be condemned as enemy's property, no claim being put in for her, the owner of the cargo may afterwards, if it become material in the prosecution of his claim for the cargo, contest the fact of the vessel being enemy's property, and the prior decree is not conclusive against him.(z) On the same principles the sentence of a foreign court of admiralty, condemning a vessel or cargo as enemy's property, has been held conclusive in an action by the insured against the insurers, on a policy in which the property is warranted to be neutral. For the owners of the vessel or cargo having an interest in them, had in law notice of the controversy, were parties to the suit, and had full opportunity to assert their rights, either immediately, or by the agency of the master: and moreover, because the question of prize is one over which courts of common law in which the suit on the policy is brought, have no direct cognisance.(a)

The district court as a court of admiralty, will enforce a maritime judgment in another court of admiralty(6) on original proceeding: but the relief granted can only be commensurate with the decree.(c) If the decree merely directed restoration of the thing, and it was in the possession of the officer of the court, and neither it nor the proceeds ever were in the possession of the libellant, or came to his hands, the libellant is not answerable in a suit to carry into effect the judgment.(rf) The court will enforce a foreign maritime judgment between foreigners, where either the person or thing is within its jurisdiction,^) and the district and other courts of the United States, on appeal, have repeatedly enforced the decrees of the former

0) The Mary. 9 Cranch, 126. 144. See the Sybil. 4 Wheat. 98, where it was held that ship owners could not come in, in a suit for civil salvage, (which appears to have been *in rem* against the cargo,) and claim freight and average, but were bound to apply by libel or petition, and call the shippers of the cargo to answer.

(a) The Mary. Ib.

(b) The Jerusalem. 2 Gall. 200. *Ante,* 193, 194. <(c) Jennings v. Carson. 4 Cranch, 23.

(d) Ib.

<e) The Jerusalem. 2 Gall. 200.

courts of appeals instituted under the authority of the old Congress, and under the confederation^/)

When property is seized as forfeited under the revenue laws and process commenced, the property is in the custody'of the law: for it is a general rule in all proceedings *in rem,* that the custody of the thing in controversy belongs to the court in which the suit is pending. The act of 8th May, 1792, sect. 4, directed that the marshal should have the custody of all vessels and goods seized by any officer of the revenue, and should be allowed such compensation therefor as the court might judge reasonable. But this provision is altered as to goods, wares and merchandise, by the collection act of March 2d, 1799, sect. 69,

which declares that all goods, wares or merchandise which shall be seized by virtue of that act, shall be put into and remain in the custody of the collector, or such other person as he shall appoint for that purpose, until such proceedings shall be had as by that act are required, to ascertain whether the same have been forfeited or not. It seems, however, that this act does not change the legal custody, after process is served upon the property. It is still, in contemplation of law, in the custody of the court, and the collector remains as much responsible to the court for the property, and as much bound to obey its decrees and orders, as the marshal is, as to property confided to his care. The collector is, in fact, *quoad hoc,* the mere official keeper for the court. And in cases not within the act of March 2d, 1799, if a seizure is made by the collector for the use of the United States, and possession held for this purpose at the time of the service of the process, and afterwards continued with the assent of the marshal, it ought to be adjudged his possession, under the act of May 2d, 1792. Besides, the provision of the latter act is not restrictive of the jurisdiction of the court, but merely directory: and the property is to be considered as taken into the custody of the court, if it was sold by its order, and the proceeds are within its control.(g)

As to the liability of the seizing officer to damages, it is held, that seizures for breaches of municipal law, are made by officers of the customs and others at their own

(f) Jennings *v.* Carson. 4 Cranch, 2. *Ante,* 193.

(g) Burke *v.* Trevitt. 1 Mason, 100. Schooner Bolina. 1 Gall. 81.

peril. If made without probable cause, the seizor is responsible for all consequences; the act is construed a tortious act, and even if loss happen to the thing seized by superior force or inevitable casualty, it is no protection to him that he has exercised due diligence in taking care of the property. If made with probable or reasonable cause, the seizor, at least by the acts of Congress, is entitled to the benefit of a *boncefidd* possessor, and is responsible only for ordinary diligence in the preservation of the property, and in bringing it in for adjudication. In these respects he stands on the same footing with captors exercising the rights of prize: that is, the goods are to be kept with the same caution with which a prudent person would keep his own property. Whether a loss of the goods by theft while in his pos session, would make him liable, is a question of some nicety. If it is to be considered even as presumptive evidence of ordinary neglect, the presumption may be removed by proof of due diligence, and in the admiralty a captor is not held responsible for theft unless there lies against him the imputation of personal negligence. At all events, if such loss happen while the goods are not in his possession, but after they have been removed therefrom to the custody of the law, and to the possession of the court, the seizing officer is not responsible for it.(g')

The collection act of March 2d, 1799, sect. 89, provides, that when any prosecution shall be commenced on account of the seizure of any ship or vessel, goods, wares, or merchandise, and judgment shall be given for the claimant or claimants, if it shall appear to the court before whom such prosecution shall be tried, that there was a reasonable cause of seizure, the said court shall cause a proper certificate or entry to be made thereof, and in such case the claimant or claimants shall not be entitled to costs, nor shall

the person who made the seizure or the prosecutor be liable to action, suit or judgment on account of such seizure or prosecution: provided, that the ship or vessel, goods, wares or merchandize be, after judgment, forthwith returned to such claimant or claimants, his, her, or their agent or agents.

The acts of 24th February, 1807, sect. 1, and March 3d,

(g) Burke v. Trevitt. Mason, 96.

1815, sect. 7, extend still further the benefit of these provisions. The former enacts, that when any prosecution shall be commenced on account of the seizure of any ship or vessel, goods, wares or merchandise made by any collector or other officer, *under any act of Congress authorising such seizure,* and judgment shall be given for the claimant or claimants, if it shall appear to the court before whom such prosecution shall be tried, that there was reasonable cause of seizure, the said court shall cause a proper certificate or entry to be made thereof; and in such case the claimant or claimants shall not be entitled to costs, nor shall the person who made the seizure or the prosecutor be liable to action, suit, or judgment, on account of such seizure and prosecution: provided, that the ship or vessel, goods, wares, or merchandise, be, after judgment, forthwith returned to such claimant or claimants, his, her, or their agent or agents. By the act of March 3d, 1815, sect 7, in any suit or prosecution against any person, for any act or thing done as an officer of the customs, or any person aiding or assisting such officer therein, and judgment shall be given against the defendant or respondent, if it shall appear to the court before which such suit or prosecution shall be tried that there was probable cause for doing such act or thing, such court shall order a proper certificate or entry to be made thereof; and in such case, the defendant or respondent shall not be liable for costs, nor shall he be liable to execution or to any action for damages, or to any other mode of prosecution for the act done by him as aforesaid: provided, that such property or articles as may be held in custody by the defendant, if any, be, after judgment, forthwith returned to the claimant or claimants, his, her, or their agent or agents.

Under the act of 2d March, 1799, sect. 89, it seems, a doubt respecting the fact is a reasonable cause of seizure; and it was decided, that a doubt as to the true construction of the *law* is as reasonable a cause of seizure as a doubt respecting the fact. And, therefore, though on error to the Supreme Court in a case of seizure under that act, that court thought it too plain to admit of argument or to require deliberation, that the case was not within the law; that it was not within even its *letter,* and certainly not within its *spirit,* yet as the construction of the law was liable to some question, the court suffered the certificate

of probable cause to remain as it was.(/t) So in a later case it was determined, that probable cause, in all cases of seizure has a fixed and well known meaning. It docs not mean *prima facie* evidence, but something inferior to that. It means less evidence than would justify condemnation; it imports a seizure under circumstances of suspicion. In this legal sense the court understand the term when used by Congress.(z)

Still circumstances to justify suspicion of a violation of the law must exist, to justify the officer in seizing: he cannot make seizures at his arbitrary discretion. The discretion vested in him by law is a legal discretion: and he cannot protect himself if he act wantonly and without probable cause, for he is then a mere trespasser and not in the execution of the duties of his office. What constitutes probable cause for seizure, a mere question of law, is when the facts are given on which the court, on an indictment against a person for resisting an officer of the customs, in attempting to seize, ought to instruct the jnry.(&)

In relation to captures on the high seas *jure belli,* it seems, it is a universal principle which applies to those engaged in a partial as well as those engaged in a general war, that when there is probable cause to believe the vessel met with at sea is in the condition of one liable to capture, it is lawful to take her, and subject her to the examination and adjudication of the courts,(7) and the same principle applies to re-captures.(m)

It would seem also that, without any provision in the acts of Congress, there arc cases in which a commander of an American armed vessel seizing a vessel on the high seas for an alleged violation of an act of Congress prohibiting intercourse by an American vessel with a foreign nation, and authorising a seizure by him would be excused from damages in a case of probable cause for such seizure, though no violation of the law took place, and the vessel seized were neutral.(w) But a distinction exists between

(h) United States *v.* Riddle. 5 Cranch, 313. *(i)* Locke *v.* United States. 7 Cranch, 348. *(k)* United States v. Gay. 2 Gall. 259. *(I)* Talbot *v.* Seeman. 1 Cranch, 31.

(») Murray *v.* The Charming Betsey. 2 Cranch, 122. Maley v. Shattuck. 3 Cranch, 490. In the year 1800 there was a partial war with

the effect of probable cause in cases of *capture jure belli 9* and the effect in cases of municipal seizures. In the former case captors are entitled as of right to an exemption from damages, and sometimes to their costs and expenses in proceeding to adjudication. But in municipal seizures, unless some statute gives an exemption from damages, the seizure is made at the peril of the party, and if an acquittal takes place he is liable to damages. Circumstances of suspicion may go in mitigation when vindictive damages are sought: but where compensation only is sought, it is of no importance to inquire into the existence of probable cause.(o)

By the act of June 9th, 1794, the district judges of the United States shall be authorised to appoint a commissioner or commissioners, before whom appraisers of ships or vessels, or goods, wares, and merchandises, seized for breaches of any law of the United States, may be sworn or affirmed, and such qualifications made before such commissioner or commissioners shall be, to all intents and purposes, as effectual, as -if the same were taken before the said judges in open court.

2. The admiralty jurisdiction expressly vested in the district court embraces also captures within the jurisdictional limits of the United States.

By the act of the 20th April, 1818, sect. 7, the district court shall take cognisance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts and shores thereof.

This section formed a part of the first neutrality act, passed the 5th June, 1794, which was repealed and supplied by the above mentioned act, and is intended to provide a tribunal for the redress of violations of the sovereignty of the United States, by captures made within the jurisdictional limits of the United States, by foreign cruizers, of vessels belonging to nations with whom they

France; the vessels, in these cases, were captured as Americans trading with the enemy, in violation of the act of 27th February, 1800. See also, on this point, Little *v.* Barerae. 2 Cranch, 179.

(o) The Apollon. 9 Wheat. 372. See Burke v. Trevitt. Mason, 103. And the arguments. Murray r. The Charming Betsey. 2 Cranch, 64.

are at war, but the United States are at peace. In the year 1793, when no act of Congress existed on the subject, it appears that a doubt existed, whether the redress of such violations belonged to the judicial or the executive department of the government. In the case of the British ship Grange, captured in that year by the French Frigate L'Ambuscade, within the waters of the river Delaware, President WASHINGTON interfered, and applied to the French ambassador, and procured her restoration.(p) The attorney general (E. Randolph) on the application of the secretary of state, gave an elaborate opinion that the waters of the river and bay of Delaware within the capes were within the jurisdiction of the United States, and neutral ground,^) to which the French ambassador (Genet) acceded.(r) Afterwards, in the same year the British ship William, being captured by the French schooner Citizen Genet, within, as was alleged, two miles of Cape Henry, and sent into the port of Philadelphia, was libelled in the district court of the United States for the district of Pennsylvania, and restoration of ship and cargo, and damages were prayed for, but the court decided that it had not jurisdiction of the case.(x) It appears to have been thought by the President, that it then resulted to the executive to interfere. The William was, by his arrangement, placed in the hands of the consuls of France, in lieu of a military guard, till the question of the place of capture should be decided, and, eventually, it was determined that she was captured beyond the jurisdictional limits of the United States. She was, therefore, returned to the captors, and damages awarded in their favour.(tf)

It was also a question in the case of the William, what was the distance from the coast or shore, to which the sovereignty of the United States extended by the laws of nations. President WASHINGTON fixed it at one sea league, or three geographical miles,(w) and Congress by the above

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(p) 1 Wait's State Papers, 71. 80. 145.

(q) 1 Wait's State Papers, 72.

(r) Ib. 80.

(*) Findlay et al. p. Ship William. 1 Peter's Adm. Decisions, 12. gee also Moxon et al. *v.* Brigantine Fanny. 2 Pet. Adm. Dec. 309. S. P.

(«) 1 Wait's State Papers, 145, 140. 168. 2 Wait's State Papers, 314, 315. 347. *Seepost.* Constitution. Art. vi. sect. 2.

(«) 1 Wait's State Papers, 195. The treaty of 1794, with Great Bri-

mentioned acts of 5th June, 1794, and 20th April, 1818,

adopted this limit.

By the 8th section of the act oi 20th April, 1818, in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States, the President is authorised to employ force, for the purpose of taking possession of, and detaining any such ship or vessel, with her prize or prizes, in order to the execution of the prohibitions and penalties of that act, and to the restoring the prize or prizes in the cases in which restoration shall have been adjudged, &c.

2. The district court also possesses jurisdiction in certain seizures on land, and in suits for penalties, &c.

By the 9th section of the act of September 24th, 1789, the district court has also exclusive original cognisance of all seizures on land, and other waters than as aforesaid, made, (viz: other than those which are navigable by vessels of ten or more tons burthen within their respective districts, or the high seas,) and of all suits for penalties and forfeitures incurred, under the laws of the United States.(V)

tain, fixed it within cannon shot of the coast, or in any of the bays, ports, or rivers of their territories. Art. xxv.

(a;) Generally speaking, the acts of Congress imposing penalties and forfeitures, make them recoverable in tho courts of the United States having competent jurisdiction, or in any court competent to try the same; in which case the jurisdiction results to the district court by virtue of this section of the act of 24th September 1789. Seethe collection act, March 2d, 1792, sect. 11 and 89, act of 20th April, 1818, concerning the importation, &c. of slaves. This course has, however in some instances, been deviated from, and the jurisdiction has been specially vested in the circuit as well as the district court. Thus, the act of 22d March, 1794 concerning the slave trade which was inforce until the act of 20th March, 1818, gave jurisdiction of seizures for forfeitures, under that act, to the circuit as well as the district court of the district. So the act of May 10th, 1800, on the same subject, which in this respect is now in force, gives the district and circuit courts cognisance ofall acts and offences against the prohibitions therein contained. It is, however, to be remarked that some of these are to be prosecuted by indictment. The 4th sect, of the act of March, 1807, to prohibit the importation of slaves, gave the circuit courts jurisdiction of forfeitures of the ship or vessel. The act of June 13th, 1798, now expired, to suspend commercial intercourse with France, contained in sect. 1, a provision of the same kind. The act of 13th February, 1801, now repealed, for establishing a new circuit court system, gave the circuit oourts cognisance of all seizures on land or water, and all penalties and

It seems, seizures of the above description are triable by jury; they are not cases of admiralty and maritime jurisdiction.^)

The court, in the trial of all cases of seizure on land, sits as a court of common law, and its jurisdiction must be kept as distinct from that exercised in cases of seizure on waters navigable by vessels of ten tons burthen and upwards, as if they were vested in different tribunals.(z) If the libel state a seizure on water navigable by vessels often tons burthen and upwards, and the proof is of a seizure on land, the libel ought to be dismissed or amended. The empannelling a jury at the instance of the claimants, with a knowledge of this fact, would not, in such case amount to a consent that the libel should stand amended. But on appeal to the Supreme Court from the sentence of a district court sitting as a circuit court, rendered after the verdict of the jury, the Supreme court will reverse the proceedings after the libel, and remand the cause with directions to amend.(a)

Query, whether a seizure by a non-commissioned captor on land, of property liable to seizure and condemnation in war, ought to be proceeded against as prize, or by a process applicable to municipal seizures.(^)

The words, " penalties and forfeitures," must be restrained to such penalties and forfeitures as may be sued for in a civil action, as for instance, by an action of debt, or an information of debt.(e) For where an act of Congress, (9th January, 1809,) prohibited the attempt to export merchandises, and declared, that " the offenders, their aiders and abettors, should, upon conviction, be adjudged guilty of a high misdemeanor, and be fined a sum by the court before which the conviction was had, equal to four times the value," and, by a subsequent section, declared, that all penalties and forfeitures incurred by force of the act, unless therein otherwise provided for, might be proseforfeitures made, arising, or accruing under the laws of the United States, exclusively of the state courts under certain circumstances. See also the stamp act of July 6th, 1797, sect. 20.

(y} United States v. The Betsey and Charlotte. 4 Cranch, 443.

{z) The Sarah. 8 Wheat. 395.

(a) Ib.

{&) Brown c. The United States. 8 Cranch, 137.

(c) United States v. Mann. 1 Gall. 137.

cuted, sued for, and recovered by action of debt, or by indictment, or information," &c., it was held, that loading goods in a sleigh, with intent to export to Canada, was an *offence* against the United States, and not merely an act liable to a penalty, and was, therefore, within the original jurisdiction of the circuit court, by information *in personam.(d}* And such fine is to be assessed by the court, and not found by the jury as a penalty.(e)

A bond, conditioned to be void on relanding goods within the United States, is not within the provision as to forfeitures: but the circuit court, it seems, has jurisdiction of a suit upon such bond.(f)

By the 5th section of the act of 8th May, 1792, in every prosecution for any fine or forfeiture incurred under any statutes of the United States, if judgment is rendered against the defendant, he shall be subject to the payment of costs. And on every conviction for any other offence not capital, the court may in their discretion award, that the defendant shall pay the costs of prosecution. And if any informer or plaintiff on a penal statute, to whose benefit the penalty, or anypart thereof, if recovered, is directed by law to accrue, shall discontinue his suit or prosecution, or shall be nonsuit in the same, or if, upon trial, a verdict shall pass for the defendant, the court shall award to the defendant his costs, unless such informer or plaintiff, be an officer of the United States specially authorised to commence such prosecution, and the court before whom the action or information shall be tried, shall, at the trial, in open court, certify upon record, that there was reasonable cause for commencing the same; in which case no costs shall be adjudged to the defendant. By the act of 28th February, 1799, if any informer on a penal statute, and to whom the penalty, or any part thereof, if recovered, is directed to accrue, shall discontinue his suit or prosecution, or shall be nonsuited in the same, or if, upon trial, judgment shall be rendered in favour of the defendant, unless the informer be an officer of the United States, he shall alone be liable to the clerks, marshals, and attorneys, for the fees of such prosecution; but, if such informer be

(d) United States *v.* Mann. 1 Gall. 3. 177.

(e) Ib. United States «. Tyler. Ib. 181. 7 Cranch, 285. (f) Durousseau v. The United States. 6 Cranch, 35.

an officer whose duty it is to commence such prosecution, and the court shall certify there was reasonable ground for the same, then the United States shall be responsible for such fees.

The 65th section of the collection act of the 2d March, 1799, enacts, that in all cases in which suits or prosecutions shall be commenced for the recovery of duties, or pecuniary penalties, prescribed by the laws of the United States, the person or persons against whom process may be issued, shall and may be held to special bail, subject to the rules and regulations which prevail in civil suits, in which special bail is required.(g-)

By the 6th section of the act of May 8th, 1792, the fees and compensations to the several officers and persons therein before mentioned, other than those which are above directed to be paid out of the treasury of the United States, shall be recovered in like manner as the fees of the officers of the states respectively for like services are recovered.

By the 2d section of the act of July 22d, 1813, whenever proceedings shall be had on several libels against any vessel and cargo which might legally be joined in one libel, before a court of the United States, or of the territories thereof, there shall not be allowed thereon more costs than on one libel, unless special cause for libelling the vessel and cargo severally shall be satisfactorily shown as aforesaid^) And in proceedings on several

libels or informations against any cargo, or parts of cargo or merchandise, seized as forfeited for the same cause, there shall not be allowed by the court more costs than would be lawful on one libel or information, whatever may be the number of owners or consignees therein concerned, but allowance may be made, on one libel or information, for the costs incidental to several claims: *provided,* that in case of a claim of any vessel or other property seized on behalf of the United States, and libelled or informed against as forfeited under any of the laws thereof, if judgment shall pass in favour of the claimant, he shall be entitled to the same upon paying only his own costs.

(g) Post.

(h) See this act, *ante,* 154. 175.

3. Jurisdiction of the district court, in certain suits by aliens.

The act of September 24th, 1789, sect. 9, provides, that the district court shall also have cognisance, concurrent with the courts of the several states or the circuit courts, as the case may be, of all causes where an alien sues for a tort only, in violation of the law of nations, or a treaty of the United States.

But, it would seem, such suit for a violation of the law of nations, (if not in the admiralty,) must be against a citizen of a state: for, by the constitution, the right of an alien to sue is restricted to that case; the 11 th article of the amendments having taken away the right to sue a state.(z')

4. Jurisdiction of the district court in suits by the United States.

By the 9th section of the act of September 24th, 1789, the district court shall also have cognisance, concurrent as last mentioned, of all suits at common law, where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And by the act of March 3d, 1815, sect. 4, it has cognisance, concurrent with the courts and magistrates of the several states, and the circuit courts of the United States, of all suits at common law where the United States, or any officer thereof, under the authority of any act of Congress sue, although the debt, claim, or other matter in dispute, shall not amount to one hundred dollars.

These last words do not confine the jurisdiction given by this act to one hundred dollars, but prevent it from stopping at that sum: and consequently, suits for sums over one hundred dollars are cognisable in the district, circuit, and state courts, and magistrates, in the cases here mentioned.(&) By virtue of this act, these tribunals have jurisdiction over suits brought by the postmaster-general, for debts and balances due the general post office.(T)

(i) See *ante,* in a question of salvage, 201.

(fe) Postmaster-General *v.* Early. 12 Wheat. 149.

(0 Ib.

5. Jurisdiction of the district court, in suits by and against consuls.

By the 9th section of the act of September 24th, 1789, the district court also has jurisdiction, exclusively of the courts of the several states, of all suits against consuls or vice consuls, except for offences where other punishment than whipping not exceeding thirty stripes, a fine exceeding one hundred dollars, or a term of imprisonment exceeding six months, is inflicted.

For offences above this description, the circuit court has jurisdiction in the case of consuls.(m)

It has been determined by the Supreme Court of Pennsylvania, that a state court has not jurisdiction in an action brought against a consul, the act of September 24th, 1789, having vested such jurisdiction exclusively in the Supreme and district courts of the United States.(w) And also that a consul is not liable to indictment in a state court, for a crime committed within the limits of such state, the constitution having vested in the Supreme Court of the United States, original jurisdiction in all cases affecting consuls; and even if such jurisdiction is not to be considered exclusive, yet the 9th and 11th sections of the act of 24th September, 1789, excluded the state courts, in such case, in express terms.(o)

6. Jurisdiction of the district court in proceedings to repeal patents.

By the 10th section of the act of February 21st, 1793, upon oath or affirmation being made before the Judge of the district court where the patentee, his executors, administrators or assigns reside, that any patent, which shall be issued in pursuance of this act, was obtained surreptitiously, or upon false suggestion, and motion made to the said court within three years after issuing the said patent, but not afterwards, it shall and may be lawful for the judge of the said district court, if the matter alleged shall ap-

(m) Commonwealth *v.* Kosloff. 5 Serg. and Rawle, 545.

(») Mannhardt *v.* Soderstrom. 1 Binn. 143.

(o) United States *v.* Ravara. 2 Ball. 277. But see *ante,* 27,

pear to him to be sufficient, to grant a rule that the patentee, his executor, administrator or assign show cause, why process should not issue against him to repeal such patent And if sufficient cause shall not be shewn to the contrary, the rule shall be made absolute, and thereupon the said Judge shall order process to be issued against such patentee or his

executors, administrators, or assigns, with costs of suit. And, in case no sufficient cause shall be shown to the contrary, or if it shall appear that the patentee was not the true inventor or discoverer, judgment shall be rendered by such court for the repeal of such patent; and if the party at whose complaint the process issued, shall have judgment given against him, he shall pay all such costs as the defendant shall be put to in defending the suit, to be taxed by the court and recovered in due course of law.

It seems the proceedings upon the rule *nisi,* are not conclusive; and that the process to be awarded, upon making the rule absolute, is not a final process, but a judicial writ, in the nature of a *scire facias* at common law; and this has been the practical exposition of the statute. The trial of issues of fact joined on such *scire facias* is to be by jury: as the act of 24th September, 1789, sect. 9, declares that the mode of trial of all issues of fact in the district court shall be by jury, except civil causes of admiralty and maritime jurisdiction.(p)

7. Equity jurisdiction of the district court, *habeas corpus* &c.

By the 1st section of the act of February 13th, 1807, the judges of the district courts of the United States shall have as full power to grant writs of injunctions, to operate within their respective districts, as is now exercised by any of the judges of the Supreme Court of the United States, under the same rules, regulations, and restrictions, as are prescribed by the several acts of Congress establishing the judiciary of the United States, any law to the contrary notwithstanding. *Provided,* that the same shall not, unless so ordered by the circuit court, continue longer than to the circuit court then next ensuing; nor shall an injunc-

(/j) Stearns «. Berret. Mason, 164, 1C6. Ex parte Wood. 9 Wheat, 603.

lion be issued by a district judge in any case, where the party has had a reasonable time to apply to the circuit court for the writ.

An injunction may also be issued by the district, judge under the act of March 3d, 1820, sect. 4, /», where proceedings have taken place by warrant and distress against a debtor to the United States or his sureties, subject by sect. 6, to appeal to the circuit court from the decision of such district judge in refusing or dissolving the injunction, if such appeal be allowed by a justice of the Supreme Court. On which, with an exception as to the necessity of an answer on the part of the United States, the proceedings are to be as in other cases.(^)

The act of24th September, 1789, section 14,vests in the judges of the district courts, power to grant writs of *habeas corpus,* for the purpose of an inquiry into the cause of commitment.(r) Other acts give them powers to issue writs, make rules, take depositions, &c.(s) The acts of congress already treated of relating to the privilege of not being sued out of the district of which the defendant is an inhabitant or in which he is found, restricting suit? by assignees, and various others, apply to the district court as well as to tho circuit cnurt.(t)

By the 9th section of the act of September 24th, 1789, the trial of issues in fact in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.

By the 10th section of the act of May 8th, 1792, the clerks of the district arid circuit courts are empowered to take the affidavits of all surveyors relative to their reports, and to administer oaths to all persons identifying papers found on board of vessels or elsewhere, to be used on trials in admiralty cases.

The act of 1st March, 1793, sect. 3, continued by the act of 28th February, 1799, ascertains the fees in admiralty cases.

The *practice* of the district court in common law and criminal proceedings is the same as that of the circuit

(q) See *ante* 107. 141.

(/•) *Ante,* 71.

(*) *Ante,* 29, 31, 32, 54,71.

(t) Ante, 103. See Supreme and circuit court, practice, *passim.*

court: and the acts of Congress regulating these points for the most part apply to the courts of the United States generally, and include the district courts.

But as a court of original proceeding in admiralty and maritime causes, the practice of the district court is peculiar to it. By the first process act of September 29th, 1789, the forms and modes of proceeding in causes of admiralty and maritime jurisdiction were to be according to the course of the civil law.(w) But the act of May 8th,

1792, sect. 2, which now regulates the practice of the district court directs, that the forms of writs and executions and other process, and the forms and modes of proceeding in suits of admiralty and maritime jurisdiction shall be according to the principles, rules, and usages which belong to courts of admiralty as contra-distinguished from courts of common law, except so far as may have been provided for by the act of September 24, 1789,(V) subject, however, to such alterations and additions as the said courts respectively should in their discretion deem expedient, or to such regulations as the Supreme Court should think proper from time to time to prescribe to any circuit or district court concerning the same. The act of March 2d,

1793, sect. 7, also gives power to the courts to make rules and regulate their practice.

The courts of admiralty whose principles and usages are referred to in the above act of May 8th, 1792, are those of England and our own country: and where they differ the practice of the latter must claim precedence.^)

The principles, rules, and usages of courts of admiralty are principally derived from the civil law, although, in cases omitted, they appear to have used the aid of the canon law.(*y)* In suits for the recovery of seamen's wages, a particular mode of proceeding in the first instance is prescribed by the act of 20th July, 1790, sect. 6, by summons and process against the ship, or in some cases by process in the first instance, the course of which is to be according to that of admiralty courts, reserving the right of recovery at common law. The act of 19th June, 1813, ex-

{u} Ante 30.

(t>) Ib.

(x) Manro e. Almeida. 10 Wheat. 490,

(y) 3 Bro. Adm, & Civil Law, 34R,

tends these provisions to the skipper or any other fisherman of a vessel employed in the fisheries, to enable them to recover their share offish, under certain provisions.

From the foregoing view of the jurisdiction of the district court, it will be perceived that its admiralty jurisdiction in civil cases embraces four different descriptions of causes, namely, 1. Prize causes. 2. Instance causes. 3. Suits for certain forfeitures and penalties, commonly called revenue causes. 4. Suits for violations of our jurisdictional limits.

1. Prize causes are proceedings *in rem:* and in them in an especial manner, the allegations, the proofs and proceedings are in general modelled upon the civil law, with such additions and alterations as the practice of nations and the rights of belligerents and neutrals unavoidably impose.^)

The law of nations is the great source of those rules respecting belligerent and neutral rights, which are recognised by all civilized and commercial states throughout Europe and America. This law is in part unwritten and in part conventional. To ascertain that which is unwritten resort is had to the great principles of reason and justice. But as these principles may be differently understood by different nations under different circumstances, they are considered as being in some degree fixed by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded on a law common to every country, are received not as authority but with respect. The United States having atone time formed a component part of the British Empire, their prize law was our prize law. When we separated, it continued to be our prize law so far as it was adapted to our circumstances, and was not varied by law or treaty. A case, therefore, determined in a British prize court professing to decide the ancient principles of public law will not be disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations. Where, therefore, a British prize court in the year , referring to a case decided in 1783, determined the principle that the possession of the soil impresses on the owner of it, the character of the country so far as its produce is concerned, in its

(z) Scfaooner Adeline. 9 Cranch, 284.

transportation to any other country, whatever the local residence of the owner may be, the Supreme Court of the United States in the year 1815, approved and adopted the principle, it not appearing to be contrary to former practice or opinions, nor to the rule of other nations, nor unreasonable in itself.(a)

Where the proceedings of the court are *in rem* their sentences act on the thing itself. They decide who has the right and order its delivery to the party having the right. The libellant and claimant arc both actors. They both demand from the court the thing in contest. The thing in dispute is taken into the custody of the law: and if in a proceeding on a decree in such case, it do not appear who had the possession, it must be presumed to be in the custody of the law until the contrary appears.(^)

The proceedings in the admiralty must always contain at least a general allegation of such a nature as will apply to the case, as of prize, &c. Some kind of rule must be adhered to, though the court do not require the same technical strictness as at common law. The case must be so stated as to authorise a decree; evidence cannot be admitted varying from the facts alleged. But the Supreme Court on appeal, on reversing the decree of the circuit court in such case, will remand the cause with directions to permit the pleadings to be amended and for farther proceedings.(c)

2. Instance causes, comprehend suits upon contracts or *quasi* contracts, salvage, torts, and former judgments, in which the proceedings are *in personam* as well as *in rem.* In these causes the court refers when the statute law is silent, to the marine law, embracing the ancient sea laws of Oleron, Wisbuy, &c. judicial expositions, and the decisions of our own tribunals. It is in relation to this species of causes that the contest existed in England between the courts of common law and admiralty, which terminated in restricting the latter by prohibitions within narrow limits. In our courts these limits have been much enlarged in consequence of the grant in the constitution of all cases

(a) 30 Hhds. Sugar u. Boyle. 9 Cranch, 198.

(6) Jennings v. Carson. 4 Cranch, 25.

(c)The Divina Pastora. 4 Wheat. 64. *Ante* 53, 57. For a view of the Admiralty practice, sec Brown's Civil and Admiralty law, and Hall's Clerks Praxit.

of *maritime* as well of admiralty jurisdiction: though their precise extent may yet be considered as a question *sub judice.*

The process in these causes is to arrest the thing or the person, according to the nature of the proceeding. These modes are customary in cases arising *ex contractu:* and it affords such remedies to compel a party to answer *ex delicto,* where the tort complained of is a mere marine trespass, but not where it involves directly the question of prixe.(rf) Process *in personam* lies to compel a party to answer a libel charging him with piratically taking

the libellant's property from on board a vessel at sea, and converting it to his own use, without bringing it into a place of adjudication.(e)

In cases of marine trespass not connected with prize, the district court as a court of admiralty, may award the thing or its proceeds, or damages therefor, either collaterally on claim, or in a direct suit. Thus, where the commander of an American vessel of war, seized a vessel on the high seas, on the ground of a violation of the act of Congress passed the 27th of February, 1800, further to suspend the commercial intercourse between the United States and France, and the dependencies thereof, and sold the cargo abroad, and brought the vessel into the port of Philadelphia, where they were libelled in the district court under the act of Congress, and claimed as Danish property, restoration of the vessel, and payment of the proceeds of the cargo, were decreed to the claimant, and damages^/) So, in a direct suit by libel *in personam,* against the commander of an American armed vessel, who had seized a vessel on the high seas for breach of the act of Congress, the owner libelled in the district court, and prayed that the respondent might proceed against her, or damages be decreed, and obtained a decree for damages.(g-)

It proceeds also by foreign attachment against the property, credits and effects, of a concealed or absconding

(cTj The Invincible. 2 Gall. 41. *(e)* Manro *v.* Almeida. 10 Wheat. 474.

(f) Murray *v.* The Charming Betsy. 2 Cranch, 64. See also Little v. Barreme. Ib. 169.

(g) Maley *11.* Shattuck. 3 Cranch, 457. See Burke *v.* Trevltt. 1 Mason, 99.

defendant, when they are within the jurisdiction of the court, or in the hands of a third person within such jurisdiction and the property attached may be condemned on default.(h) Such attachment cannot issue without an express order of the judge, and it is a proceeding *in personam* to compel an appearance.(i)

The pleadings in instance causes, are by libel and answer, or claim, and it is said that each party is entitled at any time, even down to the hearing of the cause, to demand the answer of his adversary upon oath, to every one of his pleadings.(k) In our own courts it has been held, that in causes on the instance side of the court, the answer of the claimant should be verified by his oath, and that this is the general practice both of courts of equity, and courts of admiralty proceeding according to the course of the civil law.(l) In suits for mariner's wages, the libellant may compel the adverse party to answer special interrogatories, which are filed under the direction of the court, and are like the interrogatory parts of a bill in chancery. And in point of convenience, say the court, the practice should be adhered to: for it brings distinctly before the court the points on which the defence is intended to be rested. As to all facts denied, the burthen of proof lies on the plaintiff, except in special cases of the shipping paper and logbook, as provided for in the act of Congress of the 20th of July, 1790, sect. 6.(m)

Salvage.

A suit for mere civil salvage is an instance cause: and it seems, the libel for it ought regularly, distinctly to allege and claim salvage, though that may not be indispensable. But a proceeding for military salvage, arising up-

(A) The Invincible. 2 Gall. 41. Bee's Adm. Rep. 141. Manro v. Almeida. 10 Wheat. 473. See 2 Bro. Adm. and Civil Law, who states that this has gone into disuse in England. Yet it appears it was formerly used in Pennsylvania. *Ante,* 2.

(t) Manro v. Almeida. 10 Wheat. 473.

(k) 2 Bro Adm. and Civil Law, 416.

(1) Gammell *v.* Skinner. 2 Gall. 45. Brown, however, seems to think that this is not derived from the civil law, but from the canonists. See 2 Bro. Adm. and Civil Law, 371, *note.*

(m) Gammell v. Skinner. 2 Gall. 45.

on a recapture of property, is a prize proceeding: inasmuch as the property is taken on the high *seas, jure belli,* out of the enemy's hands. The captors therefore may proceed against the property as prize, and the court having thus jurisdiction over the property as prize, will exercise its authority over all its incidents. It will decree a restoration of the whole, or of a part. It will decree it absolutely, or burthened with salvage, as the circumstances of the case may require, though not specifically claimed or stated.(w)

But in a case of civil salvage, in which the salvors are proceeding against the cargo to obtain a decree, ship owners cannot interpose in the way of claim for freight and average, nor can the court in the case depending award either of those demands, if there be no pretext for claiming either as against the salvors. The question is *inter alios acta,* and the ship owners ought to pursue their rights by libel, or by petition by way of libel, against the portion of the proceeds of the cargo adjudged to the shippers. They are entitled to be heard on such claim, and can only be called upon to answer in that mode. They may pursue this remedy while these proceeds are in the possession of the law, even after a final decree in the Supreme Court on appeal in the case, on the question of salvage.(o)

Where from the peculiar circumstances of the case, the amount of salvage is discretionary, as well as the mode of its distribution, the Supreme Court will not encourage appeals, nor reverse the decision of a circuit court in such a salvage case, unless it manifestly appeared that some important error had been committed, but will affirm the decree with costs.Qj)

3. Suits for penalties and forfeitures arising under the revenue and other laws, are proceedings *in rem,* founded on a prior seizure. The rules that govern in these cases, are mainly the acts of Congress, and the expositions given to them. The pleadings are by libel of information and

(n) The Schooner Adeline. 9 Cranch, 284, 285. *(o)* The Sybil. 4 Wheat. 98. This appears to have been a proceeding *in rem.*

(p) The Sybil. 4 Wheat. 99.

claim.(o) If the seizure in such cases be made on waters navigable for vessels often or more tons burthen, the court sits as an instance court.(r)

In a proceeding in the district court of the Pennsylvania district, in the year 1805, against a defendant, the commander of an American armed vessel, to compel him to proceed to adjudication of a vessel captured by him on the high seas, for an alleged breach of a law of trade, and for damages, the respondent after appearing absolutely, put interrogatories to the libellant, which were answered on oath.(5) And in a proceeding in 1808, in the district court, by libel of information against a vessel for a forfeiture under a law of trade, the claimant was required to put in his answer on oath, and the court also decided that the attorney for the United States might except to the answer, in the same manner as to an answer in chancery, or might reply seting forth new facts not inconsistent with the libel, and put interrogatories thereon, as upon the allegations in a bill in chancery, which if proper and pertinent must be answered. This was done, and the claimant was ordered to answer *viva voce.(t}* The question on the propriety of this proceeding, was made, among others, in the Supreme Court, on appeal from the circuit court, but no decision on it took place, (w)

The collection act of March 2d, 1799, (which is usually referred to by acts of navigation, impost and trade, for the mode of proceeding to recover penalties and forfeitures) prescribes, in the 89th section, the duty of the collector in seizing, and the mode of proceeding against property seized as forfeited.

Where property is brought into court for adjudication, upon a seizure for a forfeiture, or other cause cognisable there, the property is, in contemplation of law, in the custody of the court, whether the court be an instance or prize court. In a suit *in rem,* both parties are actors. Though the libellant does not make out a title, yet if the

(q) Seethe Samuel. 1 Wheat. 19. *note.*

(r) Le Jeune Eugenie. 2 Mason, 444.

(s) Maley *v.* Shattuck. 3 Cranch, 472.

(t) United States *v.* Betsy and Charlotte. 4 Cranch, 442.

(«) Ib.

claimant fail to show his, the court will hold the property till a lawful owner appear, and would repudiate a claim founded on piracy, or fraud, or even on a crime against the municipal law of a foreign country.^)

4. Captures within the jurisdictional limits of the United States. These are *in rem,* and are proceedings *in rem* for restoration to the owners.

In these cases the law of nations would form the rule, where the acts of Congress, or treaties, are silent.

(a;) La Jeune Eugenie. 2 Mason, 436. 461.

CHAPTER XXII.

DISTRICT COURT — CRIMINAL JURISDICTION.

By the 9th section of the act of September 24th, 1789, the district court shall have, exclusively of the courts of the several states, cognisance of all crimes and offences that shall be cognisable under the authority of the United States, committed within their respective districts, or upon the high seas, where no other punishment than whipping not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted.(a)

It is, therefore, the grade of punishment alone, that separates the jurisdiction of the district from that of the circuit courts; in other respects their jurisdiction as vested by this act. is similar.

By the same section the district court shall also have jurisdiction, exclusively of the courts of the several states, of all suits against consuls or vice-consuls, except for offences above the description above mentioned. Here, it is the character of the party, and the grade of punishment combined that give jurisdiction.

(a) See circuit court, criminal jurisdiction

CHAPTER XXIII.

TERRITORIAL COURTS.

The courts of the territories of the United States have been created by the several acts of Congress, passed from time to time, establishing territorial governments. At present, these courts are organised as follows:

1. In the territory *of Michigan,* there is a court consisting of three judges, any two of them form a court, who have a common law jurisdiction, and are appointed by the President, by and with the advice and consent of the Senate, to hold during good behaviour. The powers and duties of the magistrates, and other civil officers are to be regulated by the general assembly of the tcrritory.(a) By act of 30th January, 1823, an additional judge is established for certain counties with an appeal to the Supreme Court of the territory. And by act of 3d March, 1823, the judges of the territory have a chancery jurisdiction.

2. In the territory of *Jlrkansas,* the judicial power of the territory is vested in a superior court, in such inferior courts as the legislative department of the territory shall, from time to time, institute and establish, and in justices of the peace. The superior court is

composed of three judges, who are to continue in office for the term of four years, unless sooner removed by the President. The superior court has jurisdiction in all civil and penal cases and exclusive cognisance of all capital cases, and original jurisdiction, concurrently with the inferior courts, and exclusive appellate jurisdiction, in all civil cases in which the amount in controversy is one hundred

(a) Ordinance for 1787, for tho government of the territory of the United States, north-west of the river Ohio. Acts of Congress, August 7tli, 1789. January 14th, 1805. February 5th, 1826-

dollars, or upwards; it is to be held at such time and place as the legislative department directs, *provided,* that any *two* of the judges shall constitutes a court of appellate, and any *one,* a court of original jurisdiction. These judges are appointed by the President, by and with the advice and consent of the Senate; the judges of the inferior courts, and magistrates, by the Governor.(6)

3. In *Florida,* the judicial power is vested in two superior courts, and in such inferior courts'arid justices of the peace, as the legislative council of the territory may establish. One superior court is for East Florida, to consist of one Judge; another for West Florida, to consist of one judge. Each court has jurisdiction in all criminal cases, and exclusive jurisdiction in all capital cases, and original jurisdiction in all civil cases of the value of one hundred dollars, arising under, and cognisable by the laws of the territory. The judges of the superior courts are appointed by the President, by and with the advice and consent of the Senate. All judicial officers are to hold their offices for four years. The Judges of the inferior courts, and magistrates are appointed by the Governor. Each of the superior courts has, moreover, the same jurisdiction, within its limits, in all cases arising under the laws and constitution of the United States, which by the act of September 24th, 1789, was vested in the court of Kentucky district.(c) And writs of error and appeals from the decisions in the said superior courts, may be taken to the Supreme Court of the United States, in the same cases, and under the same regulations, as from the circuit courts of the United States.(J)

Under the provisions of the act of 3d March, 1823, the legislative council of Florida might establish a court having jurisdiction of admiralty causes they not being comprehended within the words, " all cases arising under the laws and constitution of the United States," and therefore not vested in the superior courts.(e)

By the act of March 3d, 1805, the superior courts of

b) Act of March 2d, 1819.

c) See *ante,* 186.

d) Act of Congress, March 30th, 1822. *Antf,* 38.

e) American Insurance Company 51. Canter, 1 Pet. S. C. Rep. 545.

the several territories of the United States, in which a district court has not been established by law, shall *in all cases in which the United States are concerned,* have and exercise, within their respective territories, the same jurisdiction and powers, which are by law given to, or may be exercised by the District Court of Kentucky district, and writs of error and appeals shall lie from decisions therein to the Supreme Court, for the same causes, and under the same regulations, as from the said District Court of Kentucky. This act at present, it seems, extends to the superior courts of the territories of Michigan, and Arkansas; writs of error and appeals from the superior courts of Florida, being provided for by the above mentioned act of March 30th, 1822.(f)

By the act of April 18th, 1806, the provisions of the act entitled " an act for providing compensation for the marshals, clerks, attorneys, jurors, and witnesses, in the courts of the United States, and to repeal certain parts of the act therein mentioned, and for other purposes," passed February 28th, 1799, are extended to the territories of the United States, so far as the said act may relate to the provisions of the act entitled, an act to extend the jurisdiction, in certain cases to the territorial courts," passed March 3d, 1805,(») excepting that the clerks of the said territorial courts shall not receive the additional five dollars per day, allowed to the clerks of the circuit and district courts, by the 3d section of the act first above mentioned^/*)

(f) See *ante,* 38. And by the act of February 5th, 1826, appeals and writs of error lie from the decision of the highest tribunal of Michigan territory to the Supreme Court, where the amount in controversy exceeds one thousand dollars.

(g) The act next above mentioned.

(A) See also *ante,* 133. Act May 26th, 1824, 15th May, 1826, 30th March, 1823.

CHAPTER XXIV.

ATTORNEY GENERAL AND DISTRICT ATTORNEYS.

BY the 35th section of the act of September 24th, 1789, there shall be appointed a meet person, learned in the law, to act as attorney general for the United States, who shall be sworn or affirmed to a faithful execution of his office, whose duty it shall be to prosecute and conduct all suits in the Supreme Court, in which the United States shall be concerned, and to give his advice and opinion upon questions of law, when required by the president of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall be by law provided.(a)

(a) By the act of 20th February, 1819, sect. 1, the salary of the attorney general is fixed at three thousand five hundred dollars.

As to the power of the attorney general to apply, ex officio, for a mandamus to a judge of a court of the United States, to execute an act of Congress, see *ante,* 75.

In the year 1778, Congress authorised the committee of commerce to recommend, and the president of Congress to appoint, proper persons, in the respective states, to act as attorneys in each state, for recovering all commercial debts due to the United States, and for claiming the continental share in prizes libelled in the state courts of admiralty. 4 Journ. Cong. 64. In 1779, Congress authorised their marine committee to appoint advocates, for the purpose of taking care of and managing the maritime causes in which the United States were, or might be, concerned. 5 Journ. Cong. 415. And in the year 1781, before the articles of confederation were completely ratified, we find Congress recommending it to a state, to direct their attorney general to prosecute United States' officers in the name of the United States, in the ordinary course of law, for abuse of office and breach of trust. 7 Journ. Cong. 11. But soon afterwards, the necessity of an advocate to prosecute on behalf of the union, became so apparent, that Congress employed procurators in the states for that purpose. In January, 1781, Congress appointed Egbert Benson, Esq. a procurator, to prosecute in behalf of Congress for all debts due to or frauds committed against the United States, in the state of New York. 7

-By the same section, it is enacted, that in all the courts of the United States, the parties may plead and manage their own causes personally, or by the assistance of such counsel, or attorney at law, as, by the rules of the said courts respectively, shall be permitted to manage and conduct causes therein.

And there shall be appointed, in each district, a meet person, learned in the law, to act as attorney for the United States in such district, who shall be sworn or affirmed, to the faithful execution of his office, whose duty it shall be to prosecute in such district, all delinquents for crimes or offences cognisable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the Supreme Court, in the district in which that court shall be holden. And he shall receive as a compensation for his services, such fees as shall be taxed therefor in the respective courts before which the suits or prosecutions shall be.(7») In the districts since created in the new states, a district attorney is by the special provisions of the acts of Congress respectively, to be appointed, a person learned in the law, to act as attorney for the United States.(c)

Journ. Cong. 21. Afterwards, when they appointed a superintendant of finance, they authorised him to appoint, by letter of attorney or otherwise such person or persons as he might think proper, to prosecute or defend for him in his official capacity, or on behalf of the United States, in all places where the same might be necessary. Ib. 92. Before the revolution, the crown, under the great seal of the high court of admiralty of England, appointed, at the time of commissioning a judge of the vice admiralty in Pennsylvania, an advocate, register general, and marshal, who took oaths before the governor.

(b) See *post.* Fees.

(c) See *post.* Fees.

CHAPTER XXV,

MARSHAL.

By the 27th section of the act of September 24th, 1789, a marshal shall be appointed in and for each district, for the term of four years, but shall be removable from office at pleasure; whose duty it shall be, to attend the district and circuit courts, when sitting therein, and also the Supreme Court, in the district in which that court shall sit, and to

execute, throughout the district, all lawful precepts directed to him, and issued under the authority of the United States, and he shall have power to command all necessary assistance in the execution of his duty, and to appoint, as there shall be occasion, one or more deputies, who shall be removable from office by the judge of the district court, or the circuit court sitting within the district, at the pleasure of either. And, before he enters on the duties of his office, he shall become bound for the faithful performance of the same, by himself, and by his deputies, before the judge of the district court, to the United States, jointly and severally, with two good and sufficient sureties, inhabitants and freeholders of such district, to be approved by the district judge, in the sum of twenty thousand dollars, and shall take, before said judge, as shall also his deputies, before they enter on the duties of their appointment, the following oath of office.

" I A. B. do solemnly swear, or affirm, that I will faithfully execute all lawful precepts directed to the marshal of the district of under the authority of the

United States, and true returns make, and in all things well and truly, and without malice or partiality, perform the duties of the office of marshal, (or marshal's deputy, as the case may be) of the district of during my

continuance in said office, and take only rny lawful fees. So help me God." The 7th section of the act of 9th June, 1794, enacts,

that so much of the above act, as is, or may be, construed to require the attendance of all the marshals at the Supreme Court, shall be, and the same is hereby repealed: and that the said court shall be attended, during its session, by the marshal of the district only, in which the court shall sit, unless the attendance of the marshals of other districts shall be required by special order of the said court.

If a person is confined by process from an inferior court of the United States, the marshal, by an original writ from the Supreme Court, might be directed to take him into custody, and might confine him, under this writ, in the same gaol, if unable to give baiL(a)

The marshal may be directed by the Supreme Court, to return a writ directed to him, by a certain day, and, in case of default, to shew cause by affidavit.(6) And an attachment lies against him, for non-performance of his official duties.(c) He is bound to serve an attachment issued against a witness for non-attendance in pursuance of a *subpœna,* as it is the process of the court, regularly issuing for the administration of justice.(</)

By the 28th section of the act of September 24th, 1789, in all causes wherein the marshal or his deputy shall be a party, the writs and precepts therein shall be directed to such disinterested persons, as the court, or any justice or judge thereof, may appoint, and the person so appointed is thereby authorised to execute and return the same.(e) And in case of the death of any marshal, his deputy or deputies shall continue in office, unless otherwise specially removed, and shall execute the same, in the name of the deceased, until another marshal shall be appointed and sworn. And the defaults of misfeasances in office of such deputy or deputies, in the mean time, as well as before, shall be adjudged a

breach of the condition of the bond, given as before directed, by the marshal who appointed them. And the executor or administrator of the deceased marshal shall have like remedy, for the defaults and misfeasances in office of such deputy or deputies, during such

(a) Ex parte, Bollrnan *v.* Swartvvout. 4 Cranch, 96,

(b) Oswald *v.* New York. 2 IJall. 402.

(c) See 7 Cranch, 276.

(d) United States r. Burr, 365

(e) See *ante,* 115.

interval as they would be entitled to, if the marshal had continued in life, and in the exercise of his said office, until his successor was appointed and sworn or affirmed. And every marshal or his deputy, when removed from office, or when the term for which the marshal is appointed shall expire, shall have power, notwithstanding, to execute all such precepts, as may be in their hands respectively, at the time of such removal or expiration of office. And the marshal shall be held answerable for the delivery to his successor of all prisoners, which may be in his custody at the time of his removal, or when the term for which he is appointed shall expire, and for that purpose may retain such prisoners in his custody, until his successor shall be appointed, and qualified as the law directs.

By the 1st section of the act of April 10th, 1806, the bond heretofore given, or which may hereafter be given, by the marshal of any district, for the faithful performance of the duties of his office, shall be filed and recorded in the office of the clerk of the district court or circuit court sitting within the district for which such marshal shall have been appointed, and copies thereof, certified by the clerk under the seal of the said court, shall be competent evidence, in any court of justice. By sect. 2, it shall be lawful, incase of the breach of the condition of any such bond, for any person, persons, or body politic thereby injured, to institute a suit upon such bond, in the name and for the sole use of such party, and thereupon, to recover such damages as shall be legally assessed, with costs of suit, for which execution may issue, for such party, in due form; and, in case such party shall fail to recover in the suit, judgment shall be rendered, and execution may issue for costs in favor of the defendant or defendants, against the party who shall have instituted the suit: and the United States shall in no case be liable for the same. By sect. 3, the said bond shall, after any judgment or judgments rendered therein, remain as a security for the benefit of any person, persons, or body politic, injured by the breach of the condition of the same, until the whole penalty shall have been recovered, and the proceedings shall always be in the same manner as herein before directed. By sect. 4, all suits on marshal's bonds, if the right of action has already accrued, shall be commenced and prosecuted within three years after the passage of this act, and

not afterwards; and all such suits in case the right of action shall accrue hereafter, shall be commenced and prosecuted within six years after the said right of action shall have

accrued, and not afterwards. Saving, nevertheless, the rights of infants, feme coverts, and persons *non compos mentis,* so that they sue within three years after their disabilities are removed.

Where the bond is for the marshal's faithful performance, during his continuance in office, his sureties are liable for money received by him under an execution after the giving of the bond, and before he went out of office. But they were held not liable for monies received by him under an execution at the suit of the United States, anterior to the date of the bond, which were retained by him afterwards, though he was directed by the comptroller of the treasury, before receiving them, to pay them into bank to the credit of the treasury of the United States: but the majority of the court who decided this differed in their reasons: two judges holding, that no demand appearing on the record to have been made on the marshal, for the sums, either by rule of court, or otherwise, no conversion was made out: the other two judges holding that the conversion was complete by his not paying them into bank agreeably to the directions of the comptroller of the treasury, and these being given prior to the bond, the defendants were not liable. On the question, whether, on such bond, the sureties were liable for monies received by the marshal after he had been dismissed from office, under an execution levied and executed by him while in office, two of the judges were of opinion they were not liable for the conversion; two thought no conversion appeared, as he was not demanded to pay the same into court: and two were of opinion that the marshal, being authorised to do certain acts after his removal from office, the condition of the bond embraced defaults committed after dismissal from office, as well as before. A payment by the marshal of sums levied under an execution at the suit of the United States, or delivery of bonds, the property of the United States, to the district attorney, by the order of the comptroller of the treasury, is good, and, it seems, is available upon trial, without a previous submission to the accounting officers.(f)

{/) United States *v.* Giles. 9 Cranch, 212.

Payments made by the marshal, on account of money levied for the use of the United States,without directions as to their application, are not to be applied in the way most beneficial for the parties; but the United States have a rifht to apply them, in a mode most beneficial for

them.(^)

On the 23rd September, 1789, Congress resolved, that it be recommended to the legislatures of the several states, to pass laws, making it expressly the duty of the keepers of their jails, to receive and safely keep therein, all prisoners committed under the authority of the United States, until they shall be discharged by due course of the laws thereof, under the like penalties as in the case of prisoners committed under the authority of such states respectively: the United States to pay for the use, and keeping of such jails, at the rate of fifty cents per month, for each prisoner that shall, under their authority, be committed thereto, during the time such prisoner shall be therein confined: and also, to support such of said prisoners as shall be committed for offences.

The act of 15th of May, 1820, sect. 8, declares, that it shall be the duty of the clerks of the district and circuit courts, within thirty days after the adjournment of each successive term of the said courts respectively, to forward to the agent of the treasury, a list of all judgments and decrees which have been entered in the said courts respectively, during such term, to which the United States are parties, showing the amount which has been so adjudged or decreed, for or against the United States, and stating the term to which execution thereon shall be returnable. And it shall, in like manner, be the duty of the marshals of the several judicial districts of the United States, within thirty days before the commencement of the several terms of the said courts, to make returns to the said agent of the proceedings which have taken place upon all writs of execution or other process which have been placed in his hands, for the collection of the money which has been so adjudged and decreed to the United States, in the said courts respectively.

By the 5th section of the act of February 25th, 1799, it shall be lawful for the judge of any district court of the

(g) United States v. Giles. 9 Cranch, 212.

United States, within whose district any contagious or epidemical disease shall, at any time, prevail, so as, in his opinion, to endanger the life or lives of any person or persons confined in the prison of such district, in pursuance of any law of the United States, to direct the marshal to cause the person or persons confined as aforesaid, to be removed to the next adjacent prison, where such disease does not prevail, there to be confined, until he, she, or they may safely be removed back to the place of their first confinement; which removals shall be at the expense of the United Scates.

A resolution of Congress passed the 3d March, T79I, directs, that in case any state shall not have complied with the above recommendation of the 2.3d September, 1789, the marshal in such state, under the direction of the judge of the district, be authorised to hire a convenient place, to serve as a temporary jail, and to make the necessary provision for the safe keeping of prisoners, committed under the authority of the United States, until permanent provision shall be made by law for that purpose; and the said marshal shall be allowed his reasonable expenses incurred for the above purpose, to be paid out of the treasury of the United States. By another resolution of Congress, passed on the 3d March, 1821, where any state or states, having complied with the recommendation of Congress, in the resolution of the 23d of September, 1789, shall have withdrawn, or shall hereafter withdraw, either in whole, or in part, the use of tfieir jails, for prisoners committed under the authority of the United States, the marshal in such state or states, under the direction of the judge of the district, shall be, and hereby is authorised and required, to hire a convenient place to serve as a temporary jail, and to make the necessary provision for the safe keeping of prisoners, committed under the authority of the United States, until permanent provision shall be made by law for that purpose, and the said marshal shall be allowed his reasonable expenses incurred for the above purposes, to be paid out of the treasury of the United States.

Where a state has passed a law, in consequence of the resolution above mentioned, making the keeper liable to pains and penalties, the marshal, under the 28th section of the

act of 1789, is not liable for the escape of a debtor from the state jail, to which he has committed him, under civil

process from a court of the United States. The keeper of the state jail is neither in fact nor in law, the deputy of the marshal. Nor is he under the command or direction of the marshal. The keeper may become responsible, and may expose himself, by misconduct, to the pains and penalties imposed by the law. For certain purposes, and to certain intents, the state jail, lawfully used by the United States, may be deemed to be the jail of the United States, but not so as to make him responsible for escape from it.(/>)

If the state gaol be detrimental to the prisoners health, and inconvenient, the circuit court may order the marshal to prepare a place of custody, and remove a prisoner thereto, who is indicted for treason, and to employ a guard; and, it seems the expense of such guard is a legal charge on the treasury of the United States.(z) But if there be a public jail, not unreasonably distant, nor unfit for the reception of the prisoner, the court, if called upon on the part of the United States, will commit a prisoner to its keeping, provided he be there in the custody, and under the sole conduct of the marshal of the district, and that the marshal shall have authority to admit any person or persons to visit the prisoner, that the marshal may think proper.(&) That is, it seems, where the state has passed a law, permitting to the United States the use of such public goal.(7)

The act of January 6th, 1800, sect 1, enacts that persons imprisoned on process issuing from any court of the United States, as well at the suit of the United States as at the suit of any person or persons in civil actions, shall be entitled to like privileges of the yards or limits of the respective gaols as persons confined in like cases on process from the courts of the respective states are entitled to, and under the like regulations and restrictions.

By the 4th section of the act of 8th May, 1792, the marshal shall have the custody of all vessels and goods seized by any officer of the revenue, and shall be allowed such compensation therefor, as the court may judge reasona-

(h) Randolph v. Donaldson. 9 Cranch, 86.

(i) United States v. Burr. 351, 358, 366.

(fc) Ib. 358.

(I) See the argument. 9 Cranch, 80, as to Virginia.

ble.(m) And there shall be paid to the marshal the amount of the expense for fuel, candles, and other reasonable contingencies, that may accrue in holding the courts within his district, and providing the books necessary to record the proceedings thereof, and such amount, as also the compensation aforesaid, to the grand and petit jurors, to the witnesses summoned on the part of the United States, to the clerk of the Supreme Court for his attendance, to the clerks of the district and circuit courts, for their travelling and attendance, to the attorney of the district for travelling to court, to the marshal for his attendance at court, for summoning grand and petit jurors, and witnesses, in behalf of any

prisoner to be tried for a capital offence, for the maintenance of prisoners confined in gaol for any criminal offence, and for the commitment or discharge of such prisoner, and also the legal fees of the clerk, attorney and marshal, in criminal prosecutions, shall be included in the account of the marshal, and the same having been examined and certified by the court, or one of the judges of it, in which the service shall have been rendered, shall be passed in the usual manner, at, and the amount thereof paid out of the treasury of the United States to the marshal, and by him shall be paid over to the persons entitled to the same; and the marshal shall be allowed two and a-half per cent, on the amount by him to be paid over, to be charged in his future account.(/i)

By the 6th section the fees and compensations to the several officers and persons in the act before mentioned, other than those which are above directed to be paid out of the treasury of the United States, shall be recovered in like manner as the fees of the officers of the states respectively for like services are recovered.

The act of April 16th, 1817, makes particular provisions as to the duties of the marshal, clerk, and district attorney, relative to the proceeds of prizes captured by the public armed ships of the United States, and sold under the order of the proper prize court, by interlocutory or final decree.

(m) But this is altered as to goods, &c. seized by any officer of the revenue, by the collection act. *See ante,* 216.

(n) As to his duties in summoning jurors, See *post.* Chapter XXVI. The act of 28th February, 1799, sect, 2, contains a provision as to swearing his deputies at a distance-

As to money deposited in court, see circuit court practice.

The officers of court who have the custody of property pending process, are responsible for good faith, and reasonable diligence. If the property be lost, or injured, by a negligent or dishonest execution of their trust, they are liable in damages; but they are not, of course, liable, because an embezzlement or theft is proved. They must be affected with culpable negligence, or fraud, and such is the confidence the court places in its officers, that, perhaps, the proof of such negligence or fraud ought to be thrown on the other party. What degree of negligence may be properly required, in trusts of this nature, whether that diligence is required which a prudent man uses about his own affairs, and the omission of which is deemed ordinary negligence, or whether responsibility only attaches to fraud or gross negligence, the *dolus et negligentia dob proximo,* of the civil law, is not determined.(o)

It is a great irregularity in the marshal, in a proceeding *in* rem,.in admiralty, to keep the property, or its proceeds, in his hands, or to undertake to distribute the same among claimants, without the order of the court: but where this was done with honest views, and without notice of a latent claim, and with the assent and ratification of the parties interested, the court would not, after a lapse of time, under the circumstances of the case, hold him responsible for such claim.(jo)

The marshal, or any officer, may have an attachment to compel the payment of fees due to him.(g') And if by an act of assembly of the state, an indorser of the writ is made liable for the fees, the attachment may issue from the circuit court against such indorser, in a case where he is liable.(r)

By the 9th section of the act of 28th February, 1795, the marshals of the several districts, and their deputies, shall have the same powers in executing the laws of the United States, as sheriffs, and their deputies, in the several states, have by law, in executing the laws of the several states.

(o) Burke *v.* Trevitt. Mason, 100. *(p)* Anon. 2 Gall. 101. *(q)* The Collector. 6 Wheat. 194. (r) Anon. 2 Gall. 101.

The act of 28th February, 1799, sect. 7, provides, that the respective courts of the United States, shall appoint cryers for their courts, to be allowed the sum of two dollars per day. And authorises the marshal to appoint such a number of persons, not exceeding three, as the judges of their respective courts shall determine, to attend upon the grand and other jurors, and for other necessary purposes, who shall be allowed for their services the sum of two dollars per day, to be paid by, and included in, the accounts of the marshal, out of any money of the United States in his hands.

In judicial sales by the marshal, there can be no warranty express or implied, that can bind any one, in relation to the proceeds of the property sold. The marshal is personally responsible, if he steps out of his official authority and makes a warranty.(*)

(*) The Monte Allegro. 9 Wheat. 645.

CHAPTER XXVI.

PROCEEDINGS IN CRIMINAL CASES.

BY the 4th article of the amendments to the constitution, the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated: and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Commitment and Bail.

By the 33d section of the act of September 24th, 1789, for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace or other magistrate of any of the United States where he may be found,(a) agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, and imprisoned, or bailed, as the case may be, for trial before such court of the United States, as, by this act, has cognisance of the offence. And copies of the process shall be returned, as speedily as may be, into the clerk's office of such court, together with the recognisances of the witnesses for their

appearance to testify in the case: which recognisances the magistrate before whom the examination shall be, may require, on pain of imprisonment. And if such commitment of the offender or the witnesses shall be in a district other than that in which the offence is to be tried*, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a

(«) *See post.* Jurisdiction of State Courts and Magistrafps.

warrant for the removal of the offender and the witnesses, or either of them, as the case may be, to the district where the trial is to be had. And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the Supreme Court, or a judge of the district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and usages of law. And if a person committed by a justice of the Supreme, or a judge of the district court, for an offence not punishable with death, shall afterwards procure bail, and there be no judge of the United States in the district to take the same, it may be taken by any judge of the supreme or superior court of law in such state. By the 14th section of the act of March 2d, 1793, bail for appearance in any court of the United States, in any criminal cause in which bail is by law allowed, may be taken by any judge of the United States, any chancellor, judge of a supreme or superior court, or chief or first judge of a court of common pleas of any state, or mayor of a city, in either of them, and by any person having authority from a circuit court, or the district courts of Maine and Kentucky,(6) to take bail, which authority, revocable at the discretion of such court, any circuit court, or either of the district courts of Maine or Kentucky, may give to one or more discreet persons learned in the law, in any district for which such court is holden, where, from the extent of the district and remoteness of its parts from the usual residence of any of the before named officers, such provision shall, in the opinion of the court, be necessary. *Provided,* that nothing herein shall be construed to extend to taking bail in any case where the punishment for the

(J) These courts are since altered. See *ante,* 37, 38. 97. 185., and Territorial Courts. By the 3d section of the act of March 2d, 1793, the district courts of Maine and Kentucky, shall have like power to hold special sessions, for the trial of criminal cases, as hath been heretofore given, or is hereby given, to the circuit courts, subject to the like regulations. *See ante,* 131, 132.

By the 12th section of the act of 24th September, 1789, removals were authorised from state courts, to the next district courts of Maine and Kentucky, under the same regulations as to circuit courts. See *ante,* 123, 126.

offence may be death; nor to abridge any power heretofore given by the laws of the United States to any description of persons to take bail.

Although the act of September 24th, 1789, does not expressly invest the *courts* of the United States, sitting as courts, with the power to commit a person charged with an offence against the United States, yet this power is implied in the duties which the courts must perform. And the court may also take bail in such case.(c)

To warrant a commitment, that proof would not be required which would be necessary to convict the person on a trial in chief; but the committing magistrate would require, that probable cause should be shewn. Probable cause is a case made out by proof, furnishing good reason to believe, that the crime alleged has been committed by the person charged. When such probable cause is shewn, it can be done away only by its appearing that no such crime has been committed, or that the suspicion entertained of the prisoner is wholly groundless.(rf) If on a charge of treason, a suspicion has been created by the proof, that a military force has been embodied, yet it is done away, if the government has had it in its power, and had time to produce proof of that fact, and does not produce such proof, and no reason is given for the non-production.^)

A magistrate or court may commit upon affidavits made before another magistrate; inasmuch as, before the accused is put on his trial, all the proceedings are *ex parte.(f)* Still such affidavit, taken *ex parte,* will always be viewed with some suspicion, and acted upon with some caution. If it were obvious, that the attendance of the witness was easily attainable, but that he was intentionally kept out of the way, it seems, it would not be sufficient.^) There is a difference between the strictness of law, in relation to proof applicable to a trial in chief, and that which is applicable to a motion to commit for trial; but there is some limit to the relaxation; and it will not

(c) United States v. Burr. Trial, 80.

(d) Ib.

(e) Ex parte, Bollman v. Swartwout. 4 Cranch, 128. (f) United States *v.* Burr, 97.

fe)Tb. 16, 17.

be extended so far, as to admit a paper purporting to be an affidavit, which is not shewn to be one. It must be an absolute oath: not a probable one. The oath must be a legal oath; and must legally appear to the court to be *so.(fi)*

On the question whether that part of an affidavit which purports to be as nearly the substance of a letter from the accused to the witness as the latter could interpret it, where the letter is not produced, but the witness is at too great a distance to admit of its being obtained, is good evidence on a question of commitment for treason, the Supreme Court was equally divided in opinion.(e)

A warrant of commitment is illegal, which does not state some good cause certain, supported by oath. And if such commitment was in the first instance by justices, and on a *habeas corpus* before the circuit court there was a hearing, in which that court remanded the prisoner, yet if it appear that they acted entirely on the proceedings before the justices, and did not proceed *de novo,* nor correct the error, the Supreme Court, on a second *habeas corpus,* will discharge the party: and if there be really a good cause of commitment, the justices may proceed *de novo,* taking care that their proceedings are regular.(&)

A refusal by the magistrates, for want of probable cause, to commit for treason, does not detract any thing from the right of the United States attorney to prefer an indictment for treason, should he be furnished with the necessary evidence.(7) Nor is it a reason why the court should not commit, that a grand jury is sitting, competent to receive and determine a bill of indictment on the charge, where the evidence justifies a commitment. The commitment is not made for the sole purpose of bringing the accused before a grand jury; it is to subject him personally to the judgment of the court, to which the grand jury is only the first step.(m) And if the attorney of the United States were about to send up a bill to the grand jury, he might move that the person he designed to accuse

(h) United States v. Burr, 99.

(i) Ex parte, Bollman and Swartwout. 4 Cranch, 130. See Records and Laws, *post.*

(k) Ex parte, Burford. 3 Cranch, 447. *(I)* United States *v.* Burr, 18. (TO) Ib. 80.

should be ordered into custody, and it would be in the discretion of the court to grant or reject the motipn.(n)

Although a motion has been made to commit a person for treaso'n, and on a hearing the judge rejected the application, because the testimony against him was not sufficient, yet another motion may be made at a future day to commit the person on the charge, if new evidence be obtained.^)

On a motion to commit for treason no evidence of a treasonable intent will be received, till the fact of treason having been committed is first proved,(ja) but it is otherwise on the trial of an indictment for treason.(^r)

The 34th section of the act of 1789, prescribing, 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, does not, it seems, refer to criminal proceedings. The laws of the several states are not to be regarded as rules of decision on trials for offences against the United States. The words " trials at common law" apply to civil suits as contradistinguished from criminal prosecutions, as well as to suits at common law as contradistinguished from those which come before the court sitting as a court of equity or admiralty. At any rate it is certain, that this section does not apply to original process in criminal cases, for commitment of a person, against whom a bill of indictment is found in a court of the United States. That case is provided for by the 14th section of the act of 1789, authorising the courts to issue writs necessary for the exercise of their respective jurisdiction. As therefore the 33d section of the act of 1789, provides for an arrest in the first instance, a *capias* or bench warrant may issue from the court, to arrest a person against whom a bill of indictment is found for libel or misdemeanor, that he may be committed, or held to bail, though by the law of the state, a summons issues in such cases in the first instance. If already in

(n) United Stalest). Burr, 81.

(o) Ib.

(*p)* United States *v.* Burr. Trial, 96.

(3) Ib. 469. See post.

custody, an order of the court may be made in lieu of it.(r) It seems after indictment found by the grand jury for treason, the court will not bail the party indicted.(Y) And the circumstances must be very strong which will at any time induce the court to admit a person to bail who stands charged with treason.(Y) If the trial of a prisoner, indicted for treason, be postponed on his motion, to give him time to send for witnesses, and the case cannot afterwards be tried, owing to want of time in the court, it is not a reason for admitting him to bail, although the day before the adjournment he intimated his design to proceed to trial.(w)

Query, how far a court or magistrate has power to demand security for a further hearing, where there is not some evidence of probable cause.(w)

It seems bail ought to be required wherever imprisonment is part of the punishment.(;r)

As to the place at which the accused is to be committed for trial, the constitution, art. iii. sect. 2, 3, provides, that the trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crimes shall have been committed; but, when not committed within any state, the trial shall be at such place or places as Congress may by law have directed. And by art. vi. of the amendments, in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. By the 29th section of the act of September 24th, 1789, in cases punishable with death, the trial si all be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence. By the 33d section of the same act, (before stated) offenders are to be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by that act has cognisance of the offence; and copies

(r) United States *v.* Burr, 185, 117. *(s)* Ib. 312.

(t) United States *v.* Stewart. 2 Dall. 345. See United States *v.* Hamilton. 3 Dall. 17.

(w) United States o. Stewart. 2 Dall. 344.

(«) United States *v.* Burr, 165.

(x) United States v. Burr, 2 vol. 473.

of the process shall be returned, as speedily as may be, into the clerk's office of such court, together with the recognisances of the witnesses for their appearance to testify in the case, and if such commitment of the offender or the witnesses shall be in a district

other than that in which the offence is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender, and the witnesses or either of them, as the case may be, to the district in which the trial is to be had. The 8th section of the act of 30th April, 1790, inflicts a punishment on any person or persons who shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder, robbery, &c. and provides that the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he -may first be brought. In some other acts of Congress the place of trial of specified crimes is designated, as piracy, &c.

On these acts it has been decided, that the 8th section of the act of 30th April, 1790, applies only to offences committed on the high seas, or in any river, basin, or bay, not within the jurisdiction of any particular state. In those cases there is no court which has particular cognisance of the crime, and, therefore, the place in which the criminal shall be apprehended, or, if he be apprehended where no court has exclusive jurisdiction, that to which he shall be first brought, is substituted for the place in which the offence was committed, and has jurisdiction. But if a tribunal for the trial of the offence, wherever it may have been committed, has been provided by Congress, and at the place where the prisoners were seized there existed such a tribunal, such tribunal has jurisdiction, and the accused cannot be transported to a different district for trial. The word " apprehended" is not confined in its meaning to a seizure by the civil magistrate; it embraces a military seizure: and in neither case is there any right in the person seizing to select the place of trial, and direct them to be carried there. Therefore, where prisoners were first apprehended in the territory of Orleans, on a charge of treason committed in that territory, or its neighbourhood,

by an armed force under the orders of the commander in chief of the army of the United States, and transported to the District of Columbia for trial, it not being alleged that any offence was committed in the District of Columbia, it was held, that the circuit court of the District of Columbia had not jurisdiction.^) And it is not in the power of a circuit court of a district composed of a state, to commit for trial in a territory of the United States.(z)

If a man have committed a crime in one district of the United States, and be found in another, he may, under the act of Congress, be arrested in the latter, and sent to the former. But if there be a prosecution pending against him in the United States court in the district where he is arrested, he cannot be committed in order that he may be sent to that in which the crime is alleged to have taken place, either during the sitting of the court or in vacation, unless the indictment pending is previously abandoned by the attorney of the United States. The court is bound to try the indictment pending, and cannot divest itself of the indispensable obligation to try it. It will not in such case hear the motion to commit, because, if it commits it has not power to suspend the removal: the law directs the court to be specified before which the accused is to be tried; he is committed to be tried before such court: he is therefore bound over to appear at first to that court and must

be tried by it. The court therefore must exercise its own jurisdiction first, and when this duty is performed, and the accused is released by an acquittal, or a dismission of the prosecution, then he can be sent to another district.(a) Where, therefore, separate indictments had been found in the circuit court of the United States of the district of Virginia, against the defendant, for treason, and for misdemeanor, in fitting out an illegal expedition, after acquittal on the indictment for treason, the court refused to determine on the propriety of a motion made by the attorney of the United States, to commit the defendant to be tried for treason committed in another district,

(y) Ex parte Bollmanu. Swartwout. 4 Cranch, 135. (z) United States v. Burr. Append. 2d part, 211. (V) UnUed States v. Burr. Vol 2, 451, 452. 455. 487. 489. 492. 399,, 501.

until the indictment for misdemeanor, still pending, was disposed of.(£)

Sureties of Peace.

By the first section of the act of 16th July, 1798, the judges of the Supreme Court, and of the several district courts of the United States, and all judges and justices of the courts of the several states having authority, by the laws of the United States, to take cognisance of offences against the constitution and laws thereof, shall, respectively, have the like power and authority to hold to security of the peace, and good behaviour, in cases arising under the constitution and laws of the United States, as may or can be lawfully exercised by any judge or justice of the peace of the respective states, in cases cognisable before them.(c)

Juries.

By the 29th section of the act of September 24th, 1789, in cases punishable with death, the trial shall be had in the county where the offence was committed, or, where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence.

The act of the 30th April, 1790, provides, that if any person or persons be indicted of treason against the United States, and shall stand mute or refuse to plead, or shall challenge peremptorily above the number of thirty-five of the jury, or if any person or persons be indicted of any other of the offences *herein before set forth,* for which the punishment is declared to be death, if he or they shall also stand mute or will not answer to the indictment, or challenge peremptorily above the number of twenty persons of the jury, the court, in any of the cases aforesaid, shall notwithstanding proceed to the trial of the persons so standing mute or challenging, as if he or they had pleaded not guilty, and render judgment thereon accordingly. The

(V) United States o. Burr. Ib.

(c) See *post.* Jurisdiction of State Courts and Magistrates, and Constitution, art. 1. sect. 8. 3. Art. iii. sect. 1. *I.post.*

defendant indicted under the act of 30th April, 1810, sect. 19, for putting the life of the mail carrier in jeopardy by the use of dangerous weapons, in effecting the robbery of the mail, on being arraigned stood mute. And it was contended that they were not embraced by this act of Congress, the offence not being treason, nor one of the offences previously mentioned in the act of 30th April, 1790. But the court decided that the trial should proceed as if the prisoners had pleaded not guilty.(rf)

The acts of 24th September, 1789, sect. 29, February 28th, 1799, sect. 6. May 13th, 1800, sect. 1. April 29th, 1802, and 20th May, 1826, make other provisions as to juries in civil and criminal cases.(e)

The words of reference in the act of September 24th, 1789, sect. 29, to the laws of the state were held to be restricted to the mode of designating the jury by lot or otherwise, and to the qualifications requisite for jurors, but not to relate to the number of jurors. The number, therefore, not being fixed by the act of Congress, nor any state rule adopted by it, it must depend on the common law, by which the court may direct any number to be summoned, on a consideration of all the circumstances under which the *venire* is issued. As the precept for the petit jury in these cases, which were charges of treason, directed the marshal to return at least forty-eight, he was held to have a discretion as to the number beyond that, (there being no other order of the court,) and that the number of seventy-two jurors summoned in each case was not excessive. It seems, also, that the most proper and legal mode of proceeding is, to issue a *venire* in each case, and then there must of course be a separate panel returned, in conformity to every writ. And where the marshal to each *venire* returned sixty jurors from the counties in and near the place of holding the court, and twelve from the county in which the treason was charged to have been committed, it was held good.(f) In a subsequent case in Pennsylvania a *venire* tested the 11th October, 1798, and returnable the 11th April, 1799, had issued, by which, the marshal was commanded to summon " not less than forty-eight,

(<J) United States v. Hare. Cir. Co, Maryland Dist. May 1818. Pampht

(e) Ante, 165, 166.

(f) United States *v.* Insurgents. 2 Ball. 335.

and not exceeding sixty, to serve as petit jurors." The marshal returned sixty jurors from the city and county of Philadelphia, and on a separate paper seventeen jurors from Northampton county, (the place where the treason was alleged to have been committed,) and twelve from Bucks county. No *venire* had issued for the two latter returns, nor did any special award appear on the record, and the jurors that tried the prisoner were from all the three counties. The district judge had verbally ordered the return of the additional jurors. IREDELL, J. gave no opinion, but thought the objection to the panel by the prisoner's counsel, that the proceedings were not according to the act of Congress, was not insurmountable. PETERS J.

thought the proceedings correct.(*g)*

In a later case, it seems to have been held, that where a state law has fixed the number of grand jurors, the circuit court of the United States is governed by such law as to the number. No more can be summoned by the marshal, and the deficiencies of the panel can be supplied only from the bystanders. If a person is regularly put on the panel of the grand jury and summoned, he stands there, and cannot be displaced by the marshal. The marshal cannot substitute another in his stead. If he substitute another, such other cannot be considered as being on the panel, and the first may come into court, and on proving that he was actually summoned, would be entitled to be on the grand jury.(h) A person under recognisance on a criminal charge, may, before the grand jury is sworn, to whom a bill of indictment is to be sent, except to an irregularity in summoning part of the panel of the grand

Jury.(i)

It seems, that the part of this act which requires twelve

jurors to be summoned from the county where the offence was committed, is in force, notwithstanding the adoption, after the passage of this act, of the 6th amendment of the constitution requiring the trial of the accused to be

(g) United States *v.* Fries. 3 Dall. 515.

(h) United States *v.* Burr. Trial, 37. See a decision of TALLMABGB D. J. on this subject, referred to, 3 Hall's Law Journ. 121. It is believed, that it was afterwards overruled by VAN NESS D. J.

(i) United States v. Burr. 37.

before an impartial jury of the state and district where the crime was committed; for they are not incompatible.(k)

If only four jurors are obtained from the original panel of forty-eight, in consequence of challenges by the defendant for favour, an additional panel of forty-eight may be awarded by the court.(l)

By the 29th section of the act of 30th April, 1790, if any person or persons be indicted of treason against the United States, and shall stand mute, or refuse to plead, or shall challenge peremptorily above the number of thirty-five of the jury; or if any person or persons be indicted of any other of the offences herein before set forth for which the punishment is declared to be death, if he or they shall also stand mute, or will not answer to the indictment, or challenge peremptorily above the number of twenty persons of the jury, the court, in any of the cases aforesaid, shall, notwithstanding, proceed to the trial of the person or persons so standing mute, or challenging, as if he or they had pleaded not guilty, and render judgment thereon accordingly. In murder, and other crimes (except treason) set forth in this act, the prisoner can challenge only twenty: but in offences created since that act, where the penalty is death, the prisoner is entitled to challenge thirty-five, as at common law. The words, " herein before set forth," confine the provision to the offences described in that act.(m)

Under the provisions of the constitution, and of the common law, requiring an impartial jury in criminal cases, those who have deliberately formed and delivered an opinion, that the party is guilty of the crime charged against him, are disqualified to serve as jurors. Having formed an opinion of any fact conducive to the final decision of the case, would not disqualify. But if the opinion formed be on a point so essential, as to go far towards a decision of the whole case, and to have a real influence on the verdict, it seems, it would disqualify. Thus, on a charge of treason, it seems, it would riot be a sufficient objection to a juror that he did believe, and had said, that the prisoner, at a time considerably anterior to the fact charged in the in-

(fc) United States v. Burr. Trial, 353.

(I) United States *v.* Burr. Trial, 354. 382. 420, 421

(m) United States *v.* Johns. 4 Dall. 414.

dictraent, entertained .treasonable designs against the United States'. But if he had made up and declared the opinion that to the time when the fact laid in the indictment is said to have been committed, the prisoner was prosecuting the treasonable design with which he is charged, it is a sufficient cause of challenge. So, in homicide, whether the fact of killing is admitted or is doubtful, if a juror should have made up and delivered an opinion, that though uninformed as to the fact of killing, he was confident in the malice, he was confident that the prisoner had deliberately formed the intention of murdering the deceased, and was prosecuting that intention up to the time of his death, it seems it would be a sufficient cause of challenge. So, on the charge of passing counterfeit bank notes, knowing them to be counterfeit, if the juror had declared, that though uncertain as to the fact of passing the notes, he was confident the prisoner knew them to be counterfeit, it would be a sufficient objection.(w) Where, however, the the character charged, and the circumstances, are so universally notorious that it is obviously and totally impossible to obtain a jury, whose minds are not already made up, perhaps the rule may be relaxed, so far as necessity requires. But, if this necessity does not exist, the rule will be adhered to.(o) These cases, it is to be observed, suppose the opinion formed from reports and newspaper publications: whether an opinion formed by a juror on his own knowledge, is good cause of challenge, *query.(p)*

It is no objection to the petit jury who have tried a capital case, that the *venire* was issued and served before the bill of indictment was found by the grand jury.^)

Grand jurors as well as petit jurors may be challenged for favour;(>) and in Burr's case the court established the following as the proper questions to be put to jurors: first, have you made up your mind on the case, or on the guilt or innocence of the accused, from the statements you have seen in the papers or otherwise; and finally, have

(n) United States *v.* Burr. 416,417, 418. (o) Ib. 419.

(p) Ib. 419. Sec also Mima and child *v.* Hepburn. 7 Cranch, 290. *Ante.*

(q) United States *v.* Cornell. 2 Mason, 102. *(r)* United States *v.* Burr. 38.

you formed and expressed, (or delivered,) an opinion on the guilt or innocence of the accused.(s)

A new trial was granted in treason, because, one of the jurors had declared previously to the trial, that" he was not safe at home for these people, (meaning the insurgents,) that they ought to be all hung, and particularly, that the defendant must be hung."(f)

If a trial has been had by a jury duly sworn and impanelled, in a capital cause, *query,* whether it is a reason for granting a new trial, that a juror had been set aside by the court for an insufficient cause.(w)

On the question, whether the juror himself could be a witness as to the declarations made by him, the court thought, he could not be compelled to give evidence, but might be admitted as a witness at his t>wn request.(#)

The United States, on a trial for treason, may challenge for cause.(«/)

If, on the whole panel being drawn out, there are not twelve unchallenged, if the defendant retract his challenge of a juror, previously made, such juror may serve on the trial.(z)

Though jurors are not challenged, yet if on being called to be sworn in a capital case, they appear to be Quakers, and except to themselves as disqualified because they are conscientiously scrupulous of taking life, and do not think themselves impartial in a capital cause, the court may set them aside on such statement, where they have no doubt of their perfect veracity, though not sworn or affirmed to the truth thereof.(a)

On the indictment of Fries, for high treason, in the circuit court for the district of Pennsylvania, the trial continued fifteen days, and although the court adjourned from time to time, the jury were kept together at a tavern, during the adjournments. They were once permitted to ride

*) United States v. Burr. Trial, 43.

f) United States v. Fries. 3 Ball. 515.

'«) United States *v.* Cornell. 2 Mason, 106.

x) United States c. Fries. 3 Call. 515.

y) United States *v.* Burr. 424, 425.

z) United States o. Porter. 3 Dall. 345.

a) United States *v.* Cornell. 2 Mason, 104.

out under the charge of an officer, and within the jurisdiction of the court.(£)

By the 6th article of the amendments to the constitution in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of tho accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the assistance of counsel for his defence.

The 28th section of the act of 30th April, 1790, provides, that any person who shall be accused and indicted of treason, shall have a copy of the indictment, and a list of the jury, and witnesses to be produced on the trial for proving the said indictment, mentioning the names and places of abode of such witnesses and jurors, delivered unto him, at least, three entire days before he shall be tried for the same, and in other capital offences, shall have such copy of the indictment, and list of the jury, two entire days, at least, before the trial.

As the caption and indictment form but one instrument, copies of both should be delivered to the prisoner, under the provisions of this section. The township in which the jurors and witnesses reside, as well as the county and state, should be specified: but the act of Congress does not require a specification of their occupations, and, therefore, it is not necessary.(c)

A reasonable time will be allowed by the court, after a list of the names of the witnesses is furnished to the prisoners, for the purpose of bringing testimony from the county in which those witnesses live, though it exceed the three days mentioned in the above section.(rf)

By the same section, every person so accused and indicted for any of the crimes aforesaid, shall also be allowed and admitted, to make his full defence by counsel learned in the law, and the court, before whom such person shall be tried, or some judge thereof, shall, and they are hereby

(6) 3 Dall. 515, *note.*

(c) United States *v.* Insurgents. 2 Dall. 335.

(d) United States », Stewart. 2 Dall. 243.

authorised and required, immediately upon his request, to assign to such person such counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours: and every such person or persons, accused or indicted of the crimes aforesaid, shall be allowed and admitted, in his said defence, to make any proof, that ho or they can produce by lawful witness or witnesses, and shall have the like process of the court, where he or they shall be tried, to compel his or their witnesses to

appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them.

Though this act applies only to capital cases, yet persons charged with offences not capital, have a constitutional and legal right to examine their testimony, and this act is to be considered as declaratory of the common law, in cases where this constitutional right exists. The word, *or,* is to be taken disjunctively, and any person, charged with a crime in the courts of the United States, has a right before as well as after indictment, to the process of the court, to compel the attendance of his Avitnesses*;* and the *subpœna* in such case is to be returnable at the term when the indictment is to be tried.(e)

Query, whether an attachment is the proper process, to compel the attendance of witnesses, or a process to punish.(f)

In relation to persons imprisoned in consequence of not giving security to attend as witnesses on behalf of the United States, the act of 20th May, 1826, provides for their compensation by enacting, that the marshals for the several districts and territories, be authorised to pay such persons as may have been, or hereafter shall be, imprisoned on account of inability to give security in a recognisance for their attendance as witnesses on behalf of the United States, the same sum for each day's imprisonment as is provided by law for witnesses actually attending the court under process, the said allowance to be fixed and certified by the proper judge, as in the case of jurors.

By the 5th section of the act of May 8th, 1792, in every prosecution for any fine or forfeiture, incurred under any

(e) United States c. Burr. Trial, 180.

(f) United States u. Ogden and Smith. See *ante,* 159.

statutes of the United States, if judgment is rendered ao-ainst the defendant, he shall be subject to the payment of costs. And on every conviction, for any other offence not capital, the court may, in their discretion, award that the defendant shall pay the costs of prosecution.(g)

Military Expeditions.

By the act of April 20th, 1818, sect. 6, if any person shall, within the territory or jurisdiction of the United States, begin, or set on foot, or provide or prepare the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince, or state, or of any colony, district, or people, with whom the United States are at peace, every person, so offending, shall be deemed guilty of a high misdemeanor, and shall be fined, not exceeding three thousand dollars, and imprisoned, not more than three years. This act repeals the act of 5th June, 1794, the 5th section of which

is similar to this section, except that it does not contain the words, " or of any colony, district, or people."(/0

Under this act, the crime consists, not in intention, but in acts. The act of Congress does not extend to the secret design, if not carried into open deed, nor to any conspiracy, however extensive, if it do not amount to a beginning, or setting on foot, a military expedition. The issue, on an indictment containing no charge of conspiracy, is, whether the particular facts charged were committed.(i)

It seems, a single individual may commit the crime forbidden by this act.(k)

In misdemeanors punishable by statute, describing, as the sole offender, the person who commits the prohibited act, the principal is within the act, the accessary is not. One, therefore, who counsels or procures the acts mentioned in this law, is not indictable as committing the acts; nor, on an indictment so charging him, can the acts

(g) *Ante,* 222.

(h) See Ex parte, Bollman v. Swartwout. 4 Cranch, 136. See Commitment and Bail, *ante,* 252.

(i) United States *v.* Burr, Trial. Append. 2d part, 191. (k) Ib.

of the principal be given,in evidence, except to show the character and object of the expedition.(l)

Where the defendant was indicted for beginning a military expedition in the county of Wood, in the state and district of Virginia, to be carried on from thence against the dominions of a foreign prince at peace with the United States, and for there setting on foot a military enterprise, it was held,

1. That on such indictment, the declarations of third persons, not forming a part of the transactions, and not made in the presence of the accused, cannot be received in evidence.

2. That any legal testimony, shewing the character and objects of the expedition, as, for instance, respecting the arms and provisions, no matter by whom purchased, the conduct of the parties concerned or their public declarations, or marching against the foreign territory, any manifesto to this effect, or agreement among themselves for such expedition, are evidence.

3. The acts of accomplices, except so far as they prove the character and objects of the expedition, are not evidence. The accomplice is responsible himself; and he who procures or advises the act is an accessary, and he is not punishable as a principal, under the act.

4. The acts of the accused in a different district, constituting in themselves substantive cause for a prosecution, cannot be given in evidence, unless they go directly to prove the charges laid in the indictment. Providing means in Kentucky, was, therefore, held not evidence on this indictment: though the declarations of the defendant in Kentucky, that he had provided means in Wood county, would be.

5. Orders given in Kentucky, by the defendant, and means provided in consequence thereof in Virginia, are evidence on this indictment; if those orders were given to

(Z) United States o. Burr. Trial. Append. 2d part, 191.

persons not accomplices, and not guilty, under the act, themselves; but if they are accomplices, it is otherwise.^)

Perjury.

By the 18th section of the act of April 30th, 1790, if any person shall wilfully and corruptly commit perjury, or shall by any means, procure any person to commit wilful and corrupt perjury, on his or her oath or affirmation, in any suit, controversy, matter, or cause depending in any of the courts of the United States, or in any deposition taken pursuant to the laws of the United States, every person, so offending, and being thereof convicted, shall be imprisoned, not exceeding three years, and fined, not exceeding eight hundred dollars, and shall stand in the pillory for one hour, and be thereafter rendered incapable of giving testimony in any of the courts of the United States, until such time as the judgment so given against the said offender shall be reversed.

An indictment, charging the perjury to have been committed on the hearing of a certain complaint against A. B. and others, for piracy," depending before the Hon. J. D. Ihen, and ever since, being judge of the district court of the United States, for the district of Massachusetts, and a magistrate of the United States," is not good under this act. The act applies only to suits, &c, depending in *court,* and that should be stated. Nor would a charge of perjury in a deposition, be good, unless it was stated in the indictment, that it was taken pursuant to the

laws of the United States. The word deposition means written testimony, and cannot be construed to include a verbal oath.(w)

Larceny.

By the 16th section of the act of 30th April, 1790, if any person, within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take and carry away, with an intent to

(m) United States v. Burr. Trial. Append. 2d part, 189. (n) United States v. Clark. 1 Gall. 497. But see now the act of 3d March, 1825, sect. 5.

steal or purloin, the personal goods of another, or if any person or persons, having at any time hereafter the charge or custody of any arms, ordnance, munition, shot, powder, or habiliments of war belonging to the United States, or of any victuals provided for the victualling of any soldiers, gunners, mariners, or pioneers, shall, for any lucre or gain, or wittingly, advisedly, and of purpose to hinder or impede the service of the United States, embezzle, purloin, or convey away any of the said arms, ordnance, munition, shot, or powder, habiliments of war, or victuals, then, and in every of the cases aforesaid, the person or persons so offending, their counsellors, aiders,, and abettors, (knowing of and privy to the offences aforesaid,) shall, on conviction, be fined, not exceeding the fourfold value of the property so stolen, embezzled, or purloined: the one moiety to be paid to the owner of the goods, or the United States, as the case may be, and the other moiety to the informer and prosecutor, and be publicly whipped not exceeding thirty-nine stripes.

It is not larceny, punishable under this act, if committed on board an American vessel lying in an enclosed dock, in a foreign country, not being on the high seas.(o)

(o) United States v. Hamilton. Mason, 152. But see now the act of 3d March, 1825, sect. 13.

CHAPTER XXVII.

UNITED STATES COURTS — COMMON LAW JURISDICTION.

How far the courts of the United States can exercise criminal jurisdiction, over offences at the common law, not declared such nor made punishable, by any act of Congress, is a question on which a contrariety of opinion is to be found. It arose at an early period after the adoption of the constitution. In the year 1793, Gideon Henfield, a citizen of the United States, was arrested for engaging at Charleston, in the service of the French Republic, and afterwards committing hostilities in a French vessel, on the high seas, against the enemies of France, with whom the United States were at peace, and had

treaties; there being, then, no act of Congress forbidding such acts. The attorney general of the United States, (E. Randolph,) on the application of the secretary of state, gave an opinion, that Henfield was punishable, because treaties were the supreme law of the land, and by treaties with three of the powers at war with France, it was stipulated, that there should be a peace between their subjects and the citizens of the United States: and that he was indictable at the common law, because his conduct came within the description of disturbing the peace of the United States. Henfield was afterwards indicted, and tried at Philadelphia, but was acquitted.(a)

(a) 1 Wait's State Papers, 85, 86. 143. See 2 Ball. 391, 392, arg. 5 Marsh. Life of Washington, 434, 435. The charges to the grand juries delivered by JAY, C. J. and WILSON, J., tho former at Richmond in May, 1793, and tho latter at Philadelphia in July, 1793, are to the same effect, as the above mentioned opinion. They are contained in The Philadelphia Daily Advertiser, of the year 1793. Congress, by the acts of 5th June, 1794, and 14th June, 1797, made provision for cases of a similar description.

An indictment in the circuit court against the defendant, (a consul from Genoa,) for sending anonymous and threatening letters to the British minister, and other individuals, with a view to extort money, was sustained, in the year 1794, on the ground of its being an offence at common law.(6) In the year 1798, a defendant was convicted in the circuit court, of attempting to bribe the commissioner of the revenue, an officer under the treasury department of the United States, to give him a contract for building a light house, which was to be erected under a law of the United States, and, on a motion in arrest of judgment, the court were divided in opinion. CHASE, J. held, that the indictment was not sustainable, as Congress had not defined the offence, nor prescribed a punishment, and that no common law authority was vested in the courts of the United States, as to crimes and punishments. PETERS, D. J. held, that the courts of the United States were constitutionally possessed of a common law power to punish misdemeanors, and that the indictment was good. Sentence of fine and imprisonment was passed on the defendant by the court. The question was not carried up to the Supreme Court, there being then no law that provided for its being done by certificate, where the opinions of the judges were opposed, and the prisoner's counsel declining to remove the case by consent.(c)

In the case of Isaac Williams, an American citizen, who was indicted in Connecticut, in the year 1799, in the circuit court, for accepting a commission from the French Republic, in Guadaloupe, to cruize against the British, and also for capturing a British vessel, contrary to the 21st article of the treaty with Great Britain, the defendant set up as a defence, a naturalization by the laws of France in 1792, and a residence there from that time, during part of which he was in public service in the French navy, ELLSWORTH, C. J. declared, that the common law of this country remains the same as it was before the revolution; that the defendant could not dissolve the compact which bound him to allegiance, without the default or consent of the community: neither of which appeared; and

(b) United States *v.* Ravara 2 Dall. 297. JAY, C. J. and PETSBS, D. J.

(c) United States v. Worrall. 2 Dall. 384.

that the evidence was irrelevant, and ought not to go to the jury LAW, D. J. *dubitante,* and the defendant was convicted and sentenced to fine and imprisonment on both indictments.(d)

This jurisdiction was not asserted in any case afterwards for several years. In the year 1812, it was adjudged, by a majority of the Supreme Court, that before criminal jurisdiction can be exercised, Congress must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence. It was, therefore, held, that an indictment at common law, could not be supported in the circuit court, for a libel on the president and Congress of the United States.(e) But it would seem from a subsequent case, in the year 1816, that the point is not settled by this decision. For where the defendant was indicted in the circuit court, for forcibly rescuing a prize, that had been captured during the war, by two American privateers, and the question was, whether the circuit court had jurisdiction over common law offences against the United States, on which question the judges of the circuit court were divided,(f) although one of the justices, (JOHNSON,) stated, that he considered the question settled by the foregoing case, the other justices present seem not to have so considered it, and it was stated, that a difference of opinion existed among the members of the court, on the point; but, the attorney general, declining to argue it, the court certified in conformity with the decision in the United States *v.* Goodwin.(g-)

(d) 4 Hall's Law Journ. 361. See tho act of 14th June, 1797, *and post.*

(e) United States v. Hudson and Goodwin. 7 Cranch, 32. See United States c, Passmore. 4 Ball. 374.

(f) See the reasons of STORY, J. at large in favour of the jurisdiction. United States v. Coolidge. 1 Gall. 488, 502.

(g) United States *v.* Coolidge. 1 Wheat. 410. See United States v. Gill. 4 Ball. 42C. United States *v.* Burr. 4 Cranch, 501. Commonwealth *v.* Schaeffer. 4 Ball. Append. XXXI. Commonwealth *v.* Kosloff. 5 Serg. and Rawle. 545. Observations of BLAND, J. 12 Nilcs'g Reg. 377, 461. United States B. Berans. 3 Wheat. 330. United States u. Wiltberger. *5* Wheat. 70. Tucker's Black, vol. i. part 1. 378. And Mr. Buponceau's able and eloquent dissertation on the jurisdiction of the courts of the United States. The understanding now seems to be that the cases above referred to have decided, that the courts of the United States have no cognisance of offences at common law, unless it be conferred on them by the laws of the United States. See charge of WASHINGTON, J. to the grand jury, Philadelphia, October, 1822, where this position is laid down.

CHAPTER XXVIII.

JURISDICTION OF STATE COURTS AND MAGISTRATES.

THE constitution of the United States was ordained and established, not by the states in their sovereign capacity, but emphatically, as the preamble pronounces, by the people of the United States. They could invest the government of the union with any power they pleased, and could restrain or prohibit the exercise of any power by the state governments, if deemed expedient. They could reserve to themselves those sovereign authorities, which they did not choose to delegate. The constitution was not necessarily carved out of existing State sovereignties, or a surrender of power already existing in

them: but a new distribution by the hands of the people, so far as respected the government of the union, leaving unimpaired, in other respects, the state governments. Thus the 10th article of the amendments declares, that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.(a) The basis of the government is, that the people have an original'right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness. These principles are fundamental, and designed to be permanent^)

The constitution containing a grant of powers in many instances similar to those already existing in the state governments, and some of these being of vital importance also to state authority and state legislation, a mere grant of such power, in affirmative terms to Congress, does not, *per se,* transfer an exclusive sovereignty on such subjects to the latter. On the contrary, the powers so granted are

(a) Martin v. Hunter's lessee. 1 Wheat. 325. M'Culloch v. Mayland. 4 Wheat. 404.

(b) Marbury v. Madison. 1 Cranch, 176. 5 Wheat. 48.

never exclusive of similar powers existing in the states, unless where the constitution has expressly, in terms, given an exclusive power to Congress, or the exercise of a like power is prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of it by the states. The example of the first class is to be found in the *exclusive* legislation delegated to Congress, over places purchased by the consent of the legislature of the state in which the same shall be, for forts, arsenals, dock-yards, &c; of the second class, the prohibition of a state to coin money, or emit bills of credit; of the third class, the power to establish an uniform rule of naturalization, and the delegation of admiralty and maritime jurisdiction. In all other cases, not falling within the classes already mentioned, the states retain concurrent authority with Congress, not only upon the letter and spirit of the 10th article of the amendments of the constitution, but upon the soundest principles of general reasoning.(c) There is this reserve, however, that in cases of concurrent authority, where the laws of the states and of the United States are in direct and manifest collision on the same subject, those of the United States, being the supreme law of the land, are of paramount authority, and the state laws so far, and so far only, as such incompatibility exists, must necessarily yield.(rf) So, it is declared to have been generally held, that the state courts have concurrent jurisdiction with the courts of the United States in cases to which the judicial power is extended, unless the jurisdiction of the courts of the United States be rendered exclusive by the words of the third article of the constitution.(e) How far the jurisdiction of the Federal Courts is rendered exclusive by the words of the third article of the constitution, is not specifically stated, except, as we have seen, that it is exclusive as to all cases of admiralty and maritime jurisdiction.(f) But, it is said, that Congress have power to make the jurisdiction of the courts of the United States exclusive in all cases to which the judicial power of the United States is extended by the Constitution, and, throughout the act of

(c) Houston c. Moore. 5 Wheat. 48. Per STOKY, J.

(d) Ib.

(e) Cohens *v.* Virginia. 6 Wheat. 396. Per MARSHALL C. J.

(f) Martin v. Hunter's lessee. 1 Wheat. 337. See Houston e. Moore, 5 Wheat. 1.

September 24th, 1789, have legislated on that supposition.^)

It seems, the United States, in the course of legislation upon the objects entrusted to their direction, may commit the decision of causes arising under a particular act, to the courts of the United States solely, if deemed expedient; but in every case in which the state courts are not expressly excluded by act of Congress, they may take cognisance of causes growing out of such act.(A) Congress cannot *confer* jurisdiction upon any courts but such as exist under the constitution and laws of the United States; but the state courts may exercise jurisdiction in cases authorised by the laws of the state, and not prohibited by the exclusive jurisdiction of the Federal courts.(e)

The criminal jurisdiction vested by the act of September 24th, 1789, in the courts of the United States, in cases arising under the judicial power granted by the constitution, was made, by that act, exclusive of all state jurisdic-

(g) Martin *v.* Hunter's lessee. 1 Wheat. 337. See Houston c. Moore. 6 Wheat. 26. Cohens *v.* Virginia. 6 Wheat. 397. By the 11th section of the act establishing circuit courts, passed the 13th of February, 1801, now repealed, *(ante,* 95,) the cognisance of all penalties and forfeitures accruing under the laws of the United States, was vested in the circuit courts, exclusively of the state courts, where the offence was committed within fifty miles of the place of holding the circuit courts. See also sect. 13.

(h) Houston *v.* Moore. 5 Wheat. 26. STORY, J., however, excepts all cases of admiralty and maritime jurisdiction. These, he considers vested by the constitution exclusively in the courts of the United States. Ib. 49. See Martin v. Hunter's lessee. 1 Wheat. 330. Cohens v. Virginia. 6 Wheat. 396.

(i) Houston *v.* Moore. 5 Wheat. 27, 28. But see the opinions of JOHNSON and STORY, J. in that case. To confer the power of determining such causes, (causes arising out of the national constitution,) upon the existing courts of the several states, would, perhaps, be as much, " to constitute tribunals," as to create new courts with like power. Federalist, No. 81. I am inclined to suppose, that Congress are not restrained from vesting the cognisance of any case, comprehended under those heads, (controversies to which the United States are a party, and all trials for offences against the constitution or laws of the federal government,) in the state courts, should they find it advisable so to do, especially in fiscal proceedings, and lesser offences against the peace. Tucker's Black, vol. i. part i. page 182. — Indeed, it is extremely probable, that in other instances, particularly in the organization of the judicial power, the officers of the states will be clothed with the correspondent authority of the union. Fed. No. 45.

tion. Still, it seems, Congress may vest in the state courts criminal jurisdiction over these cases, concurrent with that of the United States courts. But to vest this jurisdiction an act of Congress must expressly authorise it: for, as the jurisdiction of the circuit and district courts was, by the act of September 24th, 1789, made exclusive in criminal cases, cognisable under the authority of the United States, unless otherwise provided, it was necessary for Congress, by another law, to declare the jurisdiction in offences of this description not exclusive. Thus, the acts punishing forgery of the notes of the bank of the United States,(k) and for counterfeiting the current coin of the United States,(l) were

accompanied with *a. proviso,* that nothing therein contained should be construed to deprive the courts of the individual states of jurisdiction under the laws of the several states, of offences made cognisable therein.(m)

Where the jurisdiction of the United States court and of a state court is concurrent, the sentence of either court, whether of conviction or acquittal, may be pleaded in bar to a prosecution in the other, with the same effect as a judgment of a state court in a civil case may be pleaded in bar, in an action for the same cause, in a circuit court.(n)

Where the violation of an act of Congress necessarily involves with it a violation of a state law, as if the citizens of a state oppose the execution of a law of Congress with force, and in so doing violate also a state law, *query,* whether they can be subjected to two indictments, and two punishments, one for a breach of the act of Congress, and another for a breach of the state law.(o)

By various acts of Congress, duties have been imposed on state magistrates and courts, and they have been vested with jurisdiction in civil suits, and in complaints and prosecutions for fines, penalties, and forfeitures, arising

(fc) 24th February, 1807, April 10th, 1816.

h) 21st April, 1806.

(m) Houston v. Moore. 5 Wheat. 26. 30. See, however, the opinions of JOHNSON and STOKY, J. and the case put by JOHNSON, J. 5 Wheat. 34, as to robbery of the mail.

(n) Houston *v,* Moore. 5 Wheat. 31.

(o) See the opinion of CHASE, J. 1 Hall's Journ, of Jurisprudence, 262, and the cases above cited.

under laws of the United States,(jo) and, in civil suits, the state courts entertain such jurisdiction. Thus, bonds given to the United States for duties, may be sued in the state courts, where the act of Congress prescribes that they may be prosecuted in the proper court having cognisance thereof: for the act of 24th September, 1789, sect. 9, and 11, makes the jurisdiction of the state courts concurrent with those of the United States, where the United States are plaintiffs.^)

But, in penal and criminal cases, the state courts have, in several instances, declined exercising such jurisdiction, though expressly vested by act of Congress. In a case which occurred in the state of Ohio in the year 1803, the court was equally divided on the question, and the jurisdiction was sustained.(r) But in a subsequent case, in the same state, an information was filed by the collector of the revenue for the 6th collection district of Ohio, in the St. Clairsville court of common pleas of that state, against the defendant, for selling domestic distilled spirits without a licence therefor from the collecter, contrary to the act of Congress, praying a forfeiture to the United States under the act, and the defendant excepted to the jurisdiction of the court, and also to the mode of proceeding. The court decided, that the United States could not make use of the

(p} Houston *v.* Moore. 5 Wheat. 28. See the judicial act, 24th September, 1789, sect. 30. 33. Act relative to seamen, July 20th, 1790, sect. 2, 3, 4, 5, and to the fisheries, June 19th, 1813, sect. 1. Act relative to fugitives, February 12th, 1793. Act for laying duties on licences, 5th June, 1794, sect. 3. Act for remissions of penalties, &c. March 3d, 1797, sect. 3. The stamp act of July 6th, 1797, sect. 20. Act relative to contested elections, January 23d, 1798. Act for the relief of the refugees, April 7th, 1798, sect. 3. Act relative to sureties of the peace, 16th July, 1791, sect. 1. *(ante,* 260.) The collection law, of March 2d, 1799, sect. 20. 36. 68. Act establishing circuit courts, 13th February, 1801, sect. 11. Act relative to the Indian tribes, 30th March, 1802, sect. 16. Naturalization act, 14th April, 1802. Acts to extend jurisdiction in certain cases to state judges and state courts, March 8th, 1806, and 21st April, 1808. Act regulating the Post Office establishment, 30th April, 1810, sect. 35. Acts of July 24th, and August 2d, 1813, laying duties. Act of March 3d, 1815, to vest more effectually in the state courts, and in the district courts of the United States, jurisdiction in the cases therein mentioned.

(q) United States *v.* Dodge. 14 Johns. Rep. 25. The act of March, 3d, 1815, is to the same effect. *Ante,* 225.

(r) Worthington v. Masters. 1 Hall's Journ, of Jurisprudence, 196.

state courts, to enforce their penal laws, and that the proceeding by information was a criminal proceeding, and contrary to the constitution of the state.(s) So, where an action of debt was brought in the Supreme Court of the state of New York, to recover a penalty of one hundred and fifty dollars, under the act of Congress passed the 2d of August, 1813, entitled an act for laying duties on licences to retailers of wines, spirituous liquors, and foreign merchandises, which authorised the suit to be brought in a court of that state, and the defendant pleaded to the jurisdiction of the court, the court, (PLATT, J. diss.) determined in favour of the defendant, holding, that it was not competent to Congress to confer jurisdiction on the state courts, in criminal or penal cases arising under the lawa of the United States.(f)

Where the defendant was indicted in a state court in Virginia, in the name of the commonwealth, for stealing packets from the mail, it was determined, that as the offence was created by an act of Congress, a state court had no jurisdiction.(w)

So, where an action of debt was brought in a court of the state of Virginia, to recover a penalty, inflicted by the act of Congress to insure the collection of the revenue of the United States, which penalty the act declared might be recovered in a state court, the case being adjourned to the general court of Virginia, it was held, that the act of Congress was, in this respect, unconstitutional, and to assume jurisdiction over the case, would be to exercise a portion of the judicial power of the United States, which by the constitution, is deposited in other hands.(w)

In Pennsylvania, the Supreme Court has often sustained suits on acts of Congress, brought to recover penalties, where such acts expressly authorised a recovery in the state courts, holding, that it did not conflict with the constitution of the United States, and that it would be an intolerable inconvenience and grievance in an action for a

(*) United States *v.* Campbell. 6 Hall's Law Journ. 113. As to information, see *ante,* 205.

(t) United States v. Lathrop. 17 Johns. 5.

(«) Commonwealth v. John Freely. Virginia Cases, 321. The act of Congress of 30th April, 1810, authorises such prosecutions in the state courts. , See sect. 35.

(v) Jackson o. Row. Nat. Intell. Dec. 23, 1815.

petty penalty, to drag a man from the most remote corner of the state to the seat of the federal judiciary.(.r)

In the case of Almeida, who was committed in the state of Maryland, by a justice of the peace of that state, on a charge of piracy, and brought up on *habeas corpus* directed to the marshal, it was held, by the judges, BLAND and HANSON, that Congress could not constitutionally invest the judicial officers of that state with any portion of the judicial power of the United States, in any criminal case whatever, and, therefore, could not use the judicial officers of the states as agents, to arrest and bring offenders to justice, such agency being a judicial act. They therefore held the 33d section of the act of September 24th, 1789, by which such authority is given, to be unconstitutional, and the acts done under it, by a state magistrate, null and void, and discharged the prisoner.(y)

But in a subsequent case, the prisoner, who was brought up before Judge CHEVES, in South Carolina, on a *habeas corpus* directed to the marshal of that district, had been committed by a justice of the peace of that state, on a charge of forging protections for American seamen, which was an offence against the laws of the United States, the judge decided among other things, that granting a warrant of commitment was a ministerial, not a judicial act; that Congress had a right to constitute any citizen of the United States a conservator of the peace, though also conservator of the state, and that, in relation to the case before him, the 33d section of the act of September 24th, 1789, was constitutional; and he remanded the prisoner.^)

So where three American seamen entered on board of an American vessel at Boston, having signed the shipping articles, and afterwards deserted in Virginia, and were there committed to jail by a justice of the peace of the county of Henrico, in that state, by virtue of the 7th section of the act of Congress of the 20th July, 1790, making it " lawful for any justice of the peace within the United

(x) Buckwalter v. United States. 11 Serg. and Rawle, 196.

(y) Case of Joseph Almeida. 12 Niles's W. Reg. 115. 213.

(z) Ex parte Rhodes. 12 Niles's W. Reg. 259. See remarks of Judge BLAND, ib. 376. And see the case of Commonwealth v. Holloway. 5 Binn. 512.

States," to act in such case, a *habeas corpus* was taken out before a judge of the superior court, and was adjourned to the general court, who came to no definitive conclusion on the question, whether the act of commitment, as required by the 33d section of the act of September 2-lth, 1789, was, strictly, ministerial only, or partook in part of the judicial character, but the majority of the court, decided, that whether strictly ministerial or not, commitments made under and pursuant to the 7th section of the act of 20th July, 1790,

were lawful and right: that such commitments were not intended by the constitution to be vested exclusively in the courts of the United States; that special powers, partaking of a judicial nature, may be given by, and exercised under the acts of Congress, without making the persons exercising them courts of the United States; and that the act might be done by individuals appointed by law, or designated by general description. But the court declared their opinion, that Congress could not give jurisdiction to, or require services of, any officer of the state government, as such.(a)

Under what circumstances, and how far, judges of a state court have power to issue a *habeas corpus,* and decide as to the validity of a commitment or detainer under the authority of the United States, seems to have been variously determined in the state courts.

Where the parties imprisoned stated in their petition to the state judge *forahabeas* corpws,that they were confined in fort M'Henry, near Baltimore, without the authority of law, and it appeared on the return of the writ, that they had been arrested by General Wilkinson, (commander in chief of the army of the United States,) at New Orleans, on suspicion of being connected with Burr, in treasonable practices, and had been transported by sea to that place, to wait the order of the secretary at war, and that they were private citizens, not subject to military authority, and there

(a) Ex parte Pool and others. Nat. Intell. Nov. 10th and Dec. 1 Itb, *1821.* It is to be observed, however, in this case, that the court remark, that the imprisonment directed by this act of Congress is for no determinate period, (it being till the vessel is ready to depart, or the master require the seaman's discharge;) that it is not inflicted as a punishment, and is not directed wilh a view to any trial for any offence whatever. They could not, therefore, regard the execution of this act, *as the prosecution of a public offence, tiee post.* Constitution, art. iii. s. 1. 1.

was no proof against them, NICHOLSON C. J. held, that as General Wilkinson had no right to arrest them, his inferior officers had no right to detain them, and acted without oven the colour of authority, and he discharged them.(6) But, where a *habeas corpus* had issued from the same judge, on a petition stating, that Ernanuel Roberts had been seized, and forcibly carried on board the brig Syren, (an United States armed vessel,) and there detained, the judge stated, that if the fact had so appeared, the relator must have been discharged, and the parties implicated held to bail, to answer a criminal prosecution. But it appearing, that the relator, a boy of sixteen, had voluntarily enlisted in the service of the United States, received wages in advance, though it was contended that the enlistment was irregular, the judge held, that he could not call the United States before him, to inquire into the nature of the contracts between them and individuals, unless, perhaps, in an extreme case; and that the whole proceeding being under the constitution and laws of the United States, he had no right to iriterfere.(c)

So, where application was made to the Supreme Court of the state of New York, for a *habeas corpus* to an officer of the army of the United States, to bring up the body of a person stated, by affidavit, to be an enlisted soldier, and that he was an infant of the age of seventeen, and had enlisted without his father's consent, who prayed his release, the court refused to allow the writ. KENT C. J. declared, that the enlistment being under

colour of the authority of the United States, and by an officer of that government, the courts of the United States had complete jurisdiction over the offence of unlawful imprisonment in such case, and the state courts had none: in which case, the state courts had no jurisdiction by *habeas corpus.* That a state court would not inquire into the validity or regularity of process, where a person was detained by the marshal, under colour of process. THOMPSON, J. concurred, on the ground that the party might have relief from a judge of the circuit or district court: but would not disclaim having jurisdiction in any case, where the imprison-

(V) Cited in the case of Emanuel Roberts. 2 Hall's Law Journ. 195, sa Maryland, (1809.)

(r) Case of Ernanuel Roberts. 2 Hall's Law Journ. 195, (1809.)

ment or restraint was under colour of the authority of the United States. The other judges concurred in refusing the writ, but reserved the question of jurisdiction.^)

So in the case before mentioned, where a prisoner was arrested by a warrant from a justice of the peace of the state of South Carolina, on a charge of counterfeiting protections of American seamen, an offence against the laws of the United States, and brought up on *habeas corpus* before Judge CHEVES, and it was contended, that the magistrate who committed him, had no authority to commit for an offence against the United States, because the 33d section of the judicial act of September 24th, 1789, vesting such power, was unconstitutional, the judge held, that he had no jurisdiction over the case, that the criminal jurisdiction under the laws of the United States, was expressly exclusive, and that as a state court had no authority to take cognisance of the offence charged, so as to punish or acquit, it could not take jurisdiction under a *habeas corpus,* or declare an act of Congress unconstitutional and void.(e)

On the other hand the decisions in other states seem different. A *habeas corpus* was issued by TILGHMAN, C. J. of the Supreme Court of Pennsylvania, directed to the marshal of that district, on the return of which it appeared, that the relator was in his custody by virtue of an attachment, issued by the district court of the United States for the Pennsylvania district, to compel the performance of a decree of that court for the payment of money. It was contended, on behalf of the defendant, that the chief justice had not a right to discharge the relator, even if he should be clearly of opinion that the district court had no jurisdiction of the suit in which the attachment issued. The chief justice declared that if the district court had jurisdiction, he had no right to inquire into its judgment, or interfere with its process: if it had not, in his opinion, he would possess the right, and it would be his duty to discharge the relator, in such case. If Congress should pass a bill of attainder, or lay an export duty, such laws would be null and void, and the judicial authority of a state might declare them so. But this power should be exercised with

(d) Matter of Ferguson. 9 Johns. Rep. 239.

(fi) Ex parte Andrew Rhodes. 12 Niles's W. Reg. 264, (1819.)

very great caution, and never, where there is a reasonable cause for doubt. He then went on to examine, whether the district court had jurisdiction, and decided that they had, and ordered the relator to remain in custody.(f)

So, where on a *habeas corpus* from the Supreme Court of Pennsylvania, to the keeper of the gaol of Philadelphia, it appeared, that the prisoner was detained under a warrant of commitment by an alderman of that city, upon a charge of misprision of treason against the United States, it was held by that court, that if, under the 33d section of the act of 1789, a person be committed by a state justice or judge, for an offence against the United States, the Supreme Court might issue a *habeas corpus,* and admit to bail or discharge, as the case required, unless he were chargeable with an offence punishable with death. The court heard the evidence, and fixed the bail for the party's appearance at the next circuit court/ *g)* And in a subsequent case in the same court, the relator, being imprisoned by the marshal of the district as an alien enemy, under the regulations made by the president of the United States, in pursuance of the act of the 6th of July, 1798, respecting alien enemies, it was held, that a state court or judge might award a *habeas corpus,* in conformity to the law of the state, to enquire into the cause of his commitment, and that this writ lies to relieve a person imprisoned under colour of authority derived from the United States, as well as from any other imprisonment. Prisoners of war, however, are excepted: they are not entitled to the privilege of a writ of *habeas corpus:* but the relator was not to be considered a prisoner of war. And the court declared, that this authority to award a *habeas corpus* is one remaining in the states, emanating from the states, and not from the United States, and Congress had not attempted to exclude it.(A)

So where, on *habeas corpus* from the Supreme Judicial Court of Massachusetts, the defendant returned, that the relator was duly enlisted as a soldier in the army of the United States, the court declared, that it had authority to

(f) Ex parte Elizabeth Sergeant executor, &c. 8 Hall's Law Journ. 206, (1809.)

(g) Commonwealth c. Holloway. 5 Binn. 512. See also Commonwealth 0. Murray. 4 Binn. 487.

(A) Case of Lockington. 5 Hall's Law Journ. 92. 313.

inquire into the circumstances under which any person, brought before them by *habeas corpus,* was confined, or restrained of his liberty, and it appearing, that the relator was a foreigner, under age, and that he had enlisted without the consent of his parent or guardian, they declared the supposed enlistment to be void, and set the party at large.(i)

Where a *habeas corpus* issued from a state court of Maryland, directed to the marshal of that district, to bring up a citizen of the United States committed by a justice of the peace of that state, on a charge of piracy, the court, consisting of Judges BLAND and HANSON, decided, that the court had jurisdiction to issue such writ, and decide upon it, unless it appeared by the return, that the case had been constitutionally placed under the exclusive cognisance of the United States; and that if the authority of the officer committing were unconstitutional and void, the prisoner must be discharged. But to justify this decision, the case should be a clear one. They proceeded to enquire into the authority of the committing magistrate, and decided, that he could «ot constitutionally commit, for an offence against the United States, and discharged the prisoner.(&) So also, it was held in the year 1821, by the general court of Virginia, that the writ *of habeas corpus* may be issued by a state judge, on the application of any party, who by proper affidavit, shews probable cause, that he is unlawfully restrained of his liberty; that the question whether the law authorises his confinement, is to be decided by the laws of the state, considered as a member of the United States; and that the court is at liberty to consider all persons as lawfully restrained of their liberty, who are confined in obedience to the constitutional laws of the state or United States. In the practical application of these principles, the state judges will not discharge a party, whose commitment is *regularly* made with a view to a prosecution in the courts of the United States for an offence actually committed, and cognisable therein; neither will the judges of the state courts, as such, admit the party to bail. Whether they will look beyond the warrant of commitment, when made by any other than a judge of the

(t) Commonwealth *v.* Harrison. 11 Mass. Rep. 63. (1814.) (fe) Case of Joseph Almeida. 12 Niles's W. Reg. 115. 231.

courts of the United States, and enquire into the fact, is a matter of sound discretion, to be regulated by the circumstances of the case. But the state courts and judges have concurrent jurisdiction with the courts and judges of the United States, in all cases of illegal confinement under colour of the authority of the United States, when that confinement is not the consequence of a suit or prosecution pending in the courts of the United States, in which the allegation, upon which the commitment is made, will be tried.(7)

It seems, that from a decision on a *habeas corpus,* in a case arising under the laws of the United States, no appeal lies to the Supreme Court of the United States, under the present provisions enacted by Congress. Yet, it seems, the subject is within the constitutional power of Congress, and they might enact regulations providing for an appeal from such decisions, in cases arising under the constitution, laws and treaties.(m)

It has been decided, that a state court could not issue a mandamus to the register of a land office of the United States in Ohio, commanding him to issue a final certificate of purchase to the plaintiff, for certain lands in that state, to which the plaintiff laid claim under the laws of the United States. A state court cannot grant such mandamus to an officer of the United States, whatever may be its powers derived from its organisation, or the laws of the state. The officers of the United States, employed in disposing of the land of the United States, can only be controlled by the power that created them: and though

Congress have declined vesting the courts of the United States with power, in such case, to issue a mandamus, it does not follow that such power results to the state courts. It was, therefore, held, where the same attempt that had been made to obtain a mandamus in the circuit court, to compel the register to grant a certificate, was afterwards renewed in the Supreme Court of the state of Ohio, and that court sustained the jurisdiction, that they had no authority to issue a mandamus in such case.(w)

(l) Ex parte Pool and others. Nat. Intell. Nov. 10th and Dec. 11th, (1821.)

(m) Case of Lockington. 4 Hall's Law Journ. 96. (n) M'Clung *v.* Silhman. 6 Wheat. 598.

Nor can a state court of chancery enjoin a judgment of the circuit court of the United States. And where a court of chancery of the state of Kentucky, under the authority of an act of assembly, issued an order reinstating an injunction formerly issued and dissolved, staying proceedings on a judgment in ejectment, obtained in the circuit court of the United States of that district, until the matters of a bill in equity filed in such state court were heard, the Supreme Court of the United States determined, that the state court had no jurisdiction, and directed the circuit court to order a writ of *habere facias possessionem* moved for by the plaintiff in the ejectment, to issue, notwithstanding the injunction.(o)

It has been held by the Supreme Court of Pennsylvania, that in civil suits by the United States, there is the same privilege to suitors and witnesses in the causes depending in the state courts, as the law gives in actions by one citizen against another. Where therefore, a capias was issued out of the district court of the United States for the district of Pennsylvania, against the defendant, at the suit of the United States, for certain penalties incurred under the laws of the United States, under the act of March 2d, 1799,(jo) upon which the marshal arrested and held him to bail, while he was returning from his attendance on a magistrate before whom he had made a deposition as a witness in a cause depending in the said Supreme Court, under a rule of court, he was discharged by the same court from arrest.(y)

The act of March 3d, 1815, which gave jurisdiction to certain state courts and magistrates, over suits for penaltics, &c. arising in the collection of the direct tax and internal revenue of the United States, provided, that final decrees or judgments therein, in the state courts, should be re-examined in the circuit court agreeably to the 22d section of the act of 1789.

In matters which Congress is, by the constitution, authorised to regulate, the state courts are often controlled by the provisions of acts of Congress, operating on cases within the jurisdiction of the state courts, and pending

(o) M'Kim *v.* Voorhies. 7 Cranch, 279.

(p) See *ante,* 220.

(?) Ex parte Edme. Sup. Co. of Pennsylvania, December, 1822. MS.

before them. Thus, for example, the act for the collection of duties, passed 2d March, 1799, sect. 71, gives double costs to an officer, or other person, sued for seizing goods under the collection law, in certain cases. And in sect. 65, authorises holding to bail in suits for the recovery of duties or pecuniary penalties prescribed by the laws of the United States. The further acts on the same subject, of 24th February, 1807, and March 3d, 1815, exempt from costs, action, or execution, when the court gives a certificate of reasonable or probable cause. So the Stamp acts of 6th July, 1797, sect. 13, and 2d August, 1813, sect. 7, declared, that no instrument, charged with duty, should be pleaded or given in evidence, in any court, unless stamped. The act to establish a general stamp office, passed the 23d April, 1800, sect. 6, directed, that such instrument should be evidence after a certain indorsement and certificate. The act of 3d March, 1817, authorised any collector, &c. sued for any thing done under the act of March 3d, 1815, to remove the cause to the next circuit court, under the same regulations as if the suit were between citizens of different states.(r)

The state legislatures cannot annul the judgments of the courts of the United States, or destroy the rights acquired under those judgments.(s) Nor can the states, by any compact between themselves, deprive the Supreme Court of appellate jurisdiction, where it is granted by the constitution and laws.(^) A state insolvent law, discharging a debtor from imprisonment on making an assignment of his property for the benefit of his creditors, does not operate to discharge him from the custody under a ca. sa. issued on a judgment at the suit of the United States.(w) The statutes of limitation of the different states do not bind the United States in suits in the courts of the United States, and cannot be pleaded in bar in a suit by the United States against individuals.(#)

The ultimate right to determine the jurisdiction of the courts of the Union necessarily resides in the Supreme

(r) See *ante,* 123. Observations of BLAND J. 12 Niles's W. Reg. 377. («) United Slates u. Peters. 5 Cranch, 13(5.

t) Wilson v. Mason. 1 Cranch, 91.

u) U. S. «. Wilson. 8 Wheat. 223.

x) U. S. *v.* Hoar. 2 Mason, 311,

Court of the United States, as the supreme judicial tribunal of the nation. The state legislatures have no authority to pronounce that a sentence passed by a tribunal of the United States was rendered in a cause over which it had no jurisdiction, and an act passed by one of them to that effect can have no influence upon the question of jurisdiction. Where, therefore, the district judge for the district of Pennnsylvania in his return to a mandamus directed to him from the supreme court, commanding him to execute the sentence pronounced by him in an admiralty cause, stated as the cause of his not executing it, an act of the state legislature passed subsequent to the rendition of the sentence declaring the jurisdiction entertained by him in the cause to be in violation of the 11th article of the amendments to the constitution of the United States, and illegally

exercised, the supreme court issued a peremptory mandamus to the district judge, in consequence of which execution was issued and executed.(*y)* So far as regards the construction of the constitution, acts of Congress or treaties, the judgment of the Supreme Court of the United States is an authority by which the state courts are bound; because the Supreme Court is in such cases the court of appeal in the last resort. But with respect to the principles of the common law, the opinion of that court is not binding on the state courts.^) But they are entitled to very great respect and consideration; certainly to much more, than the judgments of any court in England since the revolution.(a)

(y) United States *v.* Peters. 5 Cranch, 115.

(2) See Jackson's lessee v. Burns, 3 Binn. 84. Sup. Co. of Penn.

(a) Ib. 86.

CHAPTER XXIX.

PRIORITY OF THE UNITED STATES.

By the 5th sect, of the act of March 3d, 1797, where any revenue officer or other person, hereafter becoming indebted to the United States by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied. And the priority hereby established shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed.

It has been held by the Supreme Court of the United States, that the preference given to the United States by this section, notwithstanding the title of the act, is not confined to revenue officers and persons accountable for public money, but extends to debtors generally, and therefore one indebted to the United States as indorser of a bill of exchange, is within its provisions, and they had a preference to the assignees of such debtor under the bankrupt law of 1800. Nor is it necessary, in order that this priority should take effect, that a suit should have been instituted by the United States: the priority exists from the time declared in the section without suit.(a) The priority, however, to which the United States are entitled does not partake of the character of a lien on the property of public debtors.(6) No bona fide transfer in the ordinary

(a) United States c. Fisher. 2 Cranch, 394. That a state has a prior right to creditors, see Grotius, Book 1. (42.)

(b) Ib. 390. United States *v.* Hooe, 3 Cranch, 90. The act of 11th July, 1798, sect. 15, gave alien for debts due by supervisors or other officers of the revenue on their lands and those of their sureties from the time of suit brought. This is now repealed. See ib. The act of May 15th,

course of business is over-reached. It is only a priority in payment, which under different modifications is a regulation in common use: and this priority is limited to a particular state of things when the debtor is living, though it takes effect generally if he be dead.(e)

The collection act of March 2d, 1799, sect. 65, enacts, that where any bond for the payment of duties shall not be satisfied on the day it may become due, the collector shall forthwith and without delay, cause a prosecution to be commenced for the recovery of money thereon, by action or suit at law in the proper court having cognisance thereof. And in all cases of insolvency, or where ant estate in the hands of the executors, administrators or assignees shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States on any such bond or bonds shall be first satisfied. And any executor, administrator or assignee, or other person, who shall pay any debt due by the person or estate from whom or for which they are acting previous to the debt or debts due to the United States from such person or estate being first duly satisfied and paid, shall become answerable in their own person and estate for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid, and actions or suits at law may be commenced against them for the recovery of the said debt or debts, or so much thereof as may remain due and unpaid, in the proper court having cognisance thereof. *Provided,* that if the principal in any bond which shall be given to the United States for duties on goods, wares, or merchandise imported, *or other penalty,* either by himself, his factor, agent, or other person for him shall be insolvent, or if such principal being deceased, his or her estate and effects which shall come to the hands of his or her execu-

1820, makes the amount due by any collector of the revenue, receiver of public money or other officer, alien on his lands, tenements, and heriditaments and those of his sureties from the date of a levy in pursuance •of the warrant of distress issued according to that act, and the record thereof in the district court.

(c) United States *v.* Fisher. 2 Cranch, 390. *Query,* whether notice is not necessary to create a *devastamt* in the administration of effects, or to bind the executor, administrator or assignee. See the opinion of Marshall C. J. ib. note. See United States *v.* Bryan and Woodcock. 9 Cranch, 374. That it is necessary, see Aiken *v.* Dunlap. 16 Johns. Rep. 79,

tors, administrators or assignees, shall be insufficient for the payment of his or her debts, and if in either of the said cases any surety on the said bond or bonds, or the executors, administrators, or assignees of such surety, shall pay to the United States the money due upon such bond or bonds, such surety, his or her executors, administrators or assignees shall have and enjoy the like advantage, priority or preference for the recovery and receipt of the said moneys out of the estate and effects of such insolvent or deceased principal, as are reserved and secured to the United States; and shall and may bring and maintain a suit or suits upon the said bond or bonds in law or equity, in his, her or their own name or names, for the recovery of all moneys paid thereon.

And the cases of insolvency mentioned in this section shall be deemed to extend as well to cases in which a debtor not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof for the benefit of his or her creditors, or in which the estate and effects of an absconding, concealed or absent debtor shall have been

attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed.

In construing this act it has been determined, that the word *insolvency* being originally used, the subsequent sentence is designed to explain the meaning and intent of that term. As thus explained it means such a general devestment of property as would, in fact, be equivalent to insolvency in its technical sense. A voluntary assignment, in order to constitute the insolvency here mentioned, must be of all the property of the debtor: the word "thereof" means all the property: a partial assignment or conveyance of part made *bona fide to* secure a fair creditor is not within the letter or intention of the act: nor does it create any preference. If, indeed, a trivial portion of an estate should be left out for the purpose of evading the act, it would be considered as a fraud upon the law, and unavailing: but where a bona fide conveyance is made, not to avoid the law, but to secure a fair creditor, it is valid against the claim of the United States. Therefore where a collector indebted to the United States for public moneys received, at the time he was unable to pay all his debts, mortgaged part of his real estate to the surety in his official bond

to secure him against his existing and future indorsements for the collector and against his responsibility on the bond, the United States were held not to have a priority for their debt due for public moneys received, though such mortgagee knew, at the time of the mortgage, that the mortgagor was largely indebted to the United States.(d)

These cases are held to have decided that the word insolvency mentioned in the act of March 3d, 1797, sect. 5, and in the collection act of March 2d, 1799, sect. 65, (originally used in the act of July 31st, 1789, sect. 21, and repeated in the act of 4th August, 1790, sect. 45, and of 2d May, 1792, sect. 18,) means a *legal* in solvency: a mere state of insolvency or inability in a debtor to pay all his debts, gives no right of preference to the United States on the ground of insolvency, unless it is accompanied by a voluntary assignment of all the property for the benefit of his creditors.(e)

Where, therefore, two partners, debtors to the United States by bond for duties, were unable to pay their debts, and their property was attached by individual creditors, and in the hands of the sheriff, and the United States afterwards attached the same property, recovered judgment, and issued execution, by virtue of which the marshal took the property out of the hands of the sheriff, but it did not appear that the effects were attached as the property of absconding, concealed, or absent debtors, nor that they or either of them had made a voluntary assignment of their property for the benefit of their creditors, nor committed an act of legal bankruptcy, the United States were held to have no preference, and that the marshal was not authorised to take the cffects.(f)

The question still remained to be decided what was the extent of this priority where such insolvency existed, as against grantees, judgment or mortgage creditors. It has been held that if before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged it to secure a debt, or if his property has been

(d) United States c. Hooe. 3 Cranch, 73.

(e) Thelussion v. Smith. 2 Wheat. 424. (f) Prince e. Bartlett. 8 Cranch, 45.

seized under a fieri facias, the property is devested out of the debtor, and cannot be made liable to the United States. But a prior creditor by judgment alone, Stands on the footing of other individual creditors, and is postponed to the claim of the United States, under the act of March 2d, 1799, sect. 65.(g)

The priority of the United States is not affected by the circumstance that the debt due to it arose upon a contract made in a foreign country, with a person resident abroad,(*h)* nor by their having proved their debt under the United States bankrupt law of 1800: as the 62d. sect, takes their case out of the general provisions of the act. But if it were not for such a section as this, their coming in as a creditor under a commission of bankruptcy and proving their debt would be considered as an election to be classed with other creditors.(z)

So it has been held, by the Supreme Court of New York, that a shipment of property by an insolvent from abroad as a mercantile transaction, to certain creditors, with directions to sell the same on commission, pay themselves out of the proceeds, and pay over the residue for the benefit of the other creditors, not appearing to embrace all the property of the debtor, was not such an assignment as would give the United States a preference; and in the same case it was decided that an attachment, taken out against the property of such insolvent as an absconding and absent debtor under an act of the legislature, which attachment was afterwards withdrawn in consequence of an agreement between the creditors and the holder of the property that the latter should sell it, and distribute the proceeds among the creditors, did not fall within the words of the act of Congress; the proceedings being in a mere inceptive Btate, no rights were acquired under it.(j)

As a mere judgment does not bind the real estate of an insolvent, indebted to the United States on duty bonds, who has made a general assignment, so also it has been held, by the Supreme Court of Pennsylvania, that a foreign attachment levied on the effects of such insolvent in the

(g) Thelussion e. Smith. 2 Wheat. 425. (A) Harrison o. Sterry, 6 Cranch, 299. (») Ib. *(j)* M'Lean *v.* Rankin, 3 Johns. Rep. 369.

hands of a garnishee, which effects consist chiefly of debts due to the insolvent, does not give a lien thereon, so as to deprive the United States of their preference on bonds given before the attachment, though payable afterwards, where a general assignment is afterwards made by such insolvent, prior to judgment against him in the attachment; and the United States, or their surety who pays such bonds, are not compelled to look to the general assignees, but may bring forward their claims in the foreign attachment, by notice to the garnishee and suggestions filed: as the words of the act of Congress include "any executor, administrator, assignee or *other person."(k)*

In a case occurring in the year 1801, it was held by the circuit court for the district of Pennsylvania, that a partial assignment by a house in trade, indebted to the United States, made in embarrassed circumstances, but not having stopped, the creditors at the same time discharging one partner and giving the other a letter of licence for limited periods, no general voluntary assignment being made, was not within the act of Congress, though the debtors afterwards became bankrupt: the court declaring that the insolvency contemplated by the act of Congress must be a notorious, flagrant insolvency, testified by a resort to an insolvent law, bankruptcy, or an assignment of property: though it need not be an assignment of the whole property to one set of trustees for the benefit of creditors; an assignment of all to one set of creditors to pay their own debt, or an assignment of the whole to a variety of creditors would be within the act: for that would be considered as an attempt to accomplish, indirectly or by artifice, what the law prohibits to be done directly.^) And such intent to defraud the United States is not to be left to the jury to determine, but is matter of law to be decided by the court.(m)

But if there be a voluntary assignment of the whole of the insolvent's estate, it is not necessary that it should be done at one time, or by one conveyance, or to one set of

(&) Willing 0. Bleeker, 2 Serg. *&,* Rawle, 221. *(I)* United States e. King, cited in Downing c. Kintzing, 2 Serg. fc Rawle, 336, from MS. of C. J. TILGHMAN. Wallace's Rep. 13. (w) Downing c. Kintzing, 2 Serg. &, Rawle, 836.

trustees: if it appears to be an artifice to elude the act of Congress and defeat the claim of the United States.

Where, therefore, a house, after they were clearly insolvent and had ceased to do business, made two assignments comprehending all their estate, except wearing apparel, household furniture, &c. the first part to their surety on custom house bonds owing bythemto the United States, to pay them, and also a private debt, and thirty-one days after, of the residue, (except as above mentioned,) toother persons, and the jury found that the latter assignment was in contemplation of the assignors at the time of making the first assignment, it was held by the Supreme Court of Pennsylvania, that there was an assignment of the whole of the debtor's property within the purview of the act of Congress, and the preference of the United States took effect, (w)

An assignment of property by the insolvent in such case to his surety, to pay a private debt due to the surety and custom house bonds, does not oblige him to pay the bonds out of it first, or take away his preference for the amount paid on account of them beyond the proceeds of the property. And where two assignments of an insolvent debtor's effects are thus united together, and treated as one general assignment, and thereby brought within the act of Congress, a surety, who is assignee under the first assignment, made to pay his private debt and custom house bonds, if he pays the latter beyond the property remaining in his hands after satisfying his own private debt, is entitled to a contribution out of the effects conveyed by the latter assignment/o)

But the act of March 2, 1799, only contemplates a preference to the United States, or the surety paying their debt, out of the estate of the insolvent in the hands of his assignees. If

such surety bring an action against the debtor personally, a plea by the latter of a discharge under the bankrupt law of the United States is a good bar.(p) So also in such case is a plea of a discharge under a state insolvent law. Whether the United States are

ri) Downing v. Kintzing. 2 Serg. & Rawle, 326.

o) Ib.

p} Reed v. Emory. 1 Serg. & Rawle, 339.

or can be effected as to *their* right of action by virtue of such latter discharge, is suggested as a doubt in this case.(q)

(q) Aiken p. Dunlap, 16 Johns. Rep. 77.

CHAPTER XXX.

Constitution. Article I.

CONSTITUTION. ART. I. — REPRESENTATIVES AND

TAXES.

ART. 1. sect. 2, 3. Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall, by law, direct. The number of representatives shall not exceed one for every thirty thousand; but each state shall have, at least, one representative, &c.

It was settled by Congress, on the passage of the first apportionment act in the year 1791, that the population of each state, and not the total population of the United States, must give the numbers, to which alone could be applied the process by which the number of representatives was to be ascertained. Whatever fractions, therefore, the states may have, beyond the settled proportion

by which the number of representatives from each is to be regulated, no allowance can be made for them.(a)

Representatives and direct taxes are similar, in being subjected to the same rule of apportionment to the numbers ascertained by the census. They are, however, no way connected with, or dependent upon, each other. The District of Columbia, and the territories of the United States, though not entitled to representatives in Congress, are subject to direct taxation by Congress, if they see fit; and the rule of proportion of such

taxation is the same as that which is applied to the states, namely, the census or enumeration of numbers in such district or territories, as directed to be taken by the constitution. There is, however, this difference: that if a direct tax be laid at all by Congress, it must be laid on every state, conformably to this rule: but it need not be extended to the District of Columbia, or the territories, if Congress do not think it expedient to do so. And the understanding and practice have been accordingly.(b)

It is not essential that the apportionment of representatives by act of Congress should be one entire and final act. If from accident the census should not be complete in a state, at the time of the apportionment of representatives, Congress may make a contingent regulation in the act, according to which the number of representatives may be adjusted, when the census shall be complete. This mode was adopted by the act of March 7th, 1822, in relation to the state of Alabama, in which, owing to the death of the marshal, the census was not so far completed, at the time when the representatives were apportioned by law, as that it could be ascertained, whether the share of that state would be two or more members.

Constitution. Art. 1. — Senate.

Art. 1. s. 3. 1. The senate of the United States shall l>e composed of two senators from each state, chosen by

(a) 5 Marshall's Life of Washington, 318. A former bill, which allowed representatives for the fractions, distributing them among the states that had the largest fractions, was returned by President WASHINGTON, as not conformable to the constitution.

(b) Loughborough *v.* Blake. 5 Wheat. 317.

the legislature thereof for six years, and each senator shall have one vote.

If all the states, or a majority of them, should refuse to elect senators, the legislative powers of the union would be suspended. But if any one state should refuse to elect them, the senate would not, on that account, be the less capable of performing all its functions.(c)

Constitution. Art. 1. — Expulsion.

Art. 1. s. 5. 2. Each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two thirds, expel a member.

The power of the senate to expel one of its members, and the grounds upon which such a measure ought to be adopted, have been subjects of consideration in that branch, in three instances.

In March, 1796, application was made to the senate of the United States by the legislature of Kentucky, requesting an investigation by the senate, of a charge against Humphrey Marshall, one of the members from that state, of perjury, which had been made in a

pamphlet publication. A similar accusation had been made against him prior to his election as senator, but no prosecution had been commenced for it. The senate adopted the report of a committee declaring, among other things, that the senate had no jurisdiction to try the charge; that the consent of Mr. Marshall, though offered by him, could not give jurisdiction, and that the memorial should be dismissed; although other grounds were stated, as that no prosecutor appeared, and that no documents or evidence were furnished. This report states, on the subject of jurisdiction, "that in a case of this kind, no person can be held to answer for an infamous crime, unless on a presentment or indictment of a grand jury, and that in all such prosecutions, the accused ought to be tried by an impartial jury of the state and district wherein he committed the offence."(J)

But in the report of the committee of senate in the case

(c) Cohens v. Virginia. 6 Wheat. 390.

{d) Journal of Senate, 127- March 22d. 179G.

of John Smith, made the 31st of December, 1807, this case is commented on, and it is said that there were very sufficient reasons for not pursuing the investigation, in that particular case, any further: but that the principles advanced, as to the jurisdiction of the senate, are inaccurate. As an argument for this, it is stated, that of the sixteen senators who, in March, 1796, voted for that report, eleven, in July 1797, voted for the report which concluded with a resolution for the expulsion of Mr. Blount, and the other five senators were no longer members of that body.(e)

William Blount was expelled from the senate of the United States on the 8th of July, 1797, being declared in the resolution of senate, guilty of a high misdemeanor entirely inconsistent with his public trust and duty as a senator. He was then under an impeachment by the house of representatives, which terminated in the decision, that a senator was not liable to impeachment. The report of the committee in his case, as adopted by senate, stated, as reasons for the expulsion, his writing a letter evincing his attempts to seduce from his duty an United States Indian interpreter, and to employ him as an engine to alienate the affections and confidence of the Indians from the public officers residing among them: the measures he had proposed to excite a temper, which must produce the recal or expulsion of our superintendant from the Creek nation: his insidious advice, tending to the advancement of his own popularity and consequence, at the expense and hazard of the good opinion which the Indians entertain of this government, and of the treaties subsisting between us and them, and concluded, that the committee had no doubt, but that his conduct had been inconsistent with his public duty, rendered him unworthy of a farther continuance of his present public trust in that body, and amounted to a high misdemeanor.(f) On this case, it has been also remarked, that the member implicated was called upon, in the first instance, to answer, whether he was the author of a letter, the *copy* of which only was produced, and the writing of which was the cause of the expulsion. He was, afterwards, requested to declare,

(e) 1 Hall's Law Journal, 459.

(f) Journal of Senate, 109. July 8th, 1797,

whether he was the author of the letter itself, and declining, in both cases, to answer, the fact of his having written'it was established by a comparison of his hand writing and by the belief of persons who had seen him write, upon inspection of the letter. These it is argued shew the admission of a species of evidence, which, in courts of criminal jurisdiction, would be excluded: yet, in the resolution, the senate declared him *guilty of a high misdemeanor,* though no presentment or indictment had been found against him, and no prosecution at law was ever commenced upon the case.(g) And, it seems no law existed, to authorise such prosecution.(/t)

John Smith, a senator from the state of Ohio, was indicted at a circuit court at Richmond, in the year 1807, for treason, in levying war against the United States, and for misdemeanor, in preparing an expedition against the Spanish territory in Mexico: but owing to the acquittal of Burr, the principal in the transaction, the prosecution against Smith was abandoned, a *nolleprosequi* being entered, by the district attorney of the United States. The evidence against Burr was rejected by the court, on his trial, because, as he was not present at the overt act of treason stated in the indictment, no testimony relative to his conduct, and declarations elsewhere, and subsequently, could be admitted. In consequence of this decision the traverse jury found a verdict, " that Aaron Burr was not proved to be guilty under that indictment, by any evidence submitted to them." It was, also, the opinion of the court, that none of the transactions, of which evidence was given, amounted to an overt act of levying war. The indictment against Smith was abandoned, because the same decision would prevent a conviction on it. No other indictment was ever found against him. The report of the committee of senate in his case, made on the 31st of December, 1807, concludes with a resolution to expel John Smith from the senate " for participation in the conspiracy of Aaron Burr, against the peace, union, and liberty of the people of the United States," and embraces in its body the following points.

(g) Report in the case of John Smith. 1 Hall's Law Journal, 465. (A) The act of January 17th, 1800, now expired, imposed penalties for offences similar to those charged against W. Blount.

1. That the senate may expel a member, for a high misdemeanor, such as a conspiracy to commit treason. Its authority is not confined to an act done in its presence.

2. That a previous conviction is not requisite, in order to authorise the senate to expel a member from their body, for a high offence against the United States.

3. That although a bill of indictment against a party for treason and misdemeanor, has been abandoned, because a previous indictment against the principal party had terminated in an acquittal, owing to the inadmissibility of the evidence upon that indictment, yet the senate may examine the evidence for themselves, and if it be sufficient to satisfy their minds, that the party is guilty of a high misdemeanor, it is a sufficient ground of expulsion.

4. That the 5th and 6th articles of the amendments of the constitution of the United States, containing the general rights and privileges of the citizen as to criminal prosecutions, refer only to prosecutions at law, and do not affect the jurisdiction of the senate as to expulsion.

5. That before a committee of the senate appointed to report an opinion, relative to the honour and privileges of the senate, and the facts respecting the conduct of the member implicated, such member is not entitled to be heard in his defence by counsel, to have compulsory process for witnesses, and to be confronted with his accusers. It is before the senate, that the member charged is entitled to be heard.

6. In determining on expulsion, the senate is not bound by forms of judicial proceedings, or the rules of judicial evidence; nor, it seems, is the same degree of proof essential which is required to convict of a crime. The power of expulsion must in its nature be discretionary, and its exercise of a more summary character, than the process of judicial tribunals.(z)

(i) Report in the case of John Smith. I Hall's Law Journ. 469 J. Q. Adams, chairman. See ib. 470.

Constitution. Art. 1. — Members of Congress.

Art. 1. sect. 6. 2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

In the year 1821, Jesse B. Thomas, a senator of the United States from the state of Illinois, was appointed by the secretary of the treasury, (W. H. Crawford,) to examine the land offices in the states of Ohio, Indiana, Illinois, and Missouri, under an act of Congress passed previously to his election, making it the duty of the secretary of the treasury, at least once every year, to cause the books of the officers of the land offices to be examined, and the balances of public moneys in the hands of the receivers to be ascertained. This duty had previously been performed by persons not connected with the department, nor members of Congress; and Mr. Thomas received the same compensation of six dollars per day, and six dollars for every 20 miles travel, which had for four years previously been paid for the service. In April, 1822, a committee of the house of representatives made a report on the subject, expressing their opinion that the duty of examining the land offices was not such an office as was contemplated by the latter part of the above clause of the constitution, and therefore was not incompatible with the trust of a senator of the United States. In support of this opinion they refer to the appointment of Mr. Tracy, a senator, by President Adams in the year 1800, to the duty of inspecting the posts on the northern and north-western frontier, for which he received a liberal compensation and extra mileage. Under the administration of Mr. Jefferson, Mr. Dawson, a member of the house of representatives, from the state of Virginia, was appointed to carry a treaty to France, and was paid for performing the duty. During the same administration, Mr. Smith, a senator from Tennessee, was selected as commissioner to

treat with the Indians, and negotiated two treaties. They also refer to the appointment by President Madison of Mr.

Worthington, a senator, and Mr. Morrow, a representative from Ohio, to negociate with the Indians. In each of these, the persons employed retained their seats in Congress; and it is stated, those who were in the senate took part in deciding on their own acts.(y) The instances here^ referred to are strong to shew the practice and understanding of the government; but it may well be doubted whether they are in accordance with the spirit of the constitution.

Constitution. Art. 1. — Duties.

Art. !. sect. 8. 1. Congress shall have power to lay and collect taxes, duties, imposts, and excises; but all duties, imposts, and excises shall be uniform throughout the United States.

It has been decided by the Supreme Court of the United States, that a tax on carriages isnot a direct tax; and,of course, it may be laid uniformly throughout the United States, and need not be apportioned according to the census.^) Whether such a tax falls within the words impost duty, or excise, seems doubtful: but it is clearly a tax which Congress have power to levy: and they may decide the mode of levying it, whether uniformly, or by apportionment.^) Direct taxes are stated to be only two, namely, a capitation, or poll tax, and a land tax; whether others are comprehended in these words, appears doubtful. Perhaps, the immediate product of the land, in its original and crude state, ought to be considered as the land itself, as it makes part of it. Or else, the provision against taxing exports, would be easily eluded.(m)

Under this clause, Congress has power to levy a direct tax, not only on the states, but also on the District of Co-

(j) Reportof the committee, March, 29th, 1822. Nat. Intell. April 2, 1822. See on the extent of the word office, Shepherd *v.* The Commonwealth, 1 Serg. & Rawle, 1. Commonwealth *v.* Sutherland, 3 Serg. & Rawle, 145. Seymour *v.* Ellison, 2 Cowan, 13. Commonwealth *v.* Binns, 17 Serg. & Rawle, 219. This report also states the construction given to the act of Congress of 21st April, 1808, concerning contracts.

k) Hylton v. United States. 3 Dall. 171.

I) Ib. CHASE J.

m) Ib. PATERSON J.

lumbia, the territories, and generally throughout the United States, on all places to which the government extends; preserving the proportion prescribed by the 3d section of the 1st article of the Constitution. Congress is bound to extend the ordinary revenue system by indirect taxes to the District of Columbia: though it is not obliged to extend the system of direct taxation.(n)

An act of a state legislature requiring importers of foreign goods by the bale or package, and others selling the same by wholesale bale or package, to take out a license for which they should pay fifty dollars, under pain of certain forfeitures, is repugnant to this provision of the constitution, and also to that declaring the power of Congress to regulate commerce.(o)

Constitution. Art. 1. — Commerce.

Art. 1. s. 8. 3. Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

Under the power to regulate commerce, Congress may adopt measures that abridge commerce, if they deem them proper and necessary for the advancement of great national purposes of policy, and may apply such means in enforcing the law, as the exigency of the case requires. They have, therefore, power to lay an embargo, though not limited in its duration.(p)

By virtue of this clause of the constitution, and of the the auxiliary power given by the 17th clause of this sec-

(n) Loughborough *v.* Blake. 5 Wheat. 317.

(o) Brown *v.* State of Maryland. 12 Wheat. 419.

(p) United States c. Brigantine William. 2 Hall's Law Journ. 255, before DAVIS D. J. See act of June 4th, 1794. Resolution of Congress, March 2Gth and April 18th, 1794. Gibbons e. Ogden. 9 Wheat. 192.

Congress, in the year 1778, prior to the completion of the articles of confederation, laid an embargo, to prohibit the exportation of provisions from the United States, reciting that their exportation and capture by the British relieved the enemy in their operations, and they enforced it by stationing a galley to search vessels outward bound. They afterwards continued it for a further period by their own authority: a motion to recommend to the states to continue it, being rejected. 4 Journ. Cong. 334. 466. 576. But in 1779, we find them recommending to the states to continue embargoes if laid, and if not to lay them, to prohibit the exportation, of wheat flour and other provisions. 5 Journ. Cong. 321. 451.

tion, to make all laws necessary and proper for carrying into execution the foregoing powers, the act for the government and regulation of seamen in the merchant's service, passed on the 20th July, 1790, has been made; for without a regulation on this subject, it is not easy to perceive how this commerce, over which Congress possess the entire control, could be carried on. It is no objection to the 7th section of the act of 20th July, 1790, that it exacts a personal service under penalty of imprisonment of the seamen, for desertion after signing a contract, as this principle is a part of the general maritime law of Europe, in relation to contracts of seamen, and must have been within the view of the framers of the constitution^^)

It has been held by the court of errors of New York, that on the subject of commerce, the states are under no other restrictions than those expressly specified in the constitution, and such regulations as the national government may, by treaty, and by laws, from time

to time, prescribe. The navigable waters within the territory of a state are subject to its muncipal regulations, and the state may regulate their use, in the same mariner as it makes laws respecting turnpike roads, toll bridges, canals, ferries, health, quarantine, &c.(r) An exclusive privilege granted by an act of the legislature of a state, for the navigation of steam boats in its waters, is not contrary to this clause of the constitution, nor is it void, because it might, possibly, in the course of events, interfere with the power granted by this clause to Congress.(s) So it was afterwards decided, in the same court, that a license to carry

(q) Ex parte Pool and others, in the general court of Virginia, in 1821. Nat. Intell. Dec. 11, 1821. The language of the act of Congress of the 20th July, 1790, sect. 1. extends only to contracts with seamen on board any ship or vessel bound from a port in the United States to any foreign port, or of any ship or vessel, of the burthen of fifty tons or upwards, bound from a port in one state to a port in any other than an adjoining state. It seems, there is in Virginia, an act of the legislature, passed in 1805, providing for the case of foreign seamen only. See Ib. and Hall's Law Journ. 132, remarks on the case of the deserters from the British Frigate L'Africaine. The Jerusalem, 2 Gall. 198. But now by act of 2d March, 1829, provision is made for the arrest and delivery or detention of foreign seamen on the complaint of the consul or vice-consul, made under treaties.

(r) See the act of Congress, 25th February, 1799, respecting quarantine and health laws.

(*) Livingston *v.* Van Inghen. 9 Johns. 507.

on the coasting trade, granted under the laws of the United States, did not authorise the use of a steam boat, in contravention of such act of the legislature.(t) But this decision was afterwards reversed by the Supreme Court of the United States which decided that the acts of the legislature of New York granting to Robert R. Livingston and Robert Fulton, the exclusive navigation of all the waters within the jurisdiction of that state with boats moved by fire or steam, for a term of years, were repugnant to the foregoing clause of the constitution, so far as they prohibited vessels licensed under the laws of the United States to carry on the coasting trade, from navigating the said waters by means of fire or steam.(u)

The general power of establishing regulations for the condemnation of vessels as unfit for sea or unworthy of repair, may, it would seem, be exercised by Congress, either as appertaining to trade and commerce, or as within the admiralty jurisdiction; but until Congress think proper to legislate on the subject, the power may be exercised under the municipal regulations of the states.(v)

Constitution. Art. I. — Naturalization.

Art. I. sect. 8. 4. Congress shall have power to establish an uniform rule of naturalization.

In a case which arose in the year 1792.(w) the Judges of the circuit court, WILSOJN, BLAIR, and PETERS, were of opinion, that notwithstanding the act of Congress on the subject of naturalization, passed March 26th, 1790, the states, individually, still enjoyed, after the passage of that act, a concurrent authority to pass laws on the subject, but that it

could not be exercised so as to contravene the rule established by Congress; and that the reason of investing Congress with the power of naturalization was, to

(t) Ogden *v.* Gibbons. 17 Johns. Rep. 4 Johns. Ch. Gas. See 6 Wheat. 448, where an appeal was taken to the Supreme Court of the United States, but dismissed, the decree below not being final.

(«) Gibbons v. Ogden. 9 Wheat. 1.

(») Janney u. Columbia Insurance Company. 10 Wheat. 418. This was an insurance cause. The act for the government and regulation of seamen, 20th July, 1790, sect. 3, contains a provision on this subject, where a complaint of the unfitness of the vessel, &c. is made by the mate or first officer under the master, and a majority of the seamen.

(w) Collet v. Collet. 2 Ball, 294.

guard against the adoption of too narrow a mode of conferring it by the states, not to prevent too liberal an extension of it. They therefore dismissed a bill in equity in the circuit court, because the complainant was a citizen of the same state as the defendant, (Pennsylvania;) he having been naturalized on the 30th April, 1790, under a law passed in the year 1789, by the state of Pennsyslvania. But in a case which arose in the year 1797, IREDELL J. intimated, that if the question had not previously occurred, he should be disposed to think, that the power of naturalization operated exclusively, *as soon as it was exercised by Congress.(x^)* It seems now, however, to be considered as settled, that by the constitution, the power of naturalization is exclusively vested in Congress: there being a direct repugnancy, or incompatibility, with the objects of the constitution, in the exercise of this power by the states.(«/)

The time of residence in the United States, which the policy of the government has required, to entitle an alien to naturalization, has varied considerably at different periods. The first naturalization act passed on the 26th of March, 1790, required a previous residence of two years. The next act, passed on the 29th of January, 1795, enlarged the time to five years. On the 18th of June, 1798, the time was further extended to fourteen years: but by the act of 14th April, 1802, it was restored to the term of five years, and so continues.

The rules established by the acts of Congress, for the admission of aliens as citizens of the United States, have also been different at different periods. The first act of the 26th of March, 1790, which regulated their admission during the period that elapsed from that time to the 29th of January, 1795; the act of the 29th of January, 1795, which regulated their admission until the passage of the act of 18th June, 1798, and the latter act, which was the rule until the 14th April, 1802, have all been repealed: and at present, free white aliens, in order to become citizens, must comply with different requisites, according to the time of their arrival in the United States.

(x) United States p. Villatto. 2 Ball. 370.

{y) Chirac e. Chirac. 2 Wheat. 269. Houston v. Moore. 5 Wheat.

Such aliens may be comprehended in four classes.

1. Those who have arrived, or may arrive since the 18th June, 1812.

2. Those who arrived between the 14th April, 1802, and the 18th June, 1812.

3. Those who arrived between the 18th June, 1798, and 14th April, 1802, or were then residing within the limits, and under the jurisdiction of the United States, and have continued to reside therein.

4. Those who were residing within the limits, and under the jurisdiction of the United States, before the 29th January, 1795.

1. An alien who has arrived, or may arrive in the United States, since the 18th June, 1812, must, on application, shew, that he has complied with the following requisites: —

1. He must have declared on oath or affirmation, before the Supreme, superior, district, (which every court of record in any individual state, having common law jurisdiction, and a seal, and clerk or prothonotary, is within the meaning of this act,(Y)) or circuit court of some one of the states, or of the territorial districts of the United States, or a circuit or district court of the United States, three years at least, before his admission, that it was, *bona fide,* his intention to become a citizen of the United States, • and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whatever, and particularly, by name, the prince, potentate, state, or sovereignty, whereof such alien may, at the time, be a citizen or subject,(a) and a certificate from the proper clerk or prothonotary, of the declaration of intention, made before a court of record, must be exhibited, on application to be admitted a citizen of the United States, and must be recited at full length in the record of the court admitting such alien; otherwise he shall not be deemed to have complied with the conditions requisite for becoming a citizen

(z) Act of 14th April, 1802, sect. 3. (a) Id. sect. I.

of the United States. And any pretended admission of an alien who shall have arrived within the limits and under the jurisdiction of the United States, since the 18th June, 1812, to be a citizen, without such recital of such certificate at full length, is of no validity or effect under the act of Congress.(6)

2. He must have made registry, and obtained certificate, in the following manner. If of the age of twenty-one years, he must have reported himself, if under that age, or held in service, he must have been reported-by his parent, guardian, master, or mistress, to the clerk of the district court of the district where he arrived, or to some other court of record of the United States, or of either of the territorial districts of the same, or of a particular state; and such report must have ascertained the name, birth-place, age, nation, and allegiance, together with the country whence he or she migrated, and the place of his or her intended settlement: and it is made the duty of such clerk, on receiving such report, to record the same in his office, and to grant to tho person making such report, and to each

individual concerned therein, whenever he shall be required, a certificate under his hand and seal of office, of such report and registry: and for receiving and registering each report of an individual or family he shall receive fifty cents; and for each certificate granted pursuant to the act to an individual or family fifty cents; and such certificate shall be exhibited to the court as evidence of the time of the applicant's arrival within the United States,(c) and must be recited at full length in the record of the court admitting such alien: otherwise he shall not be deemed to have complied with the conditions requisite for becoming a citizen of the United States. And any pretended admission of an alien, who shall have arrived within the limits and under the jurisdiction of the United States since the 18th June, 1812, to be a citizen, without such recital of such certificate at full length, shall be of no validity or effect under the act of Congress.(cT)

(6) Act of March 22d, 1816, sect. 1.

(c) Act of 14th April, 1802, sect. 2.

(d) Act of March 22d, 1816, sect. 1.

3. He must at the time of his application to be admitted, declare, on oath or affirmation, before some one of the courts aforesaid, that he will support the constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty whatever, and particularly by name, the prince, potentate, state, or sovereignty, whereof he was before a citizen or subject; which proceedings must be recorded by the clerk of the court.(e)

4. The court admitting such alien must be satisfied, that he has resided within the United States five years at least, and within the state or territory where such court is at the time held, one year at least,(f) and it must further appear to their satisfaction, that during that time, he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same. But it is provided, that the oath of the applicant shall in no case be allowed to prove his residence^ *g)*

(e) Act of 14th April, 1802, sect. 1.

(f) In the act of March *3,* 1813, entitled, An act for the regulation of seamen on board the public and private vessels of the United States. The 12th section is as follows: —

No person, who shall arrive in the United States from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not, for the continued term of five years next preceding his admission as aforesaid, have resided within the United States, *without being, at any time during the said jive years, out of the territory of the United States.*

By the first and other sections of the act, the regulations of the act aa to employing seamen, were to take efiect, from and after the termination of the war in which the United States were then engaged with Great Britain. By the 10th section, the provisions of this act shall have no effect or operation, *with respect to the employment as seamen,* of the subjects or citizens of any foreign nation, which shall not, by treaty or special convention with the government of the United States have prohibited, on board of her public and

private vessels, the employment of native citizens of the United States, who have not become a citizen or subject of such nation.

The treaty of Ghent, which terminated the war with Great Britain, was ratified on the 17th February, 1815.

(g) Act of 14th April, 1802, sect. 1.

5. Ill case he shall have borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, he must in addition to the above requisites, make an express renunciation of his title or order of nobility, in the court to which his application is made, which renunciation must be recorded in the said court.(ft)

6. Every court of record in any individual state having common law jurisdiction, and a seal, and clerk, or prothonotary, is considered as a court within the meaning of this act, and every alien who may have been naturalized in any such court, shall enjoy the same rights and privileges, as if he had been naturalized at a district or circuit court of the United States.(z)

It is provided however, that no person, heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain during the war, shall be admitted a citizen, as aforesaid, without the consent of the legislature of the state in which such person was proscribed.(j)

2. An alien who arrived between the 14th April, 1802, and the 18th June, 1812.

1. He must have made a declaration of intention three years before, as above mentioned.

2. He must declare on oath or affirmation, that he will support the constitution of the United States, and renounce his allegiance to the foreign state as in the 2d, requisite next preceding.(&)

3. The court admitting him must be satisfied, that he has resided within the United States for five years at least, and within the state or territory, where the court to which he applies is, at the time, held, one year at least;

(h) Act of 14th April, 1802, sect. 1. *(i)* Ib. sect. 3. *(*?) Ib. sect. 4.

i ib,

and it must further appear to their satisfaetion, that during that time he has behaved as a man of a good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same: provided, that the oath of the applicant shall in no case be allowed to prove his residence.(l) The other circumstances are to be proved by common law evidence.(m)

4. In case he shall have borne any hereditary title, or been of any of the orders of nobility, in the kingdom or state from which he came, he must, in addition to the above requisites, make an express renunciation of his title or order of nobility, in the court to which his application is made, which renunciation must be recorded in the said court.(n)

5. He must have made a registry, and obtained a certificate, in the following manner, to wit: if of the age of twenty-one years, he must have made report of himself, if under the age of twenty-one years, or held in service, must have been reported by his parent, guardian, master or mistress, to the clerk of the district court,(o) of the district where he arrived, or to some other court of record of the United States, or of either of the territorial districts of the same, or of a particular state, and such report must ascertain the name, birth-place, age, nation, and allegiance, together with the country whence he or she migrated, and the place of his or her intended settlement: and it is made the duty of such clerk, on receiving such report, to record the same in his office, and to grant to the person making such report, and to each individual concerned therein, a certificate under his hand and seal of office, of such report and registry: and for receiving and registering each report of an individual or family, he is to receive fifty cents, and for each certificate granted pursuant to the act, to an individual or family, fifty cents: and such certificate is to be exhibited to the court by every alien

(0 Ib.

(m) Anon. 1 Pet. 457.

(n) Act of 14th April, 1802.

(o) See supra.

who may arrive in the United States after the passing of this act, on his application to be naturalized, as evidence of the time of his arrival within the United States.(p) And this registry must have been made five years antecedent to the application; for it is the only evidence which the court will receive of the time when such applicant arrived in the United States.^)

6. The same courts have jurisdiction,(r) and *the proviso* of the 4th section of the act of 14th of April, 1802,

applies.(Y)

3. An alien who, between the 18th of June, 1798, and the 14th April, 1802, was residing within the limits, and under the jurisdiction of the United States, and who has continued to reside therein.

1. No declaration of intention is necessary to have been previously made.(Y)

2. The oath or affirmation of support of the constitution of the United States, and renunciation of allegiance must be taken.

3. It must be proved, to the satisfaction of the court, that the applicant was residing within the limits, and under the jurisdiction of the United States, before the 14th of April, 1802, and has continued to reside within the same, or he shall not be admitted. And such residence, for at least five years immediately preceding the time of application, must be proved by the oath or affirmation of citizens of the United States, which citizens must be named in the record as witnesses. And such continued residence within the limits, and under the jurisdiction of the United States, when satisfactorily proved, and the place or places where he has resided for at least five years as aforesaid, must be stated and set forth, together with the

(p) Act of 14th April, 1802, sect. 2.

(g) Anon, 1 Pet. 457.

(r) Act of tho 14th April, 1802, sect. 2.

(s) Ib. sect. 4.

(t) Acts of March 20th, 1804, sect 1. March 22d, 1816, sect. 2,

names of such citizens in the record of the court admitting him: otherwise the, same shall not entitle him to be considered and deemed a citizen of the United States.(V) The court must be satisfied, that he has resided within the state or territory where such court is, at the time, held, one year at least.(^) And it must further appear to their satisfaction, that during that time he has behaved as a man of good moral character, &c., provided that the oath of the applicant shall in no case be allowed to prove his residence.(^)

4. He must renounce every title or order of nobility, &c.(z)

5. The same courts have jurisdiction,^) and the same proviso applies.

4. An alien who was residing within the limits, and under the jurisdiction of the United States, before the 29th January, 1795, may be admitted to become a citizen, on due proof made to some one of the courts aforesaid, that he has resided two years at least within and under the jurisdiction of the United States, and one year at least immediately preceding his application, within the state or territory where such court is, at the time, held; and on his declaring, on oath or affirmation, his support of the constitution, and renunciation of his allegiance, &c., moreover, on its appearing, to the satisfaction of the court, that during the said term of two years, he has behaved as a man of good moral character, &c., and upon his renouncing any title or order of nobility, &c. All of which proceeding must be recorded by the clerk thereof.(6) The proviso of the 4th section of the act of 14th April, 1802, applies.^)

It seems, under the act of 14th April, 1802, admission as a citizen by a competent tribunal is conclusive. It need

(u) Act of March 22d, 1816. sect. 2.

(a;) Act of 14th April, 1802. sect. 1.

(?) Ib.

(*) Ib.

(a) Ib.

(6) Act of(14th April, sect. 1. — Proviso.

(c) Sect. 4.

not appear, in the admission, that all the requisites prescribed by the act were complied with. It need not appear, therefore, that there was a declaration of intention, three years prior to the application, or one year's residence in the state.(J) In a naturalization under the act of 29th January, 1795, it is sufficient, if the certificate of naturalization be given by a court of competent jurisdiction, and state, that the oath prescribed by that act was administered, though it does not state, nor does it appear by the record, that the applicant was, by the judgment of the court, admitted a citizen, or that the court was satisfied that he had, during the term of two years mentioned in the same, behaved as a man of good moral character, &c.(e) But now, by the act of March 22d, 1816, as we have before seen, in all cases of persons arriving after the 18th June, 1812, the admission as a citizen is void, unless the certificate of report and registry, and the certificate of declaration of intention be recited at full length in the record of the court admitting him.

Only free white persons can be admitted to become citizens of the United States: and an alien enemy can neither be admitted a citizen(f) nor make a declaration of intention.(g-)

In relation to a widow and children, it is provided by the act of 14th April, 1802, sect. 4, that the children of persons duly naturalized under the laws of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any of the said states, under the laws thereof, being under the age of twenty-one years at the time of their parents being so naturalized, or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States. Provides, that no person heretofore proscribed by any state,

or who has been legally convicted of having joined the army of Great Britain during the late war, shall be admitted a citizen as aforesaid, without the consent of the legislature of the state in which such person was proscribed. By the 2d section of the act of 26th March, 1804,

(<?) Stark *v.* The Chesapeake Insurance Company. 7 Cranch, 420. *(e)* Campbellv. Gordon. 6 Cranch, 176.

(f) Act of 14th April, 1802, sect. 1. See act of July 30,1813. *(g)* Ex parte Newman. 1 Gall. 11.

when any alien shall have complied with the first condition specified in the 1st section of the act of 14th April, 1802 (declared his intention,) and shall have pursued the directions prescribed in the 2d section of said act, (made report and registry,) and may die before he is naturalized, the widow and children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law.

An infant female child who was resident abroad when the naturalization of her father took place, but came afterwards into the United States before the passage of the act of 14th April, 1802, and was dwelling in the United States at the time that act was passed, was held to be thereby naturalized; though it was doubtful how it would have been under the act of 29th January, 1795.*(K)*

By the 4th section of the act of 14th April, 1802, the children of persons who then were, or had been citizens of the United States, should, though born out of the limits and jurisdiction of the United States be considered as citizens of the United States. *Provided,* that the right of citizenship should not descend to persons whose fathers have never resided within the United States. It has been held that an infant might be naturalized under the act of 14th April, 1802, on the petition of his guardian or parent, but not on his own petition.(z)

Expatriation.

Congress has never passed any act regulating the manner and terms according to which the right of expatriation shall be exercised, although several judges of the Supreme Court of the United States have expressed their opinions, that such a law is much wanted. In the few cases that have occurred in the courts of the United States, in which this important point has been agitated, it seems admitted, that Congress has power to determine the mode in which expatriation may be exercised. But in regard to the law, at present it is not easy to deduce a general rule from the opinions expressed. In the year 1792, the

(A) Campbell v. Gordon. 6 Cranch, 176.

(f) Case of La Forestiere, 2 Mass. Rep. 419. (1807.)

state of Virginia passed an act on this subject. It was held, however, that this could affect the person complying with it, only as a citizen of that state, and not as a citizen of the

United States; and it seems questionable, how far such a law is compatible with the constitution of the United States.(jf) It was held, in the case of Talbot *v.* Jansen, that to render valid an expatriation by a citizen domiciled within the United States, there must be an entire departure by the party from the United States, and he must become the citizen of another country, with a view to relinquish his native country. Therefore, a citizen of the United States still remains such, notwithstanding his renunciation of allegiance to an individual state under the authority of a state law, or his becoming a citizen of a foreign state by taking an oath, without residence, and without a view to residence.(k) It seems also, that such departure must not be an illegal act: as, in the capacity of a cruizer against foreign powers at peace with us; or in the act of treason, or any other crime or offence.(l) Nor ought it to be leaving duties unperformed at home. Thus, a person in the exercise of a public trust, ought not to leave the country, till he has accounted; nor one who owes money, till he settles with his creditors. Under these restrictions, the right of expatriation exists, in the time of war as well as of peace, until restrained by Congress.(m) It is said, however, that a citizen of the United States, may become a citizen of another country, without *necessarily* relinquishing his own country: and it is no objection, that he thereby becomes a citizen of two governments at the same time. A man may, at the same time, enjoy the rights of citizenship under two governments.(n) His becoming a citizen or subject of another country, does not absolve him as a citizen or subject of his own country, but is subordinate to his original allegiance. Such latter citizenship, in such case, has only this effect, that whenever he goes into that country, and chooses to reside there, he

(*j)* Talbot *v.* Jansen. 3 Dall. 133. (1795.)

(k) Ib. PATERSON J. See the Bello Corunnes. 6 Wheat. 170.

(l) Talbot v. Jansen. 3 Dall. 133. IREDELL J. See the Santissima Trinidad. 7 Wheat. 548.

(in) Talbotv. Jansen. 3 Dall. 133. IREDELL J.

(») Talbot c. Jansen. 3 Dall. 169. Per RUTLEDGE C. J. Per IKEDEX.L J. See also the case of Isaac Williams, *post.*

is *ipso facto,* to be deemed a citizen, without any thing further.(o) But this doctrine does not apply, where a citizen has fully expatriated himself, in the manner permitted by the laws of his own country.(p)

In the case of Isaac Williams, who was tried in the circuit court of Connecticut, in September, 1799, before ELLSWORTH, C. J. and LAW, district judge, for accepting a commission from the French Republic at Guadaloupe, and also for cruising against and capturing their enemies, who were at peace with us, it was held by the Chief Justice, that it was no defence that the defendant had left this country, of which he was before a citizen, in the year 1792, and was naturalized in various bureaus at Rochefort, in that year taking an oath of allegiance to the French Republic, and renouncing his allegiance to all other countries, especially to America, and was thereupon appointed, and continued to be a commissioned officer in the, French marine, and was resident in the French Republic,

making one visit of only six months to the United States in the year 1796, and was domiciled for three years then past in Guadaloupe, without any intention to return hither; but he was convicted on two indictments for the above mentioned offences, and fined and imprisoned: LAW district judge *dubitante.* The chief justice declared his opinion, that a member of the community cannot dissolve the social compact, so as to free himself from amesnability to our laws operating on citizens generally, without the consent or default of the community, and no consent either express or implied, existed under the policy or acts of the United States. It could not be inferred from our pacific station, or from our acts naturalizing foreigners. The embarrassment that may be occasioned to the individual, by becoming a member of two governments, is for himself to judge of; and, therefore, the facts given in evidence were irrelevant, and ought not to go to the jury.j^)

In a case which occurred in the year 1804, the question whether a person born within the United States, or be-

(o) Talbot *v.* Janson, 164. Per IHEDELI, J. who puts the case of tho Marquis do La Fayctte.

(p)Ib.

(q) United States *v.* Williams. 4 Hall's Law Journ. 461. 2 Cranch, 82, note. Sec also the opinion of WASHINGTON J. United States c. Gillies 1 i'ct, 1*31,

coming a citizen according to its laws, can devest himself absolutely of that character, otherwise than in such manner as may be prescribed by law, is left undecided. It is admitted, that an American citizen may acquire in a foreign country, the commercial privileges attached to his domicil, and would be exempted from the operation of a commercial act, embracing only " persons resident in the United States or under its protection." And although becoming a subject of a foreign power, may not rescue him from punishment for any crime committed against the United States, (a point not intended to be decided,) yet it places him out of the protection of the United States while within the territory of such foreign power, within the meaning of these words" of the law.(r)

In August, 1812, during the late war with Great Britain, Elijah Clark was Arrested, and charged as a spy before a general court martial of the American army,- held at Buffalo, in the state of New York. He had, about eighteen months before removed, with his wife, from the United States to Canada. Being convicted of the charge, he was sentenced by the court martial to the punishment of death. But some doubt afterward arising, whether he was embraced within the rules and articles of war, inasmuch as the 101st art. on this subject includes only persons not citizens of, or owing allegiance to the United States, a suspension of the sentence took place, and the case was referred to President MADISON. The president directed Clark to be discharged, unless he should be arraigned by the civil court for treason, or for a minor crime under the laws of New York, the said Clark being considered a citizen of the United States.(s)

(r) Murray *v.* The Charming Betsy. 2 Cranch, 120.

(s) Case of Elijah Clark. Brackenridge's Law Miscellanies. 409. See the remarks, Ib. The sentiments of the government of the United States, in the year 1793, are thus expressed, in a letter from the secretary of state,

(Mr. Jefferson,) to Mr. Morris, dated 16th August, 1793. "Our citizens are certainly free to devest themselves of that character by emigration and other acts, manifesting their intention, and may then become the subjects of another power, and free to do whatever the subjects of that power may do. But the laws do not admit, that the bare commission of a crime amounts, of itself, to a devestmcnt of the character of citizen, and withdraws the criminal from their coercion." The government, therefore, resisted the claim of M. Genet, the ambassador from Prance, of

In the latest case in which the point occurred in the Supreme Court of the United States, the court declared, that they gave no opinion whether an American citizen may, independently of any legislative act to this effect, throw off' his own allegiance to his native country; but that it was perfectly clear that this cannot be done without a *bona fide* change of domicil, under circumstances of good faith. It can never be asserted as a cover for fraud, or as a justification for the commission of a crime against the country, or for a violation of its laws, when this appears to be the intention of the act. But that it was unnecessary to go into a farther examination of this doctrine: it would be sufficient to ascertain its precise nature and limits, when it should become the leading point of a judgment of the court.(i)

Constitution. Art. I. — Bankruptcies.

Art. 1. s. 8. 4. Congress shall have power to establish uniform laws, on the subject of bankruptcies, throughout the United States.

This grant of power to Congress is not exclusive, either by the terms of the constitution of the United States, or the nature of the power. Until the power is exercised, the states are not forbidden to pass bankrupt laws, ex-

Gideon Henfield as a French citizen, who being an American citizen, had engaged in the French naval service in Charleston, and cruised against their enemies, who were at peace with the United States. 1 Wait's State Papers, 143. 86.

In the year 1794, the secretary of state, (Mr. Randolph,) thus expresses himself m relation to the alleged expatriation of Captain Talbot. " I cannot doubt that Captain Talbol has taken an oath to the French Republic; and at the same time I acknowledge my belief, that no law of any of the states prohibits expatriation. But it is obvious, that, to prevent frauds, some rules and ceremonies are necessary for its government. It then becomes a question, which is *also* an affair of the judiciary, whether those rules and ceremonies have been complied with." Letter to M. Fauchet, minister of the French Republic, Oct. 28th, 1797. 2Wait's State Papers, 251.

(t) The Santissima Trinidad. 7 Wheat. 342. See Stoughton v. Taylor. Opinion of VAN NESS D. J. Nat. Intell. Dec. 3d and 5th, 1818. Duponceau's Bynkershoek, 175. 3 Hall's Law Journ. Murray *v.* M'Carty. 2 Mumf. 393. Hay's Treat, on Expatriation. Washington. 1814. Tucker's Black. Vol. I. Part 1, 426. Bee's Adm. Rep. 11. Jackson's lessee *v.* Burns. 3 Binn. 85.

cept so far as they impair the obligation of contracts.^) When, however, Congress enact a general bankrupt law, the right of the states is suspended, though not extinguished: for, on the repeal of the bankrupt law, the ability of the states to exercise the power revives. And when Congress does pass such a law, the power of the states exists over such cases, as that law may not reach.(;r) Accordingly, by the 61st section of the bankrupt act of

April 4th, 1800, now expired, the insolvent laws of the states were recognized as valid, except so far as they respected persons clearly within the purview of that act, and whose debts were sufficient to bring them within its provisions.

As to the effect given by the courts of the United States, to discharges under state or foreign bankrupt or insolvent laws, this has been treated of under a former head, so far as respects discharging on bail.(y) As to their operation in bar of the suit, where the debt was contracted in Boston, to the plaintiff, a native and resident there, and the defendant removed into Pennsylvania, became a citizen of that state, and took the benefit of the bankrupt laws of Pennsylvania, being arrested on his return on a visit to Boston, it was held, that his certificate was no *bar.(z~)* So, where the defendant had petitioned the legislature of Rhode Island for the benefit of their insolvent law, and they ordered a continuance of the petition to their next session, and that all process against the defendant should be suspended, it was held, that these circumstances were no bar to a suit in the circuit court of that state, for a debt contracted in Massachusetts.(a) And in relation to discharges abroad, under foreign bankrupt laws, the rule seems to be, that if the contract is made and is payable in the country where such discharge takes place, the courts of the United States give it effect, in a suit brought in them; because the law of the country where the contract takes place, is the law of the contract,

(u) See post. art. 1. s. 10. 1.

(a-) Sturcres *v.* Crowninshield. 4 Wheat, 122. See Adams c. Story. 6 Hall's Law Journ. 474. Golden *r*>. Prince. 5 Hall's Law Journ. 502.

(y) Ante, 152.

(z) Emory v. Greenough. 3 Dall. 369.

(a) Babcock t;. Weston. 1 Gall. 168.

wherever performance is demanded: and the same law which creates the charge, will be regarded if it operate a discharge of the contract.(^) But the laws of one country can have no extra-territorial force, except so far as the comity of other nations may extend to give them effect; and, it seems, a nation ought not to acknowledge the validity of foreign laws, legislating over persons not within their jurisdiction, and affecting contracts entered elsewhere, and with a view to other laws.(c) If the debt accrued elsewhere, not in a country governed by such foreign laws, a discharge there will not bar it. Therefore, a discharge at Teneriffe, under the bankrupt laws there, will not bar a suit in the circuit court of the United States, for a debt not contracted at Teneriffe, nor in a country governed by Spanish laws. If the defendant allege that the debt arose in such foreign country, he must prove it. A residence there at the time, and for several years before, and after, with occasional absence at another place, where the debt might have been contracted, especially if the debt is joint, and it does not appear where the other partner lived, it seems, is not sufficient proof of the allegation, that the contract arose there.(c?)

Constitution. Post Roads.

Art. 1. s. 8.7. Congress shall have power to establish post offices, and post roads.

The power of Congress to set apart funds for internal improvements in the states, with their assent, by means of roads and canals, has been claimed as being incidental to this, and other powers granted by the constitution, namely: the right to declare war, to regulate commerce, to pay the debts, and to provide for the common defence, and general welfare, the power to make all laws necessary and proper for carrying into execution all the powers vested, by the constitution, in the government of the United States, or in any department or officer thereof; and lastly, from the power to dispose of and make all needful rules and regula-

(6) Green v. Sarmiento. 1 Pet. 74. Golden *v.* Prince. 5 Hall's Law Journ. 502.

(c) Ib. Babcock v. Weston. 1 Gall. 168. Van Reimsdyk *v.* Kane. 1 Gall. 371. See 9 Cranch, 153.

(d) Green P. Sarmiento, 1 Pet. 74.

tions respecting the territory and other property of the United States.(e) Its exercise is also vindicated by precedent. It has been the constant practice to allow to the new states, five per cent, of the nett proceeds arising from the sale of public lands, to be laid out in the construction of roads and canals. Of this five per cent., three fifths were to be expended within the states, and two-fifths, under the direction of Congress, in the making of roads leading to these states. From forty to fifty thousand dollars are annually expended in this manner. Moreover, in 1806, the President was authorised by Congress to open a road from Nashville, in the state of Tennesse, to Natchez: this road passed through a state without asking consent. In the year 1809, the President was authorised to cause the canal of Carondelet, leading from Lake Ponchartraine to the city of New Orleans, to be extended to the river Mississippi^/) The Cumberland road, which has been constructed under an act passed March 29th, 1806, has cost nearly 1,800,000 dollars, which exceeds the proceeds arising from the sales of public lands in the state of Ohio, more than 1,000,000 dollars.(g-) This road was made under a covenant with the state of Ohio by act of April 30th, 1802, that a portion of the avails of the sales of land lying within that state, should be applied to the opening of roads leading to that state, with the consent of the several states through which the road was to pass, and Virginia, Pennsylvania, and Maryland, through which it passes, gave their consent. Other acts confirming, amending, and enlarging this act, were passed in 1810, 1815, and 1816.

In the year 1817, however, after a bill had been passed by Congress setting apart the *bonus* to be paid by the bank of the United States for its charter, for constructing roads, and canals, and improving the navigation of water courses, it was returned by President MADISON, who assigned as a reason, that the power of Congress, under the constitution, did not extend to making roads and canals, and improving water courses, through the different states, nor could the assent of those states confer the power: and

(e) Message of President Monroe, May 4th, 1822.

(f) But it seems this was through a country that was territorial.

(g) Report of committee of house of representatives, April 26th,

1822.

that it could be constitutionally vested only by an amendment of the constitution;*(fi)* and the bill, on its return, was negatived in the house of representatives.

Afterwards on the 15th December, in the same year, a committee of the house of representatives reported in favour of the power of Congress.

1. To lay out, construct, and improve post roads through the several states, with the assent of the respective states.

2. To open, construct, and improve military roads through the several states, with the assent of the respective states.

3. To cut canals through the several states, with their assent, for the promoting, and giving security to internal commerce, and for the more safe and economical transportation of military stores, &c. in the time of war, leaving, in all these cases, the jurisdictional right over the soil in the respective states. And they recommended a resolution, that it was expedient to constitute the sum to be paid by the bank of the United States, and the dividends, as a fund for internal improvements.^')

In the year, 1822, a bill was passed by Congress, for the preservation and repair of the Cumberland road, appropriating money and establishing gates, and tolls on the road, and enforcing the collection of tolls by penalties. But the bill was returned by President MONROE as unconstitutional, with his reasons for that opinion, and was finally lost.(j) The act of 30th April, 1824, authorised the President to cause the necessary surveys, plans, arid esti-

(h) Message, March 3d, 1817, 12th Niles' Reg. 25.

(f) 13Niles's W. Reg. 287.

(j) Message of President MONROE to Congress, May 4th, 1822. President MONROE communicated to Congress, at the same session, an extensive discussion of this interesting question. See Niles's W. Reg. August, 1822.

It appears from the message of President JEFFERSON to Congress, of December 2d, 1806, that it was his opinion, that these objects are not within the constitutional powers of Congress, and that an amendment to the constitution is necessary, to authorise the expenditure of the public money for such purposes. 5 Wait's State Papers, 458, 459. See also Message of President MADISON, Dec. 3, 1816, to the same point.

mates to be made of the routes of such roads and canals as he might deem of national importance in a commercial or military point of view, or necessary for the transportation of trie public mail: with authority to employ engineers: and appropriated 30,000 dollars to that purpose.

In May 1830, this subject was again discussed in Congress, and a bill passed the senate and house of representatives appropriating a sum of money out of the treasury of the United States, as a subscription of stock in the Maysville, Washington, Paris, and Lexington turnpike road company. This road was exclusively within tho limits of the state of Kentucky, starting at a point on the Ohio river and running out sixty miles to a interior town. It was returned with objections by President JACKSON, and on the question of passing, the votes in the house of representatives were yeas 96, nays 90, and the bill was lost.(k)

Various acts seem to have been passed, from time to time, by Congress, for constructing roads in the territories, under the 4th article of the constitution, sect. 3. 2.

Under the acts passed by Congress, for the establishment of the post office, it is no justification to a person indicted under the 7th section of the act of 30th April, 1799, for wilfully obstructing the passage of the public mail, that he had fed the horses employed in carrying the mail, and that a sum of money was due to him for food furnished at, and before their arrest and detention. No lien exists against the government in such case; nor can the government be sued: the only remedy is by application to Congress, if the government refuse payment. A stolen horse, found carrying the mail stage, cannot be seized by the owner, so as to retard the mail. A driver being in debt, or even committing an offence, can only be arrested in such way, as does not obstruct the passage of the mail.(l) But it has been held by the circuit court in a subsequent case, that the act of Congress of 1810 ought not to be so construed, as to shield the carrier of the mail against a temporary stoppage of the mail, by a municipal officer,

(&) Message of President JACKSON of the 27th May, 1830. This message contains a historical view of the opinions of prior administrations on the constitutionality of such laws.

(1) United States c. Barney. 3 Hall's Law Journ. 128, by WIHCHESTI:K J.

Where it is driving through a populous city at such a rat© as to endanger the safety of the inhabitants, contrary to an ordinance of the city. And that if the officer had a Warrant against a felon, who had placed himself in the stage, or the driver should commit murder in the street, in tne presence of the officer, and then place himself on the box, they would not be protected against arrest, because a temporary stoppage of the mail would be the congequence.(m)

By the 19th section of the act of Congress of the 30th April, 1810, if any person shall rob any carrier of the mail of the United States, or other person intrusted therewith, of such mail, or of part thereof, such offender or offenders shall, on conviction, be imprisoned not exceeding ten years, and if convicted a second time of a like offence, he or they shall suffer death. Or if, in effecting such robbery of the mail the first time, the offender shall wound the person having custody thereof, or put his life in jeopardy by the use of dangerous weapons, such offender or offenders shall suffer death.

In the case of the mail robbers, Hare and others, who robbed the Baltimore mail in Maryland, in the year 1818, it was held that effecting a robbery of the mail by persons

armed with loaded pistols, with threats of death in case of resistance^ in consequence of which the mail carrier was put in fear of his life, and surrendered the possession of the mail, was putting his life in jeopardy by the use of dangerous weapons, within the meaning of this act, though no pistol was fired or snapped; and the prisoners were capitally convicted.(«)

Constitution. Art. 1. — Patents.

Art. 1. sect. 8. 8. Congress shall have power to promote the progress of science and useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries.

(m) United States *v.* Hart. 1 Pet. 390.

(n) United States *v.* Hare, and United States c. Alexander. Circ. Co. Maryland dibt. May 1818. United States *v.* Wood. Giro. Co. Eastern dist. of Pennsylvania. June, 1818. The same doctrine was held by BALDWIN, J. in the case of United States c. Porter and Wilson, May, 1830.

It has been held by the New York court of Errors, that this power is concurrent with the power of the states, provided the exercise of the power by the latter does not contravene the acts of Congress on the subject. The state may, therefore, grant to an author or inventor, an exclusive right, the operation of which would be confined to the limits of such state, where no patent-right from the United States is granted. Where Congress go no further than to secure the right to the author or inventor, the state may regulate the use of such right, or restrain it so far as it is injurious to the public. It is subject, like other property, to taxation or debts. But, at any rate, as the acts of Congress extend only to the *inventor* of a useful art, a state may grant an exclusive right to the *possessor* of that art, who does not claim as an inventor, or to one who introduces it from abroad. It was, therefore, determined, that acts of assembly, passed at different periods by the legislature of New York, since the adoption of the constitution of the United States, granting to the plaintiffs, as *possessors* of the art, for limited periods, the exclusive privilege of navigating the waters of New York with steamboats, and imposing a penalty on other persons navigating in the same manner, in such waters, without license from the grantees, were not contrary to the constitution and laws of the United States, but were valid, and an injunction was issued by the court, to restrain the defendant from the use of them.(o)

Constitution. Art. 1. — War.

Art. 1. s. 8. 10. Congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

A mere declaration of war by an act of Congress, does not, of itself, vest a right to seize and condemn tangible property, of the individuals of the nation against whom war is declared, found within the territory of the United States, at the time of such declaration. Such property cannot be seized and condemned, without some further

(o) Livingston v. Van Inghen. 9 Johns. 507. See 1 Tucker's Black, 183. See *post.* Commerce. Andante, 308.

legislative provision authorising it. The right to seize and condemn property of the belligerent, whether tangi-< ble or consisting of debts, exists by the law of nations: but'it is a right to be exercised or waved at the will of the sovereign authority, and without the expression of the will of Congress, further than by a mere declaration of war, the judiciary cannot enforce it. The right to debts due between belligerents at the breaking out of war, revives at the restoration of peace, unless confiscation is enforced by a particular provision of the legislative power. An act of Congress, therefore, declaring war, and authorising the president to issue letters of marque and general reprisal, against the vessels, goods, and effects of the enemy, does not authorise a seizure by an individual, not commissioned, of property of an enemy, found in the care and custody of one of our citizens on land, or floating in a creek within the territory of the United States, at the declaration of war, nor does it authorise such seizure by order of the executive.(jo)

The whole powers of war being by the constitution vested in Congress, the acts of that body can alone be resorted to as guides in the inquiry how far a state of war exists. Congress may authorise general hostilities, in which case the general laws of war apply to our situation: or partial hostilities, in which case the laws of war, so far as they actually apply to our situation must be attended to. The United States and France were by virtue of various acts of Congress, passed from time to time, in a state of partial war in^the year 1799.(^)

Constitution. Art. 1. — Army and Navy.

Art. 1. s. 8. 11 and 12. Congress shall have power to raise and support armies, to provide and maintain a navy.

Congress have power, under the constitution, to authorise the enlistment of minors for the army and navy of the United States, without the consent of their parents.(r)

(p) Brown *v.* The United States. 8 Cranch, 110. *(q)* Talbot *v.* Seeman. 1 Cranch, 1.

(r) United States v. Bainbridge. Mason, 71. Per STOEY J. DAVIS, D. J. diss.

Constitution. Art. 1. — Militia.

Art. 1. sect. 8. 14. Congress shall have power to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions.

15. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress.

Under these clauses of the constitution, the following points have been decided.

1. If Congress had chosen, they might, by law, have considered a militia man, called into the service of the United States, as being, from the time of such call, constructively in

that service, though not actually so, although he should not appear at the place of rendezvous. But they have not so considered him, in the acts of Congress, till after his appearance at the place of rendezvous: previous to that, a fine was to be paid for the delinquency in not obeying the call, which fine was deemed an equivalent for his services, and an atonement for his disobedience.

2. The militia belong to the states respectively, and are subject, both in their civil and military capacities, to the jurisdiction and laws of the state, except so far as these laws are controlled by acts of Congress, constitutionally made.

3. It is presumable theframers of the constitution contemplated a full exercise of all the powers of organising, arming, and disciplining the militia; nevertheless, if Congress had declined to exercise them, it was competent to the state governments respectively to do it. But Congress has executed these powers as fully as was thought right, and covered the whole ground of their legislation by different laws, notwithstanding important provisions may have been omitted, or those enacted might be beneficially altered or enlarged.

4. After this, the states cannot enact or enforce laws on tho same subject. For, although their laws may not be directly repugnant to those of Congress, yet Congress having exercised their will upon the subject, the states cannot legislate upon it. If the law of the latter be the same, it is inoperative: if they differ, they must, in the nature of things, oppose each other, so far as they differ.

5. Thus if an act of Congress imposes a fine, and a state law fine and imprisonment for the same offence, though the latter is not repugnant, inasmuch as it agrees with the act of Congress, so far as the latter goes, and add another punishment, yet the wills of the two legislating powers in relation to the subject are different, and cannot consist harmoniously together.

6. The same legislating power may impose cumulative punishments; but not different legislating powers.

7. Therefore, where the state governments have, by the constitution, a concurrent power with the national government, the former cannot legislate on any subject on which Congress has acted, although the two laws are not in terms contradictory and repugnant to each other.

8. Where Congress prescribed the punishment to be inflicted on a militia man, detached and called forth, but refusing to march, and also provided that courts martial for the trial of such delinquents to be composed of militia officers only, should be held and conducted in the manner pointed out by the rules and articles of war, and a state had passed a law enacting the penalties on such delinquents which the act of Congress prescribed, and directing lists of the delinquents to be furnished to the comptroller of the United States and marshal, that further proceedings might take place according to the act of Congress, and providing for their trial by state courts martial, such state courts martial have jurisdiction. Congress might have vested exclusive jurisdiction in courts martial to be

held according to their laws, but not having done so expressly, their jurisdiction is not exclusive.

9. Although Congress have exercised the whole power

of calling out the militia, yet they are not national militia, till employed in actual service, and they are not employed in actual service, till they arrive at the place of rendezvous.^)

But, it seems, a state court martial sitting without the authority of an act of assembly of the state, passed for that purpose, would not have jurisdiction.^)

Constitution. Art. 1. — Piracy.

Art 1. s. 8. 9. Congress shall have power to define, and punish piracies, and felonies committed on the high seas, and offences against the law of nations.

This power *to define and punish,* seems rather applicable to felonies and offences against the law of nations, than to piracies; for as to those, tho power *to punish* would be sufficient. Piracy is well defined by the law of nations as robbery on the sea. The term, felonies, however, in relation to offences on the high seas, is necessarily somewhat indeterminate, since the term is not used in the criminal jurisdiction of the admiralty, in tho technical sense of the common law. Offences against the law of nations cannot, with any accuracy, be said to be completely ascertained and defined in any public code, recognised by the common consent of nations. In respect to these, there is a peculiar fitness in giving the power to define, as well as to punish.(w)

The constitution having conferred on Congress the power of punishing piracy, there can be no doubt of the right of Congress to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United Stateg.(w)

The first act of Congress on the subject of piracy, was the act of 30th April, 1790, which provides, in the 8th section, that if any person or persons shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder or robbery, or

(*) Houston 0. Moore. 5 Wheat. 1. See, however, the opinions of JOHNSON J. and STORY J. And Martin *v.* Mott. 12 Wheat. 19.

(t) Meade'sCase. 5 Hall's Law Journ. 536, and Bolton's Case, 3 Serg. & Rawle, 176, *note.* ,

(w) United States e. Smith. 5 Wheat. 159.

(») United States v. Palmer. 3 Wheat. 630.

any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death, or if any captain or mariner of any ship or

other vessel shall, piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate: every such offender shall be deemed taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought.

A vessel within a marine league of shore, at anchor in an open roadstead, where vessels only ride under the shelter of land, at a season when the course of winds is invariable, is upon the *high seas.(w}* So, it is held, that high seas, mean any waters on the sea coast, which are without the boundaries of low water mark, although such waters may be in a roadstead or bay, within the jurisdictional limits of a foreign government.^) Those limits, though neutral to war, are not neutral to crimes.(y) In the construction of the words " upon the high seas," it has been held, that it makes no difference whether the offence of piratical murder was committed on board of a vessel, or in the sea, as by throwing the deceased overboard and drowning him, or by shooting him when in the sea, though he was not thrown overboard.^) Piratical murder committed from on board an American vessel by a mariner sailing on board an American vessel, by a foreigner on a foreigner, in a foreign vessel, is within this act.(a) And the same offence committed by any person *from on board* a vessel having no national character, and drowning him is within the same law.(6)

The words, "out of the jurisdiction of any particular

(w) United States *v.* Griffin and Brailsford. 5 Wheat. 204. 206.

(x) United States?). Ross. 1 Gall. 624. See also United States v. Smith. Mason, 147.

(y) United States v. Griffin and Brailsford. 5 Wheat. 200, 201. See *pott,*

(2) United States «. Holmes. 5 Wheat. 418.

(a) United States c. Furlong. 5 Wheat. 203.

(6) United States *v.* Holmes. 5 Wheat. 418.

state," in this section, mean, out of the jurisdiction of any particular state of the United States. So that land piracies, and piracies committed within our waters, are not within it.(c)

The words, " which, if committed within the body of a county, would, by the laws of the United States, be punishable with death," relate to any other offence, should there be any, of the description mentioned, and not to robbery or murder. Although, therefore, a robbery committed on land is not, by the laws of the United States, punishable with death, yet a robbery on the high seas is piracy within this section.(W)

The word, robbery, used in this section is to be understood in the sense in which it is recognised and defined at common law.(e) If an act of Congress use a technical term which is known, and its meaning fully ascertained by the common or civil law, from one or the other of which it is obviously borrowed, it is necessary to refer to the source from which it is taken, for its precise meaning.(f) Therefore, the felonious taking of goods from the person of another, or in his presence, on the high seas, by violence or by putting him in fear, and against his will, is felony and piracy, by the act of 1790.(g-)

Though the words, " any person or persons," are broad enough to comprehend every human being, yet it was held, that the crime of robbery committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state, is not piracy within the true intent and meaning of this act.(/i) This opinion, however, was afterwards reconsidered, and it was then determined, that it applied exclusively to a robbery or murder committed by a person on

(c) United States *v.* Ross. 1 Gall. 624. See *post,* as to murder, and United States *v.* Bevans. 3 Wheat. See the act of 3d March, 1845. United States *v.* Robinson, 4 Mason, 307.

(d) United States c. Palmer. 3 Wheat. 610. United States c. Jones, (1813.)

(e) United States *v.* Palmer. 3 Wheat. 630. (f) United States *v.* Jones, (1813.) Paraph. 67. *(g)* Ib. 5tv.

(A) United States o. Palmer. 3 Wheat. 633, 634. See 5 Wheat. App. Speech of C. J. MAKSHALL.

board of any ship or vessel belonging to subjects of a foreign state; that is, she must be the property of subjects of a foreign state, under their controul, and sailing under the flag of a foreign state whose authority is acknowledged. For, general piracy, murder, or robbery, committed in the places described in this section, by persons on board of a vessel, not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true meaning of this act, and is punishable in the courts of the United States.(z)

In questions, therefore, of murder, or robbery, under this act, it makes no difference, whether the offender be a citizen of the United States or not. If it be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the United States by a foreigner, the offender is to be considered, *pro hoc vice,* and in respect to this subject, as belonging to the nation under whose flag he sails. If it be committed by a citizen or foreigner, on board of a piratical vessel, the offence is equally cognisable by the courts of the United States under this law.(&)

It seems, a commission given by one as brigadier of a republic, of whose existence the court knows nothing, or as independent generalissimo of a province in the possession of the mother country, is, so far as the court can take cognisance of it, void. But, whether a person acting under such commission with good faith can be guilty of piracy, *query.* If, however, the whole transaction of the capture made under such commission,

demonstrates that it was not made *jure belli,* but the vessel was seized on the high seas, and carried into a port of the United States, *animo furandi,* it is not a belligerent capture, but a robbery on the high seas. Fraud in effecting a capture will not, of itself, constitute piracy; yet it may be an ingredient in the transaction, not inconsistent with that character.(l) A belligerent character may be put off, and a piratical one

(i) United States *v.* Klintock. 5 Wheat. 151, 152. United States c. Holmes. 5 AVhcat. 417.

(k) United States v. Holmes. 5 Wheat. 417.

(1) United States o. Klintock. 5 Wheat. 151. United States e. Holmes, 5 Wheat. 416.

assumed, even under the most unquestionable commission, *(m)*

When a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts o the Union must view such newly constituted government, as it is viewed by the legislative and executive departments of the government of the United States. If the government of the union remains neutral, but recognises the existence of a civil war, the courts of the union cannot consider as criminal, those acts of hostility which war authorises, and which the new government may direct against the enemy.(w) Each party in the war is to be deemed, by us, a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights.(o) It follows, that persons or vessels, employed by such government, may prove the fact of their being employed in such service, by the same testimony, which would be sufficient to prove they were employed by an acknowledged state. Such fact may be proved, without proving the seal of the new government. The seal cannot prove itself, but may be proved by such evidence as the nature of the case admits.(p) In general, the commission of a public ship, signed by the proper authorities of the nation to which she belongs, is complete proof of her national character. A bill of sale is not necessary to be produced: nor will the courts of a foreign country inquire into the means, by which the title to the property has been acquired.^) But, where it does not appear by any legal proof, that a privateer had a commission, or any ship's papers, or documents, from such government, or that they were ever recognised as ships of that nation, or of its subjects, or who were the owners, or where they resided, or when, or where the privateer was armed or equipped, but the captain and crew were of different nations, the captain was domiciled at Baltimore, was by birth an American, and the privateer was Baltimore built, the burthen of proof of the national character of the vessel, on

(m) United States i>. Pirates. 5 Wheat. 202.

(n) United States c. Palmer. 3 Wheat. 643. (o) The Santissima Trinidad. 7 Wheat. 337. *(p)* Ib. *((f}* United States «. Holmes. 5 Wheat. 418.

board of which the offence was committed, lies on the defendants who stand charged with piracy.(r)

The national character of an American vessel plundered, or run away with, may be proved without production of her register, or proof of its having been on board of her. Property or character is a matter *inpais,* and is to be so established.^) So, it has been held, on an indictment for piracy, committed on board of a neutral vessel, by an American privateer, where it did not appear that there was any registry or bill of sale of the vessel, but there were invoices and bills of lading, that other evidence of the ownership might be given. These papers might be necessary in case there was ground to suspect that they were kept out of sight for fraudulent purposes. But if nothing of this sort be pretended, the captain may testify as to the vessel and cargo being *bona fide* neutral property.(Y)

In a case that occurred during the late war with Great Britain, the defendant, who was first lieutenant of the schooner Revenge, a regularly commissioned American privateer, was indicted in the circuit court of the district of Pennsylvania, for piracy, by a robbery committed upon the property of a neutral met with on board a neutral vessel on the high seas, and it was held, that if a commissioned cruizer take the property of a neutral, he is a trespasser, and will be compelled, not only to make restitution, but compensation also, in damages, unless he had probable cause for seizing the property as prize. But if he should make the seizure, not as prize, but with a felonious intent to convert the property to his own use, without inquiry or trial, his commission would not shield him from the charge of felony and piracy. In deciding, in either case, whether the act amounts to felony or trespass, the *quo antmo* is to be sought after, and is to be judged of by the actions of the party.(w) The 8th and 9th articles of the rules for the government of the navy, (act of Congress of 23d April, 1800,) inflicting punishment by court martial on those who shall take from a vessel at sea any part of her

(r) The Santissima Trinidad. 7 Wheat. 335. See the case of the Exchange. 7 Cranch, 116.

(«) United States v. Pirates. 5 Wheat. 199. 205, 206.

(t) United States c. Jones. Pamph. Philadelphia, (1813,) 11. Before WASHINGTON J, and PETEBS D. J. See *post.*

(w) United States e. Jones. Pamph. Philadelphia, 1813. 59.

cargo, or embezzle the same, or who shall maltreat any of the persons, relate expressly *to prizes,* or to the vessels seized as *prizes,* and not to acts of piracy. And the act of 26th June, 1812, respecting privateers, is confined to the conduct of persons on board of privateers, and is intended for their government. But for piratical acts committed on others, no punishment or mode of trial by court martial is prescribed.^)

It seems, that though a treaty made by the United States with a foreign power, stipulate, that if any citizen of the United States take a commission, or letter of marque, or for arming any ship or vessel, to act as a privateer against the subjects of such foreign power, or their property, from any prince or state at war with such power, he shall be punished as a pirate, yet, it is questionable, whether such citizen is punishable as a pirate under the present laws of the United States, for such act or for aggressions under it: but he might have been punishable under the act of 14th June, 1797, for a high misdemeanor, in so

arming, commanding, &c. such vessel, out of the jurisdiction of the United States; and he cannot in a court of the United States, demand restitution of a prize taken under such authority, of which he has been dispossessed by his associates^?/)

(x) Ib. 57. In this case, the Portuguese vessel was detained for some hours, and then permitted to proceed. Money, clothing, and much other valuable property were taken on board the privateer, which was under English colours, and no attempt was made to send them in for adjudication, but part was divided among the crew, and the rest concealed. After arrival in the United States, they observed a profound silence respecting the property. Force, and intimidation were used in obtaining the property. These and other circumstances, the court considered sufficicierit to establish a felonious intent. The prisoner, however, was acquitted, as it appeared by the evidence, that the acts charged were committed by others, and that he was not concerned in them.

(y) The Bello Corunnes. 6 Wheat. 171.

The 9th section of the act of June 5th, 1794, and the 2d section of the act of 14th June, 1797, provided, that nothing in those acts should be construed to prevent the prosecution or punishment of treason, *or any piracy defined by a treaty, or other law* of the United States. These acts are repealed by the act of 20th April, 1818, and, in part supplied by it: but this proviso is omitted.

Many of the treaties made by the United States with foreign powers, contained a stipulation similar to that of the treaty with Spain, referred to in the above case. Such stipulation was contained in the treaty of 1778, with France, art. 21; the treaty of 1T82, with the United Netherlands,

The piratically and feloniously running away with a ship, within the foregoing section, is the running away with a ship, with the wrongful and fraudulent intent to convert the same to the taker's own use, and make the same his own property, against the will of the owner. The intent must be that *animus furandi* which the law deems felonious. It is not necessary, that any force, or violence, or putting in fear should have been used, to constitute this offence.(2-)

The 9th section of the act of 30th April, 1790, enacts, that if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under colour of any commission from any foreign prince or state, or on pretence of any authority, from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed adjudged and taken to be a pirate, felon, and robber, and, on being thereof convicted shall suffer death.

This section appears to have been passed for the purpose of declaring those acts piracy in a citizen, when committed on a citizen, which would be only belligerent acts when committed on others. And, it seems, that a citizen, taking a commission under a foreign power, must still be deemed a citizen under this law, and his acts, committed under such commission, may be adjudged piratical acts, under this section.(a) A citizen who offends against the United States, or its citizens, under colour of a foreign commission, is punishable in the same manner as if he had no commission.(6)

Query, whether this section embraces offences committed in a river, harbour, basin, or bay, which are waters of a foreign state, or of the United States out of the jurisdiction of a particular state.(c)

By sect. 10, of the act 30th April, 1790, every person who shall, either upon the land or the seas, knowingly and

art. 19.; the treaty of 1783, with the king of Sweden, art. *23.;* the treaties of 1785, (art. 20,) and of 1799, (art. 20,) with Prussia. In the treaty of 1794, (art. 21,) with Great Britain, the language is varied.

(«) United States *n.* Tully and Dalton. 1 Gall. 247.

(a) United States v. Pirates. 5 Wheat. 201, 202. United States *v.* Jones. Pamph. 60.

(6) United States v. Wiltberger. 5 Wheat. 100. 97.

(c) United States c. Wiltberger. 5 Wheat 99, 100.

Wittingly aid and assist, procure, command, counsel or advise, any person or persons to do or commit any murder or robbery, or other piracy aforesaid upon the seas, which shall affect the life of such person, and such person or persons shall thereupon do or commit any such piracy or robbery, then all'and every such person, so as aforesaid aiding, assisting, procuring, commanding, counselling, or advising the same, either upon the land or the sea, shall be, and they are hereby declared, deemed and adjudged to be, accessary to such piracies before the fact, and every such person, being thereof convicted, shall suffer death.

It seems, this section does not extend to punish in our courts, the subject of a foreign prince, who, within the dominions of that prince, should advise a person, about to sail in the ship of his sovereign, to commit murder or robbery.^)

The defects in the act of 30th April, 1790, and the questions that had arisen concerning its construction, gave occasion to the act of March 3d, 1819, which provided, in the 5th section, that if any person or persons whatsoever shall, on the high seas, commit the crime of piracy as defined by the laws of nations, and such offender or offenders shall afterwards be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death. This act was, by sect. 6, to be in force until the end of the next session of Congress.

Under this act it was contended, that in punishing piraracy, " as defined by the law of nations," Congress did not sufficiently exercise their constitutional power; that they were bound to define the offence in terms, and ought not to have referred, for its definition, to the law of nations, leaving that law to be ascertained by judicial decisions. But, it was held, that Congress had the power to *punish* piracies, as well as to *define* them; that they might define them by reference, as well as in terms: that by the law of nations, piracy is robbery on the sea, and that it

(d) United States c. Palmer. 3 Wheat. 633. See the speech of C. *3.* MARSHALL. 5 Wheat. App.

wag sufficiently and constitutionally defined by this section.(e) It was also held, that the 8th section of the act of 30th April, 1790, was not virtually repealed by the passage of this act.(f)

At the ensuing session of Congress, however, the 5th section of the act of 1819, was suffered to expire, except as to crimes theretofore committed, and another act was passed, namely, the act of 15th May, 1820. The 33d section of which provides, that if any person shall, upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate; and, being thereof convicted before the circuit court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death.(g) And if any person engaged in any piratical cruize or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and on shore shall commit robbery, *(h)* such person shall be adjudged a pirate, and on conviction thereof before the circuit court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death. *Provided,* that nothing in this section contained, shall be construed to deprive any particular state of its jurisdiction over such offences, when committed within the body of a county, or authorise the courts of the United States to try such offenders, after conviction or acquittance for the same offence in a state court.

In relation to murder, under the 8th section of the act of 30th April, 1790, it has been held, that if the mortal stroke be given in a harbour of a foreign country, and the party stricken languish with the wound, and die on shore

(e) United States v. Smith. 5 Wheat. 158. LIVINGSTON J. diss. United States v. Griffin. 5 Wheat. 204.

(f) United States v. Smith. 6 Wheat. 163.

(g) By act of the 3d March, 1823, the district court of the United States, in districts where no circuit courts are holden, has cognisance of all cases arising under this act, and the same jurisdiction as the circuit courts.

(A) See Du Ponceau's Bynkershoek, 127. (3 Hall's Law Journ.)

of the wound, it is not murder within this act. The death, as well as the mortal stroke, must happen on the high seas, to constitute it murder there. Congress, however, under the power to define and punish felonies on the high seas, may provide, that a mortal stroke on the high seas, wherever the death may happen, shall be adjudged felo-

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Under the words, " out of the jurisdiction of any particular state," it has been determined, that murder committed in a harbour, within the territory of a state, is not within the 8th section of the act of 30th April, 1790, though committed on board a ship of the line of the United States, by one of the crew upon another. If the constitution, in extending the judic ial power to all cases of admiralty and maritime jur isdiction, has granted to Congress exclusive power to legislate, yet if they have not legislated, the courts of the United States cannot take cognisance of the case. Whether courts of common law have concurrent jurisdiction with courts of admiralty, over murders committed in bays which are inclosed parts of the sea, and whether, therefore, the offence is within the jurisdiction of the state, in whose bay it takes place, is not decided; but if such be the case, Congress cannot, it seems, under this clause of the constitution, devest the state courts of jurisdiction, in such case, though it might vest a concurrent one in its own courts//)

By the 3d section of the act of 30th April, 1790, if any person shall, within any fort, arsenal, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons on being thereof convicted, shall suffer death.

By the words, " other places," is meant another place of a similar character with those previously enumerated, and with that which follows. It means an object fixed and territorial. It does not, therefore embrace an of-

(i) United States v. M'Gill. 4 Ball. 426. See ante as to "high seas." and such provision is now made by the act of 3d March, 1825.

(j) United States *v.* Bevans. 3 Wheat. 356. See *ante.* Murder, by an officer, seaman, or marine, committed without the territorial jurisdiction of the United States, is punishable with death by the sentence of a court martial. Rules, &c. of the navy. Act of April 23, 1800, art. 21. See now the act of 3d March, 1826.

fence committed on board of a ship of the lino, nor does any subsequent act, which gives the ordinary courts of the United States jurisdiction in these cases.(k)

Revolt, &c. on the high seas.

By the 8th section of the act of 30th April, 1790, if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship, every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death. And by sect. 12, if any seaman or other person shall commit manslaughter upon the high seas, or confederate, or attempt, or endeavour to corrupt any

commander, master, officer or mariner, to yield up, or to run away with, any ship or vessel, or with any goods, wares, or merchandise, or to turn pirate, or to go over to, or confederate with pirates, or in any wise trade with any pirate, knowing him to be such, or shall furnish such pirate with any ammunition, stores, or provisions of any kind, or shall fit out any vessel knowingly, and with a design to trade with or supply, or correspond with any pirate or robber upon the seas; or if any person or persons shall any ways consult, combine, confederate, or correspond with any pirate or robber on the seas, knowing him to be guilty of any such piracy or robbery; or if any seaman shall confine the master of any ship or other vessel, or endeavour to make a revolt in such ship or vessel, such person or persons so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars.

An endeavour to make a revolt in a ship, is defined in one case, to be, an endeavour to excite the crew to overthrow the lawful authority and command of the master and officers of the ship. It is, in effect, an endeavour to make a mutiny among the crew of the ship, or to stir up a general disobedience or resistance to the authority of the officers of the ship. A mere act of disobedience

(Je) United States *v.* Bevans. 3. Wheat. 390. See now the act of 3d March, 1825.

to a lawful command of the officers, is not of itself, an endeavour to make a revolt: but to amount to the offence, it must be combined with an attempt to excite others of the crew to a general resistance or disobedience of orders or of a single lawful order of the master, or a general neglect and refusal of duty in a single case. So, if there be an endeavour to usurp the command and government of the ship, by combining the crew in hostility to the master and officers. And a vessel lying on the sea, outside of the bar of a harbour of the United States, within three miles of land, is on the high seas.(f)

But in a subsequent case, though WASHINGTON J. intimated his opinion, that to make a revolt was, to throw off all obedience to the master, to take possession by force of the vessel, by the crew, to navigate her themselves, or transfer the command to some other person on board, and that the clause in this section relating to revolt applied to merchant vessels, in time of peace as well as in time of war, whereas the other clause, next preceding, was confined to hostile resistance in time of war, yet, as he could find no authority in the common, admiralty, or civil law, to support this opinion, and the definitions given by philologists were multifarious and different, the case being of a capital nature, the court would not recommend to the jury to find the prisoners guilty of making or endeavouring to make a revolt, however strong the evidence might be.(m) There being another offence laid in the indictment, (that of confining the master,) the definition of which was perfectly clear. The words in the 12th section, " if any seaman shall confine the master of any ship or other vessel, or endeavour to make a revolt in such ship, &c." are not limited to the high seas, or the seas, as the offences in the preceding part of this section are. It was, therefore, held that an endeavour to make a revolt in a vessel lying in the main stream of the harbour of Salem, was within this section,(») and where the words of the shipping articles are, « H. P. Jr. master, or whoever else

(Z) United States *v.* Smith. Mason, 147. As to high seas, see *ante,* Piracy. '

(«n) United States *v.* Sharp. 1 Pet. 112. See also United States o. Bladen. 1 Pet. 213. But see 4 Wash. C. C. Hep. 405. 528. 4 Mason, 105.

(n) United States r. Hamilton, Mason, 445,

shall go as master," if H. P. Jr. be taken sick on the voyage and on that account the ship return to port, where a new master is appointed by the owners, and notice given to the crew, the shipping contract is not dissolved, and such new master is within the section, so that the crew may be guilty of an endeavour to make a revolt by obstinately refusing to obey and resisting his commands.(o)

An endeavour to commit a revolt is an offence within the 12th section of the act of 1790, if committed in a foreign port.(jo)

Under the 12th section, any confinement of the master, whether by depriving him of the use of his limbs, or by shutting him up in the cabin, or, by intimidation, preventing him from the free use of every part of the vessel, amounts to a confinement in contemplation of law.(</) The law makes no distinction as to the duration of the confinement. Therefore, where the defendant unlawfully seized the captain, and restrained him a minute or two, and would have thrown him overboard unless he had been rescued, it was held to amount to actual confinement within this law. There is, also, a constructive confinement, which is where the captain is restrained from performing the duties of his station, by such mutinous conduct of his crew as might reasonably intimidate a firm man; and it makes no difference, in this respect, that the master did, in fact, go unmolested to every part of the vessel, whenever he pleased, if he was compelled by a regard to his own safety to go armed, and if, in the opinion of the jury, under all the circumstances, it was necessary or prudent so to do.(r)

The seamen, mentioned in this section, includes, as well a seaman received on board at a foreign port, upon the application of the American consul, under the 4th section of the act of 28th February, 1803, as one engaged by the master, and signing the shipping articles.(s)

Manslaughter is not punishable under the 12th section, unless committed on the high seas. The words, high

(o) United States *v.* Hamilton, Mason, 445. (j?) United States *v.* Kcefe, 3 Mason, 475.

(q) United States *v.* Sharp. 1 Pet. 118. See 4 Wash. C. C. Rep. 547. 4 Mason, 105.

(r) United States P. Bladen. 1 Pet. 213. *(s)* United States *v.* Sharp. 1 Pet. 118.

seas, if not, in every instance, confined to the ocean which washes a coast, never extends to a river about half a mile wide, and in the interior of a country: nor can the description of place in the 8th section, be carried into this section. It was, therefore, held, that a manslaughter, committed by a master of a merchant vessel upon one of the seamen, on board such vessel, in the river Tigris, in the Empire of China, *35* miles above its mouth,

about 100 yards from the shore, in 4^- fathoms water, and below low water mark, was not punishable by the laws of the United States.(Z)

In addition to the offences made piracy by the acts of Congress before mentioned, the 4th and 5th sections of the act of 20th April, 1818, declare certain other offences relative to the slave trade, to be piracy, and punishable with death.

Constitution. Art. 1. — District of Columbia, forts, &c.

Art. 1. s. 8.1G. Congress shall have power to exercise exclusive legislation, in all cases whatsoever, over such district, (not exceeding ten miles square,) as may, by cession of particular states, and acceptance of Congress, become the seat of government of the United States; and to exercise like authority, over all places purchased by the consent of the legislature of the state, in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.

The power of exercising exclusive legislation over such district as should become the seat of government, like all others which are specified, is conferred on Congress as the legislature of the union, and cannot be exercised in any other character. A law passed in pursuance of it, is the supreme law of the land, under the 2d clause of the 6th article of the constitution; is binding as such on the states; and a law of a state to defeat it would be void. The power to pass such a law carries with it all those incidental powers, which are necessary to its complete and effectual execution: and such law may, it seems, be extended in its operation throughout the United States, if Congress think

(«) United States o. Wiltberger. 5 Wheat. 76. But this is now altered by the 5th section of the act of March 10th, 1825.

it necessary to do so.(w) But, if it be intended to give it a binding efficacy beyond the district, there ought to be language used shewing this intention: especially, if it is to extend into the particular states, and to limit and control their penal laws. If it be not essential to such law to give it such construction, and there is no evidence of an intention to do so, in the words or object of the law, it will be considered as local, and as not operating beyond the local limits.(;r)

So also, the power vested in Congress, to legislate exclusively within any place ceded by a state, carries with it, as an incident, the right to make that power effectual. They may, therefore, provide by law, for apprehending a person who escapes from a fort, &c., after committing a felony; for conveying him to or from any other place for trial, or execution; or for conveying his body, after execution, and punishing one who rescues it. So, they may punish those for misprison of felony, who, out of a fort, conceal a felony committed within it.(jr)

Though the District of Columbia has no representative in Congress, yet, under this clause of the constitution, Congress have power to lay duties, imposts, and excises on the District of Columbia. They have, also, power to levy a direct tax upon it, preserving the principle of apportionment established by the constitution.^)

Where a fortress within the acknowledged limits of a state was surrendered, under the treaty of 1794, with Great Britain, and was afterwards constantly possessed and garrisoned by the United States, but was never purchased from the state by the United States, or ceded to the latter by the former, the United States do not possess the right of exclusive legislation, or exclusive jurisdiction over such fortress, but crimes committed therein, may be punished under the laws, and by the courts of the state. To give the United States exclusive legislation and jurisdiction over a place, there must be a free cession of the same, for one of the purposes specified in the foregoing clause of the

(w) Cohensv. Virginia. 6 Wheat. 264. See United States *v.* More, 3 Cranch, 159. *(x)* Ib.

(y) Cohens *v.* Virginia. 0 Wheat. 264. (2) Loughborough *v.* Blake. 5 Wheat. 317,

constitution; they cannot acquire it tortiously, or by disseisin of the state, or by occupancy with the tacit consent of the state, when such occupancy is as a military post, for the purpose of protection, though obtained after a treaty by which foreign garrisons were withdrawn from our posts. It was, therefore, held, that a murder committed in the fortress of Niagara, which is within the boundaries of the state of New York, by one soldier of the United States upon another, was punishable under the laws of the state of New York, though that fortress had, ever since the treaty of 1794, with Great Britain, been occupied by the United States as a garrison, as no cession of it ever was made by the state of New York to the United States.(a)

And the rule is the same, although the title to such place be vested in the United States, and it has been occupied by them as a military post; for if there has been no cession by the legislature of the state to the United States, according to the foregoing clause of the constitution, the right of legislation and jurisdiction over such place remains, exclusively, in the state where it is situate. Where, therefore, the United States held a lot of ground in the borough of Pittsburg, by title from the former proprietary of Pennsylvania, which they occupied as Fort Fayette, and used as a place of defence, and Congress passed an act, authorising the president to sell it, it was held, that as the laws of the state prohibited under a penalty, any person except a licensed auctioneer, from selling real estate in the borough of Pittsburg, a person not licensed, who sold the lot under the order of the president, was liable to the penalty, and the United States had no privilege of exemption from the law of the state.(6)

When such purchase has been made by the United States, with the consent of the legislature of a state, of a place for the erection of a fort &c., the land so purchased falls within the exclusive legislation of Congress, and the exclusive jurisdiction of the courts of the United States: for exclusive jurisdiction is the attendant upon exclusive legislation. A murder committed within such place is

(a) The People c. Godfrey. 17 Johns. Rep. 225.

(b) Commonwealth v. Young. 1 Hall's Journ, of Jurisprudence, 47. Supreme "Court of Pennsylvania.

punishable, in the circuit court of the district, under the 11th sect, of the act of 24th September, 1789.(c) The courts of the state can no longer take jurisdiction of offences there committed. No indictment, therefore, lies for selling spirituous liquors there, contrary to the laws of the state.(d) And it seems, the inhabitants of such place cannot exercise any civil or political privileges there, under the laws of the state, inasmuch as they are not bound by its laws, nor held to pay taxes imposed by its authority.(e)

It is not necessary in order to vest the exclusive jurisdiction in the United States, that the act of the state legislature by which its consent is given to a cession to the United States under this clause of the constitution, should contain in terms a cession of jurisdiction. Where land is purchased by the United States for the purposes specified, and the state legislature has consented to such purchase, the exclusive jurisdiction vests in the United States by virtue of the constitution. A proviso in the act of the legislature, that civil and criminal processes issued under the authority of the state may be executed within the ceded lands notwithstanding the cession, does not affect the jurisdiction. These clauses, which are common in acts giving such consent of the legislature, are only meant to prevent these places from becoming a sanctuary for fugitives from justice, for acts done within the acknowledged jurisdiction of the state.(f)

By an act of Congress passed the 2d March, 1795, sect. 2, where any state hath made, or shall make, a cession of jurisdiction of places where light houses, beacons, buoys, or public piers have been erected or fixed, or may, by law, be provided to be erected or fixed, without reservation, all process, civil or criminal, issuing under the authority of such state, or the United States, may be served and executed within the places, the jurisdiction of which has been so ceded, in the same manner as if no such cession had been made. The 1st section of the same act, ratifies

(c) United States n. Cornell. 2 Mason, 60. 95.

(d) Commonwealth v. Clary. 8 Mass. Rep. 72.

(e) Ib. Commonwealth v. Young. 1 Hall's Journ, of Jurisprudence, 53.

(f) United States *v.* Cornell. 2 Mason, 65. 60.

former cessions of such places made with the reservation of that right to the state.

Constitution. Art. 1. — Auxiliary and Implied powers.

Art. 1. sect. 8. 17. Congress shall have power 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 word, *necessary,* here, does not import an absolute physical necessity, so strong that the powers of government cannot be exercised without it. The word, in itself, admits of degrees of comparison. As used here, it means needful, requisite, essential, conducive to;

and gives to Congress the choice of the means best calculated to exercise the power they possess. Thus, a state is prohibited by the constitution, from laying imposts or duties on imports or exports, except what may be *absolutely necessary,* for executing its inspection laws. In this case, the word *necessary* has a different meaning from that which it bears in the above clause.(^) This clause, also, is placed among the powers of Congress, not among the limitations of those powers: its terms purport to enlarge, not to restrain them. But, at all events, it leaves the legislature to exercise its best judgment in the selection of measures calculated to carry into execution the constitutional powers of the government.^)

So also the right of Congress to inflict punishments in cases not specified in the constitution, is a power implied as necessary and proper to the sanction of the laws enacted by Congress, and to the exercise of the powers conferred on them.(«) The express grant to them of power to punish, is confined to one class of cases, namely, piracies and felonies committed on the high seas, and offences

(g) McCulloch c. Maryland. 4 Wheat. 413. United States c. Fisher. 2 Cranch, 395. See the United States *v.* Fries. 10. Charge of IREDELL J. to the grand jury.

(A) M'CulIoch *v.* Maryland. 4 Wheat. 413.

(i) Ib. 4 Wheat. 416. United States e. Fries. 8. Charge of IREDELL J. to the grand jury.

against the law of nations;(&) but the express grant in this class of cases, does not prevent the exercise of the punishing power in any other cases, where it may be a necessary and proper sanction to enforce its decrees. So, by virtue of the incidental power as essential to the beneficial exercise of the powers vested, Congress has exacted, besides the oath of fidelity prescribed by the 3rd section of the 6th article of the constitution, an oath of office; and might superadd such other oath of office as its wisdom might suggest. And the power to establish post offices and post roads given by art. I. sect. 8. carries with it on the same principle the power and duty of carrying the mail along the post road from one office to another: the right to punish those who steal letters from the post office or rob the mail.(l) On the same principle, crimes, the objects of which is to subvert by violence the laws and institutions of the government, but which fall short of treason, such as a conspiracy to levy war, may be punished in such manner as the legislature may provide.(m) And Congress may inflict punishment on persons committing offences on board a ship of war of the United States, wherever that ship may be.(n)

Under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised.(o) The government of the United States can clahn no powers which are not granted by the constitution, either expressly or by necessary implication. Still, the instrument is to have a reasonable construction; the words are to be taken in their natural and obvious sense, and not to be unnecessarily restricted or enlarged.(jo) The nature of a constitution requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients, which compose those objects, be deduced from the nature of those objects them-

(fc) Anderson v. Dunn. 6 Wheat. 233. To this class must, however, be added counterfeiting the securities and current coin of the United States. Const, art. 1. sect. 8. 5. and treason, art. 3. sect. 3.

(I) M'Culloch c. Maryland. 4 Wheat. 416. 417.

(m) Ex parte Bollman and Swartwout. 4 Cranch, 126.

(n) United States c. Bevans. 3 Wheat. 336. See *ante,* Constitution, art. 1. s. 8. 16.

(o) United States *v.* Fisher. 2 Cranch, 395.

(*p)* Martin v. Hunter's lessee. 1 Wheat. 325. Houston *v.* Moore, 5 Wheat. 49.

selves. If it contained an accurate detail of all the subdivisions, of which its great powers will admit, and of all the means by which they may be carried into execution, it would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public.(y) There is not, therefore, in the whole of the constitution, a grant of powers, which does not draw after it, others that are not expressed, but which are vital to their exercise; not substantive and independent, but auxiliary and subordinate^/-)

Among the enumerated powers, we do not find that of establishing a bank or corporation. But there is no phrase in the constitution which, like the articles of confederation, excludes incidental or implied powers. Even the 10th amendment, declaring that the powers not delegated to the United States, nor prohibited to the states, are reserved to the states or people, omits the word *expressly;* thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument.(s) So, among the enumerated powers, are the great powers, to lay and collect taxes, borrow money, regulate commerce, declare war, and conduct a navy, raise and support armies. The government entrusted with such ample powers must also be entrusted with ample means for their execution. The constitution does not profess to enumerate these means. It does not prohibit a bank or corporation. A corporation is one of the means, and a bank is a species of a corporation, convenient, useful, and necessary, in prosecuting the fiscal operations of the government, and fulfilling its duties. It was not necessary to give expressly the power to establish it: such power passes as incidental to the power expressly given. A law, therefore, incorporating the bank of the United States, with power

(q) M'Culloch v. Maryland. 4 Wheat. 407.

(r) Anderson *v.* Dunn. 6 Wheat. 225, 266.

(s) In support of this argument it may be mentioned, that when the amendments to the constitution were under discussion in the first Congress, in the year 1789, a motion was made by Mr. *Gerry* to add the word *expressly,* and was rejected. Deb. of Cong, in 1789. Vol. 2.

to establish branches, is a law authorised by the constitution, and part of the supreme law of the land.(t)

On the same principles, the acts of Congress securing to the United States a priority of payment out of the effects of their debtor, in all cases of insolvency and bankruptcy, are constitutional acts. The government is to pay the debts of the union, and is authorised to use the means which appear most eligible to effect that object. It has, consequently, a right to make remittance by bills, or otherwise, and to take those precautions which will render it safe, by establishing a right of priority, out of the effects of an indorsor of a bill of exchange, held by it.(w)

The different branches of the legislature have power by implication, to punish by imprisonment, or any commutation therefor, any person guilty of a contempt towards either of them, whether committed within the walls of their place of meeting, or without; whether within the District of Columbia, or in any part of the United States, and their process against the offender may reach throughout the United States. They have power to arrest a person whom they declare guilty of a breach of their privileges, and of contempt, and to bring him before them for punishment, and their warrant for that purpose duly issued and signed by the speaker and clerk, is a sufficient justification to their sergeant at arms, in executing and obeying it. The grant in the constitution, of power to punish or expel members, does not abridge this power; that is only a grant of an additional power, which might otherwise have been questioned. They are not bound, in the first instance, to define such contempts, and ascertain their punishment by a legislative act. The modes in which this offence may be committed are not, in their nature, susceptible of legislative definition. Such power is indispensably necessary to the security and liberty of the public functionaries and to the safety of the people. But the imprisonment imposed as a punishment for contempts can endure only during their session. It terminates on their adjournment.(x)

(t) M'Culloch e. Maryland 4. Wheat. 415.

(w) United States v. Fisher. 2 Cranch, 395. See United States v. Bryan and Woodcock. 9 Cranch, 374. (x) Anderson *v. Dunn.* 6 Wheat. 598,

But though Congress, and its branches, have certain implied powers, and courts possess the implied power to punish contempts, yet, it seems, the judiciary department of the United States does not possess the implied power, to introduce and carry into effect the criminal code of the common law, on the plea that it is necessary to promote the end and object of its creation, and to preserve the government. The legislative power is vested in other departments, and till they make an act a crime, and affix a punishment to it, it is to be regarded, in the view of the judiciary of the United States, as innocent. The legislative authority must likewise, in all cases in which the constitution does not give the Supreme Court jurisdiction, declare what courts shall have jurisdiction: as all the other courts of the United States possess only such jurisdiction as is given to them by Congress.(*y)*

There can be no doubt but that under this clause, as well as under the authority to ordain and establish courts, Congress has power to make laws to authorise the issuing of

executions on judgments recovered in the courts of the United States, and to regulate their form and effect, as well where such judgments are obtained by individuals, as in other cases. The state laws cannot control the modes of proceeding, in the courts of the United States, further than such laws are adopted or sanctioned by Congress.^)

Constitution. Art. 1. — Capitation and Direct Tax.

Art. 1. s. 9. 4. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration, herein before directed to be taken.

This clause does not limit the power of levying a direct tax, to the population included in the census, viz. states: but only adopts that as the standard to fix the proportion, and this standard is to be applied to the District of Columbia, and to the territories, when Congress think proper to lay such a tax on them.(z)

(y) Waymau e. Southard. 10 Wheat. 21, 49. U. S. Bank v. Halstead. Ib/53, 63.

(y) United States c. Hudson and Goodwin. 6 Wheat. 598. (z) Loughborough v. Blake. 5 Wheat. 317.

Constitution. Art. 1. — Tax on Exports.

Art. 1. s. 9. *5.* No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue, to the ports of one state, over those of another; nor shall vessels bound to or from one state, be obliged to enter, clear, or pay duties in another.

The object of this clause, it seems, was, to prohibit Congress from passing a law, by which a vessel bound to or from a port in any state, should be obliged to enter, clear, or pay duties in any state other than that, to or from which they should be proceeding. If construed literally, the laws regulating the coasting trade, would be unconstitutional, in some of their regulations. It should be read in the words of one of the amendments proposed by the state of North Carolina. "Nor shall vessels, bound to a particular state, be obliged to enter or pay duties in any other; nor, when bound from any one of the states, be obliged to clear in another".(a)

Constitution. Art. 1. — Ex post facto laws.

Art. 1. s. 10. 1. No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

Before the establishment of the constitution of the United States, a state might pass an act of attainder or confiscation, unless prohibited by its own constitution. But such prohibition would not be implied from clauses in its constitution, providing for the trial of crimes in the county where they were committed, especially if the offence, for which the attainder took place, was committed out of the state.(6)

The prohibition in the constitution, against passing *ex post facto* laws, applies exclusively to criminal or penal cases, and not to civil cases. An *ex post facto* law consists, in declaring an act penal or criminal, which was innocent when done, or raising the grade of an offence, making it greater than it was when committed: or changing the pu-

(a) United States *v.* Brigantine William. Opinion of Judge DAVIS. 2 Hall's Law Journ. 259.

(b) Cooper *v.* Telfair. 4 Dall. 14.

nishment, after the commission of the offence, making it more severe than it was when committed; or finally, altering the rules of evidence, so as to allow different or less evidence to convict the offender, than was required when the offence was committed. But it seems no law is *ex post facto,* that mollifies the rigour of the criminsl law.(c)

The prohibition against passing *ex post facto* laws does not extend to civil cases that merely affect property, because some of the most necessary and important acts of legislation are founded on the principle that private rights must yield to public exigencies. Highways are run through private grounds. Fortifications, light-houses, and other public edifices are necessarily, sometimes, built on soil owned by individuals. In such cases if the owners should refuse voluntarily to accommodate the public, they may be constrained, so far as the public necessities require, and justice is done by allowing them a reasonable compensation.^) For it would seem to be an universal law of all free governments independent of positive regulation, that private property may be taken for public use upon making to the individual a just compensation.(e) So if a treaty stipulate for the restoration of property captured by private persons during a war, which is not yet definitively condemned, it seems, there would be no doubt of the constitutionality of such stipulation, and it would be of binding efficacy as to the property, but the nation ought, in a proper case, to make a reasonable compensation for the property^/)

Therefore, although an act of the legislature, contrary to the great first principles of the social compact, is not rightful, as, for instance, to make a man a judge in his own cause: or seizing the property of a citizen honestly acquired, without compensation, or retrospective laws in general,(g-) yet, it seems, the law cannot be declared void by a court of justice, merely because it violates these ge-

(c) Calder o. Bull. 3 Dall. 486.

(d) Calder 0. Bull. 3 Dall. 400. Constitution, Amendments, art. 5. See Vanhorne's lessee c. Dorrance, 2 Dall. 304, *and post.*

(e) Green *v.* Biddle. 8 Wheat. 89.

(f) United States *v.* Schooner Peggy. 1 Cranch, 109. See Wares. Hylton. 3 Dall. 279. *(g)* Calder *v.* Bull. 3 Dall. 386. See Beach v. Woodhull. 1 Pet. 2.

neral principles, if not prohibited by the constitution of the state in which it is passed, or of the United States.(h)

Thus the legislature of Connecticut passed a resolution or law, in the year 1795, by which they set aside a decree of the court of probate at Hartford, which decree disapproved of a certain will, made in the year 1779, and refused to record it. The legislature at the same time directed a new hearing by the same court, which took place, and the will was then approved, and ordered to be recorded. This decree was affirmed, on appeal to the Superior Court of Hartford, and also from thence to the Supreme Court of Errors of the state. In the year 1795, when the legislature interposed, the period of limitation to appeals, fixed by a statute, had expired. On error to the Supreme Court of the United States, it was held, that granting a new trial or re-hearing by a legislative act, which was in conformity with the constitution and usage of the state, was not contrary to the constitution of the United States. It might be considered retrospective, but it was not *ex post facto.(i)*

A state law may be censurable as an unwise and unjust exercise of legislative power; as retrospective in its operation; as the exercise by the legislature of a judicial function; and as creating a contract between parties where none previously existed: but none of these come within this clause of the constitution. Where, therefore, the Supreme Court of Pennsylvania had decided that by the law of that state the relation of landlord and tenant did not subsist between the plaintiff and defendant, and therefore the defendant might set up an adverse title in ejectment, and the legislature enacted that between parties situated as these were that relation should subsist, after which the Supreme Court pronounced a different judgment in the case on its coming up to them a second time by writ of error, this law was held to be constitutional and the last decision affirmed.(k) The repeal of a state law which authorised an administrator to sell real estate is valid, and pro-

(k) Ib. IREDELL J. But see ib. opinion of CHASE J. Vanhorne's lessee o. Dorrance. 2 Dall. 304. Society, &c. v. Wheeler, 1 Gall. 105. *post.*

(i) Calder *v.* Ball. 3 Call. 386. See United States v. Bryan and Woodcock. 9 Cranch, 374. 2 Pet. S. C. Rep. 627.

(k) Satterlee *v.* Matthewson, 2 Pet. S. C. Rep. 380.

ceedings carried on under the law after its repeal are void though commenced before.(l)

As to the prohibition against passing a law impairing the obligation of contracts, the following determinations have taken place.

Contracts are of two kinds, executed, and executory. The former is one in which the object of the grant is performed: the latter is that, in which a party binds himself to do, or not to do, a particular thing. The term, *contract,* as used in the constitution, applies to both, and embraces as well contracts by states as individuals. A grant by a state is a contract executed, and comes within the meaning of the clause. A law authorising a governor of a state to convey lands, is a contract executory: and a conveyance pursuant thereto, is a contract executed. Both contain obligations binding on the party.(m)

A compact between two states created by an act of the legislature of the one state offering propositions on which a portion of her territory should become a state, and accepted and ratified by the latter by being incorporated into her constitution is a contract within the meaning of the constitution.(w)

If a state has passed a law not inconsistent with its constitution, or that of the United States, authorising a conveyance by the governor of her lands, and such conveyance is made pursuant thereto, and sales are made by the grantees, to purchasers for valuable consideration, without notice of fraud or corruption, a subsequent act of the legislature of the same state, annulling such law, on the ground that the first law was made fraudulently, and without constitutional authority, because some of the members of the legislature were guilty of fraud and corruption, is, so far as respects such purchasers, unconstitutional and void, whether considered in regard to the constitution of the United States, or our free institutions.(o) The colony of New Jersey in the year 1758, purchased,

(l) Bank of Hamilton c. Dudley's heirs. 2 Pet. S. C. Rep. 523.

(m) Fletcher *v.* Peck. 6 Cranch, 135. New Jersey *v.* Wilson. 7 Cranch, 164.

(n) Green *v.* Biddle. 8 Wheat. 92.

(o) Fletcher *v.* Peck. 6 Cranch, 135. See *ante,* 15, and 5 Hall's Law Journ. 354 to 457, where the documents relative to the Yazoo question are given.

for a tribe of Indians, certain lands within their territory, and by an act of assembly authorising the purchase, and restraining leases or sales thereof, enacted, that the lands should not, thereafter, be subject to any tax. The Indians, afterwards, by virtue of an act of assembly, passed in the year 1801, sold these lands; but this act contained no privilege of exemption from taxes. It was held, that a state law, passed in October 1804, repealing the section in the first law granting an exemption from taxes, was a law impairing the obligation of contracts, and therefore was unconstitutional and void.(p) So, where the legislature of Virginia, by a statute passed in the year 1776, confirmed and established the rights of the episcopal church to all its lands and other property, it was held, that by this act, it 'vested an indefeasable and irrevocable title: and such title not being inconsistent with the bill of rights or constitution of Virginia, that state could not, by subsequent statutes passed in the years 1798, and 1801, repeal the first statute, and vest the property of the church in the state or in third persons, without the fault of the corporators.(y) So, it seems, if the legislature of a state make a constitutional grant to the towns of such state, of glebes of land for the use of religious worship, they cannot afterwards repeal the act, so as to divest the right of the towns under the grant: and if another law be passed, granting to such towns the same glebes for another purpose, as for the use of the schools of such towns, it confers a right which the towns may, or may not exercise, at their pleasure.(r)

In respect to public corporations, which exist only for public purposes, such as towns, cities, &c., the legislature may, under proper limitations, change, modify, enlarge, or restrain them, securing however the property for the use of those for whom, and at whose

expense, it was purchased: but, as to private corporations, it is different. For, it was held, that the charter granted by the British crown in the year 1769, to the trustees of Dartmouth College, in New Hampshire, by virtue of which they became an elemosynary corporation for the education of youth, was a contract within this clause of the constitution; and that

(p) New Jersey *v.* Wilson. 7 Cranch, 164.

(q) Terrett p. Taylor. 9 Cranch, 52.

(r) Town of Pawlet r. Clark. 9 Cranch, 535.

laws passed by the legislature of New Hampshire in the year 1816, new modelling the corporation in essential particulars, without the consent of the trustees, were laws impairing the obligation of a contract, and void.(s)

When the district of Kentucky was about to be separated from Virginia and to be erected into a state, the state of Virginia, of which it had formed a part, by an act of the legislature passed the 18th December, 1789, declared that all private rights and interests of land within the district of Kentucky derived from the laws of Virginia prior to their separation, should remain valid and secure under the laws of the proposed state, and should be determined by the laws then existing in that state. This provision was ratified by the convention which framed the constitution of Kentucky, and incorporated into her constitution. The legislature of Kentucky on the 31st January, 1812, passed an act concerning occupying claimants of land, (repealing a former act which had been in force from the 27th February, 1797,) conferring certain privileges on the peaceable occupant of land who supposed it belonged to him in virtue of some legal or equitable title founded on a record, in case of a successful claim established against him. None of these rights in the occupant existed under the common or statute laws of Virginia, or the principles of equity at the time of the passage of the act. In a case arising between parties both of whom claimed title under the laws of Virginia, it was held that the act of the state of Kentucky of the 31st January, 1812, was a law impairing the obligation of contracts.(^)

So, a law discharging a bankrupt or insolvent debtor from his debts, is a law impairing the obligation of contracts, within the constitution, and is, so far as respects such discharge, unconstitutional and void.(¥) And this is the case, although the law be passed prior to the making of the contract.^) For though a state may, until Congress exercise the power of passing uniform laws on the subject of bankruptcy, enact bankrupt or insolvent laws, yet it cannot pass them in such a manner as to discharge

(*) Dartmouth College v. Woodward. 4 Wheat. 518. Terrett *v,* Taylor. 9 Cranch. 52.

(t) Green *v.* Biddle. 8 Wheat. 1.

(u) Sturges «. Crowninshield. 4 Wheat. 122.

(x) M'Millan *v.* M'Niel. 4 Wheat. 209.

the bankrupt or insolvent from his dcbts.(^) Nor does it make any difference that tho defendant was a citizen of the same state with the plaintiff', at the time the contract was made, and remained such at the time the suit was commenced in its court. The constitution of the United States was made for the whole people of the union, and is equally binding upon all the courts, and all the citizens.(2)

But this subject being afterwards reconsidered by the supreme court, it was finally decided, that a state may, until Congress exercise the power of passing uniform laws on the subject of bankruptcy, enact bankrupt or insolvent laws: the states are not excluded by the constitution from the right to legislate on the subject except when the power is actually exercised by Congress, and the state laws conflict with the acts of Congress, and that a bankrupt or insolvent law of a state which discharges the person of the debtor and his future property is not a law impairing the obligation of contracts so far as respects debts contracted subsequent to the passage of such law, though it would be as to debts contracted prior. But such discharge cannot be pleaded in bar of an action brought in the courts of the United States or of any state other than that where the discharge was obtained.(a)

A state may, by means of a law, discharge a debtor from imprisonment. It may pass limitation laws, unless they are retrospective. For these only modify the remedy of the creditor, but do not impair the obligation of the contract. So, it may pass usury laws, affecting future contracts,^) and divorce laws. But, it seems, a law to dissolve a marriage contract, without any breach on either side, against the wishes of the parties, and without any judicial enquiry, would be a violation of the constitution.(c)

The objection to a law on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing con-

(y) M'Millan *v.* M'Niel. 4 Wheat. 209.

(z) Farmers' and Mechanics' Bank *v.* Smith. 6 Wheat. 131. See Adams v. Story. C Hall's Law Journ. 474.

(a) Ogden *v.* Saundeiri. 12 Wheat. 213.

(b) Farmers' and Mechanics' Bank v. Smith. 6 Wheat. 131.

(c) Dartmouth College e. Woodward. 4 Wheat. 629. 696.

ditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation.(c?)

It has been held that the language of this article was prospective, and that an act of assembly, passed by the state of Maryland, in the year 1716, requiring the sheriff to deliver upon an execution, the lands, tenements, goods and chattels, of the debtor to the

creditor at an appraisement, was not within the prohibition of this clause, so far as respected debts antecedent to the constitution.(e)

As the constitution of the United States did not commence its operation until the first Wednesday of March 1789, this provision does not extend to a state law enacted before that day, and operating upon rights of property vested before that time.

A state law, establishing gaol liberties, has been held not to be within the prohibition contained in this clause of the constitution.(f)

And when the condition of a bond for the jail limits in Rhode Island, required the debtor to remain in custody and within the limits till lawfully discharged, it was held by the Supreme Court of the United States, that a discharge obtained from the court under a resolution of the legislature, passed after the date of the bond, but in consonance with the known and established practice in that state, for the legislature to pass such resolutions from time to time, was lawful, and did not impair the obligation of a contract.(g)

The legislature of the state of North Carolina passed an act in "the year 1812, declaring that any court, rendering judgment against a debtor, between the 31st December, 1812, and the 1st February, 1811, should stay the execution, until the first term or session of the court after the latter period, upon the defendant's giving two freeholders as securities: but the supreme court of that state held the law to be contrary to the clause in the constitution of the United States, forbidding a state to pass a law

(d) Donaldsons. Harvey. 3 Haw. & M'Henry, 12.

(e) Green *v.* Biddle. 8 Wheat. 84.

(f) Holmes v. Lansing. 3 Johns. Caa. 73. *(g)* Mason *v.* Haile. 12 Wheat. 377.

impairing contracts, and declared it to be void.(7f,) So, where the legislature of the state of Missouri enacted, that proceedings should be stayed for two years and a half, on executions whereon the plaintiff should not indorse, that he would take property in payment, at two-thirds of its appraised value, the defendant giving bond with security for the payment of the debt, or pledging real property therefor, and directing the sheriff, where this was done, to release the person or property taken in execution; on a motion for an *alias ca. sa.* the sheriff having returned to a former *capias,* a bond taken pursuant to the act, the court decided, that the act of the legislature was contrary to the constitution of the United States, forbidding the passage of a law impairing the obligation of contracts, and declaring (Art. 1. sect. 10. 1,) that no state shall make any thing but gold and silver coin a tender in payment of debts,(z) and was, moreover repugnant to the constitution of the state of Missouri, which declares, that justice and right ought to be administered without sale, denial, or delay.^)

By an act of the legislature of Kentucky, passed the 5th of December, 1820, a plaintiff was permitted, on issuing execution upon his judgment, to indorse thereon that he would take paper of the bank of the Commonwealth, or of the bank of Kentucky, in discharge of

it, and if he failed to do so, the defendant might replevy the debt for two years. The act further provided, that no execution should issue upon any judgment within ten days after the end or term of the court at which judgment should be rendered; in which time, if the plaintiff should fail to make a memorandum with the clerk, that he would take the paper of these banks, the defendant was permitted to enter into a recognisance with the clerk for the payment of the money within two years. In the case of Blair *v.* Williams, a re-

(h) Crittenden *v.* Jones. 5 Hall's Law Journ. 520. See Grimballv. Ross. 2 Hall's Law Journ. 93. Golden *v.* Prince. 2 Hall's Law Journ.' 507.

(i) See Golden *v.* Prince. 5 Hall's Law Journ. 507.

(k) Glasscock *v.* Stccn. Circuit Court of the county of St. Louis, Missouri, by TUCK™ J. The Missourian, April 4, 1822. See it stated ib., that Judge HAVWOOD, in Tennessee, has pronounced, on the same principles, that such a law impairs the obligation of contracts, and is therefore void.

cognisance had been entered into under this act, after judgment rendered upon a note which had been given before the passage of the act, and the circuit court quashed the recognisance. On appeal to the court of appeals, the judgment for quashing the recognisance was affirmed, that court holding, that the act of assembly was a violation of the constitution of the United States forbidding the passage of a law impairing the obligation of contracts.0 The opinion of the court was, that the legal obligation of a contract, within the meaning of the constitution, consists in the remedy given by the law to enforce its performance: and as the law of Kentucky, in existence at the time the note was given, allowed the defendant to replevy the debt for three months only, the law above mentioned giving him further time impaired the obligation imposed by this law. It seems however to have been the opinion of the court, that no law passed before a contract is made can be said to impair its obligation.(m)

In another case a fieri facias had issued after the passage of the above mentioned act, upon a replevin bond, in which the defendants had, prior to the passage of the act, stipulated to pay to the plaintiff, in one year, the amount of an execution which had previously issued against two of them in favour of the plaintiff, upon a judgment recovered by him against them, in an action on their bond. The sheriff returned to this fieri facias levied and replevied, and returned a replevin bond conditioned to pay the debt and costs within two years. A motion was made in the court below to quash the last replevin bond, which was overruled, but on appeal, the court of appeals reversed the judgment of the court below, and remanded the proceedings with directions to quash the last replevin bond.(w)

A law of a state contrary to its own constitution is void, and, it seems, may be so declared by a court of the United States, when the matter is judicially before them. But,

(Z) Blair et al. *v.* Williams. Opinion of BOYLE, J. 1823. Pamphlet.

(m) But see M'Milledgee. M'Niel. 4 Wheat. 209, on which the court of appeals remark.

(w) Lapsley *v.* Brashier, opinions of OWSBT and MILLS, Justices, 1823. Pamphlet. The latter was of opinion that futuro as well as past contracts were within this clause of the constitution.

to authorise such a decision, the law must be a clear and unequivocal breach of the constitution, not doubtful or areumentative.(o) Thus, a law of the state of Pennsylvania passed in the year 1787, which took land from certain persons, and gave it to others, and made compensation to the owners by grants of other lands, and declared that the value of the land surrendered, and the quantity of the equivalent, should be determined by the board of property constituted under its Jaws, was held, by the circuit court of the United States, ^ be contrary to the letter and spirit of the constitution, which the state at that time had, and void, because it took away land from the owner without a compensation in money, and because the value and equivalent were not to be determined either by the parties, commissioners mutually elected, or by a jury, but by a board appointed by the legislature who were one of the parties.Q?) So, an act of assembly was passed by the legislature of New Hampshire, in the year 1805, by which the occupant of land for six years before an action brought, holding by virtue of a supposed legal title, under a *bona fide* purchase, was entitled, on recovery of the land against him, to the increased value of the buildings, and improvements made by him orthose under whom he claimed, to be assessed by the jury that found a verdict for the plaintiff, and paid before execution issued, and within one year after verdict, otherwise no writ of possession to issue. This was held not to be an *ex post facto* law, nor a law impairing the obligation of contracts; the compensation being for a tort, in respect to which the legislature created, but did not destroy a contract. But it was held to be a retrospective law, if it were construed to extend to improvements made before the act of assembly: and, as the constitution of New Hampshire forbade retrospective laws, either for the decision of civil causes, or the punishment of offences, it was, as related to such improvements, unconstitutional and void. Upon principle, every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new regulation, imposes a

(o) Coopers. Telfair. 4 Dall. 19. See Calder v. Bull. 3 Ball. 302. Opinion of CHASE. J. Ware v. Hylton, ib. 266. *(p)* Vanhorne's lessee *v.* Dorrance. 2 Dall. 304.

new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective. A limitation law as to land, *in futuro,* within a limited time after passing a law, or after a disseisin, would be constitutional. But, it seems, it would be otherwise as to a law barring all rights of recovery upon past disseisins without any allowance of tirae.(y)

(3) Society, &c. v. Wheeler. 1 Gall. 105. But see Ogden »« Saunders. 12 Wheat.

CHAPTER XXXI.

Constitution. Article II.

CONSTITUTION. ART. II. — EXECUTIVE POWER.

ART. 2. s. 1.1. The executive power shall be vested in a president of the United States of America.

The department of state is one of the organs of the executive branch of the government, established for the purpose of facilitating the operations of that branch, so far as the duties assigned to it extend. It is to this department a reference must be made, for the official acts of the president, in relation to those public measures which he may establish, and which are not more immediately connected with the duties of some other department. This has been the general practice of the government, and is fully warranted by law. Nevertheless, the president, for the more easy and expeditious discharge of his executive duties, may direct some other department to make known the measures, which he may think proper to adopt. They are equally his acts whether they emanate from the department of state, or from any other department. Nor is it necessary, that the president's orders, under an act of Congress, should be sealed, to give them validity. No law or usage requires it.(a)

Constitution. Art. 2. — President.

Art. 2. s. 2. 1. The president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States.

The president may, it seems, during a war declared by

(a) Lockington v. Smith. 1 Pet. 471. WASHINGTON J. See the case of Nathan Robbins, *post.* Constitution, art. 2. s. 2. 2.

Congress, accept or propose an armistice;(&) yet he has no power to suspend judicial proceedings on prizes made. A capture, if lawful, vests a right over which he has no controul.(c)

How far the president would be entitled in his character of commander in chief of the army and navy of the United States, independently of any provision by act of Congress, to issue instructions for the government and direction of privateers, commissioned by him during war, is not decided. But if, by act of Congress, the president be authorised to issue such commissions, in such form as he shall sec fit, and to grant, annul, and revoke the same at his pleasure, and to establish and order suitable instructions for the better governing and directing the conduct of private armed vessels, commissioned under act of Congress, he may issue instructions, directing them not to interrupt certain vessels or property, which, otherwise, would be liable to capture.(c?)

Constitution. Art. 2. — Appointment.

Art. 2. s. 2. 2. The president shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments'are not herein otherwise provided for, and which shall be established by law. But Congress may

by law, vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of departments.

Under this section, and the 3d section of the act of 15th September, 1789, when the president has nominated to the senate, and the senate approved, and the president has signed the commission, the appointment is made. If the officer be removable at the will of the executive, the act being at any time revocable, the commission may be

(6) Letters of the secretary of state, June 26, July 27, August 21,1812. 9 Wait's State Papers, 79. 61. 66.

(c) Ib. August 21, 1812. 9 Wait's State Papers, 66. *See post.* Constitution, art. 2. s. 3. 1. and art. 6. s. 2.

(d) The Thomas Gibbons. 8 Cranch, 126.

arrested, if still in the office of the secretary of state: but ifthe officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled.

The appointment and commission are distinct. The former is complete when the commission is signed by the president. Such signature is a warrant for affixing the seal, and the secretary of state is by law bound to affix the seal. He acts in this respect, under the authority of the law, and not by the instructions of the president. Delivery is not essential to the validity of a commission, the detention of the commission does not affect its validity, nor does its loss or destruction. The copy of the record is sufficient, and that record is considered as made when the authority and order to make it are given: and they are by law given when the commission is signed and sealed. Nor is acceptance of the commission necessary to vest the office. It bears date, and the salary is received, from the appointment: and if the person appointed refuse to accept, the successor is appointed in his place, and not in the place of a former incumbent who had created the vacancy. It was, therefore, held, that where by act of Congress justices of the peace were to be appointed by the president, by and with the advice and consent of the senate, for the District of Columbia, to continue in office five years, and in compliance with this law the president signed commissions for that office, after which the seal of the United States was affixed to them, that though the commissions were not delivered by the secretary of state, the persons were duly appointed, and had a right to the commissions.(e)

In the course of the debate in the first Congress on the president's power of removal, an opinion seems, at one period, to have been entertained, that a head of a department, such as the secretary of state, (then called secretary of foreign affairs,) was an inferior officer, because the president being the great and responsible officer of the government, this officer was employed only to aid him in performing his executive duties: and hence it was inferred that the power of appointment might be vested by Congress in the president alone. But the opinion seems

(e) Marbury c. Madison. 1 Cranch, 137.

to have prevailed, that heads of departments are not to be considered inferior officers within the meaning of the constitution: and that the inferior officers mentioned in the constitution, embrace clerks and other subordinate agents.(f)

In May, 1813, President MADISON nominated to the senate, a minister plenipotentiary of the United States to Swe den, assigning his reasons for the measure. The senate, in the month of June following, passed a resolution, requesting a respectful conference with the president on the subject of the nomination, the object of which is stated to have been to obtain from him the inducements to the measure. The president, however, declined, altogether, the proposed conference, stating, in his message, that the executive and senate, in the cases of appointments to office and of treaties, are to be considered independent and co-ordinate with each other. If they agree, the appointments or treaties are made; ifthe senate disagree, they fall. If the senate wish information previous to their final decision, the practice, keeping in view the constitutional relation of the president and senate, has been, either to request the president to furnish it, or refer the subject to a committee of their body to communicate, either formally or informally, with the head of the proper department. The appointment of a committee of the senate, to confer immediately with the executive himself, appears to lose sight of the co-ordinate relation between the executive and the senate, which the constitution has established, and which ought, therefore, to be maintained. The relation between the senate and house of representatives, in whom legislative power is concurrently vested, is sufficiently analogous, to illustrate that between the executive and senate in making appointments and treaties. The two houses are, in like manner, independent of, and co-ordinate with each other; and the invariable practice of each, in appointing committees of conference and consultation, is, to commission them, not to confer with the co-ordinate body itself, but with a committee of that body. And although both branches of the- legislature may be too numerous to hold, conveniently, a conference with committees, were they to be appointed by ei-

(f) Debates in the first Congress. 1 Vol. 152. 495. 516. 654.

ther to confer with the entire body of the other, it may fairly be presumed, that if the whole number of cither branch were not too large for the purpose, the objection to such a conference, being against the principle as derogatory from the co-ordinate relations ofthe two houses, would retain all its force.(^-)

In respect to the liability ofthe heads of departments to the inquiry of a court of justice, it is held, that whether the legality of an act ofthe heads of a department be examinable in a court of justice, or not, depends on the nature of it. If such officer be the organ of the president, through whom he exercises that discretion in political affairs, which is vested in the president by the constitution or laws, the acts of such officer, in that respect, are not examinable in a court of justice. But when the legislature imposes other duties; when he is directed peremptorily to perform certain acts, when the rights of individuals depend on the performance of those acts, he is the officer of the law, and amenable to the law. As, for instance, if the secretary of war should refuse to place on his pension list a person directed to be placed there by the act passed in June, 1794: or the secretary of state should

withhold a patent regularly issued, or refuse a copy where it was lost, or a commission duly signed and sealed.^)

How far the president, heads of departments, and their clerks, are bound to attend on a *subpœna,* and give evidence, has been already treated of.(«)

In organising the departments of the executive by the first Congress, the question occurred in the house of representatives, in what manner the officers who were to fill them should be removable. It was contended, that the power of removal was an incident to the power of appointment, and as the senate was, by the constitution, as-

(g) 5 Niles' Reg. 243. 290. and see remarks of Mr. Giles, in his letters to the people of Virginia, ib. and comments thereon, ib. 276. 340.

The president had authorised the secretary of state to confer with the committee ofthe senate on the subject, and to communicate any information, which they might be desirous of obtaining from the executive. But the committee refused. Ib. 277.

(h) Marburys. Madison. I Cranch, 137.

,(i) Ib. *ante,* 160. 163,

sociated with the president in making appointments, the senate ought in like manner to participate in the power of removal. But it was determined by Congress, that the power of removal belonged to the president, by virtue of the clause in the constitution vesting in him the executive power, and other parts of that instrument, and this construction has since prevailed.(&)

Art. 2. s. 2. 3. The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session.

In the year 1814, President MADISON granted commissions to ministers to negotiate the treaty of Ghent, in the recess of the senate. The principle acted upon in this case, however, was not acquiesced in, but protested against, by the senate at their succeeding session. And, on a subsequent occasion, April 20th, 1822, during the pending ofthe bill for an appropriation to defray the expences of missions to the South American States, it seemed distinctly understood to be the sense ofthe senate, that is only in offices that become vacant during the recess, that the president is authorised to exercise the right of appointing to office, and that in original vacancies where there has not been an incumbent of the office, such a power under the constitution does not attach to the executive. An amendment that had been proposed, providing that the president should not appoint any minister to the South American States, but with the advice and consent of the senate, was, therefore, withdrawn as unnecessary. And in a report of a committee of senate, made on the 25th April, 1822, it is declared, that the words, " all vacancies that may happen during the recess of the senate," mean vacancies occurring from death, resignation, promotion, or removal. The word, *happen,* has reference to some casualty not provided for by law. If

the senate be in session when offices are created by law, which were not before filled, and nominations be not then made to them by the president, the president cannot appoint after the adjournment of senate, because in such

(If) Marshall's Life of Washington, 196. Debates ofthe first Congress. See Commonwealth v. Bussier. 5 Serg. & Rawle, 451, and *post.*

case, the vacancy does not happen during the recess. In many instances, where offices are created by law, special power is given to the president to fill them in the recess of senate: and in no instance has the president filled such vacancies without special authority of law.(l)

On the last mentioned occasion, the authority of the president in making appointments, presented itself in another point of view. The measures under consideration of the senate, were those pursued by President MONROE, for carrying into effect the act to reduce and fix the military establishment of the United States, passed tho 2d March, 1821. It is stated by the president in his message to the senate, that in filling original vacancies, that is, offices newly created, it was his opinion,-as a general principle, that congress have no right, under the constitution, to impose any restraint, by law, on the power granted to the president, so as to prevent his making a free selection of proper persons for the offices in question, (colonel of artillery, and adjutant general,) from the whole body of his fellow citizens; and, that if the law imposed such restraint, it was void.(m) The report above mentioned states, on this point, that the constitution provides that "Congress shall have power to make rules, for the government and regulation of the land and naval forces.(n) Under this article of the constitution, it is competent for Congress to make such rules and regulations for the government of the army and navy, as they think will promote the service. This power has been exercised from the foundation of our government, in relation to the army and navy. Congress have fixed the rule in promotions and appointments. Every promotion is a new appointment, and is submitted to the senate for confirmation. In the several reductions of the army and navy, Congress have fixed the rules of reduction, and no executive, heretofore, had denied this power in Congress, or hesitated to execute such rules as were prescribed. But the committee

(I) See the report above referred to. Niles's Reg. 29th August, 1822. See the act to regulate the collection of duties on imports and tonnage, passed 2d March, 1799, sect. 17. Act of May 1st, 1800, fixing the compensation of public ministers, die., sect. 2.

(m) Message to senate, 12th April, 1822. Niles's Reg. 24th Aucr. 1822.

(n) Constitution. Art. 1. s. 8. 13.

did not dispute the power of the president, to discharge an officer from the land or naval service.(o)

Constitution. Art. 2. — President.

Art. 2. s. 3. 1. The president shall take care that the laws be faithfully executed.

If the president give instructions to the commanders of armed vessels, to detain vessels at sea, in cases not warranted by an act of Congress, from a misconstruction of such act, they do not excuse such commanders from liability to damages for committing a trespass in obeying them. The instructions of the president cannot change the nature of the transaction, or legalize an act which, without them, would be a plain trespass. Therefore, where an act of Congress authorised the commanders of armed vessels to detain American vessels bound *to* a French port, and the president, by his instructions to such commanders, authorised and required them to detain American vessels bound *to or from* a French port, it was held, that the captains of two United States frigates who, under these instructions, captured and detained a Danish vessel suspected to be American, bound *from* a French port, were liable in damages for so doing, and that the instructions of the president would not excuse them.(/>)

In the year 1793, President WASHINGTON determined to request the answers of the judges of the Supreme Court of the United States, to a series of questions, comprehending all the subjects of difference, existing between the executive and the minister of France, relative to the treaties between the two countries 5(9) but considering themselves only as a legal tribunal, for the decision of controversies brought before them in legal form, the judges declined any declaration of opinion, on questions not growing out of a case legally brought before them.(r)

(o) Report of the committee of senate. Niles's Reg. 29th August, 1822. See the constitution. Art. 1. s. 8. 15.

(p) Little *v.* Barrerne. 2 Cranch, 119. United States v. Bright. 3 Hall's Law Journ. 229.

(q) 5 Marshall's Life of Washington, 433.

(r) Ib. 441. See ante, 71.

Constitution. Art. 2. — Impeachment.

Art. 2. s. 4. 1. The president, vice president, and all civil officers of the United States, shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

William Blount, then a senator of the United States, was impeached by the house of representatives of the United States in the year 1797, for conspiring and contriving, while such senator, to canyon a military expedition against the Spanish territories, the Floridas, and Louisiana, and for other misdemeanors, but the senate decided, that he was not a civil officer within the meaning of this clause, and was therefore, not liable to impeachment.^)

In January, 1804, JOHN PICKERING, judge of the District Court of the United States for New Hampshire, was impeached by the house of representatives of the United States, on four articles. 1st, For misbehaviour as a judge, in ordering the delivery to the claimant of goods seized by the collector without requiring security. 2d, In refusing to hear evidence offered on the part of the United States, to show a forfeiture of said goods. 3d, In refusing to allow the United States to appeal from his decree, in a case of admiralty and maritime

jurisdiction, where the matter in dispute exceeded three hundred dollars. 4th, For appearing on the bench, for the purpose of administering justice, in a state of total intoxication, produced by the free and intemperate use of inebriating liquors, and then and there frequently, in a most profane and indecent manner invoking the name of the Supreme Being. He was found guilty on all these charges, by a constitutional majority of the senate, and a sentence of removal from office was passed, on the 12th March, 1804.

In the years 1804, and 1805, an impeachment was instituted, and tried, against SAMUEL CHASE, then one of the justices of the Supreme Court of the United States, on eight charges of misbehaviour in his official capacity, but he was acquitted, there not being a constitutional majority against him, on any one article.(if)

(s) Proceedings on the impeachment of Wm. Blount. Pamph. See report of senate in the case of John Smith. 1 Hall's Law Journ. 463, *ante,* 2C6.

(t) See proceedings on the impeachment of Judge CHASE,

These, it is believed, are the only cases of impeachment, tried under the present constitution of the United States.

CHAPTER XXXII.

Constitution. Article III.

CONSTITUTION. ART. 111. — JUDICIARY*

ART. 3. sect. 1.1. The judges both of the Supreme and inferior courts shall hold their offices during good behaviour, and shall at stated times, receive, for their services, a compensation, which shall not be diminished during their continuance in office.

An act of Congress was passed on the 27th February, 1801, for the appointment, by the president, of justices of the peace for the District of Columbia, to be commissioned for five years, and to have jurisdiction in personal demands of the value of twenty dollars; and by that act, and the act of 3d March, 1801, they were authorised to take certain fees. These acts were repealed by the act of 3d May, 1802, so far as related to their compensation. It was held, by the circuit court of the District of Columbia, (KILTY J. diss.) that such justices of the peace, appointed prior to the repealing act of 3d May, 1802, were to be considered as judges of inferior courts, within this clause of the constitution, and that no act of Congress could, during the period of their appointment, diminish, or take away their compensation. They therefore adjudged on demurrer, that an indictment would not lie against one of these justices, for taking fees after the repealing act.

The point was, afterwards, argued in the Supreme Court of the United States, on error brought, but no opinion was given; the court holding, that no writ of error lay in a criminal case.(a)

It has been since held, by the general court of Virginia, that the mere authority to perform a judicial act, vested in a person by an act of Congress, does not constitute such person a judge or a court, within the grant of judicial power described in the constitution, or within the above clause of the constitution. Thus a custom house officer, commissioner of the revenue or excise, commissioner to take depositions, commissioner in bankruptcy, or to settle various other incidental and occasional matters, though authorised to administer an oath, which is a judicial act, are not so to be considered. The commissioners to decide on the claims to the Louisiana fund, arid those deciding on the claims on the Florida fund, must exercise quasi judicial powers, yet they are not to be considered judges \within this clause. The constitution, in speaking of courts and judges, means those who exercise all the regular and permanent duties which belong to a court, in the ordinary and popular signification of the term.(6)

It was contended in Congress, in the year 1802, that after Congress had once established inferior courts, under art. 1. sect. 8, of the constitution, they could not constitutionally abolish those courts, and thereby deprive the judges of their offices, and, therefore, that the act of 8th May, 1802, abolishing the system of circuit courts, established by the act of 13th February, 1801, under which sixteen circuit judges had been appointed, was unconstitutional. But the act was, notwithstanding, passed, and the system was abolished. The question was, afterwards, argued in the Supreme Court in the year 1803, but the case was decided on different grounds.(c)

(a) United States *v.* More. 3 Cranch, 159. See Wise *v.* Withers. 3 Cranch, 336, where it is decided by the Supreme Court, that a justice of the peace in the District of Columbia is an officer of the government of the United States, and it is stated, that his powers, as defined by law seem partly judicial, and partly executive. See *ante,* 273, 274.

(6) Ex parte Pool and others. General Court of Virginia. Nat. Intel!. Dec. II, 1821, ante, 274.

(c) Stuart c. Laird. 1 Cranch, 299.

Constitution. Art. 3. — Treason.

Art. 3. s. 3. I. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

Sect. 3. 2. Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

By the act of 30th April, 1790, sect. I, if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act, of the treason whereof he she, or they shall stand indicted, such person or

persons shall be adjudged guilty of treason against the United States, and shall suffer death.

The term, levying war, is a technical term, borrowed from the English law, and its meaning is the same as it is when used in the statute 25 Edw. Ill, and is to be collected, as well from adjudged cases, as from the writings of approved elementary authors, such as Coke, Hale, Foster, and Blackstone.^) It comprehends, as well those who create or raise a war, as those who make it, or carry it on.(e)

A conspiracy to levy war is not treason:(f) nor is a secret unarmed meeting of conspirators, not in force, nor in warlike form, though met with a treasonable intent.(g) Nor, it seems, is the actual enlistment of men, to serve against the government.^) But they are high misdemeanors, and punishable in such manner as Congress may provide.(z)

(d) United States *v.* Burr. 4 Cranch, 471. United States *v.* Fries. Trial. 167.

(e) United States *v.* Burr. 4 Cranch, 471, 472.

(f) Ex parte Bollman and Svvartwout. 4 Cranch, 126. *(g)* United States v. Burr. 4 Cranch, 486. *(h)* Ex parte Bollman and Swartwout. 4 Cranch, 126. (*) Ib.

An insurrection, the object of which is to suppress an office of excise established under a law of the United States, and to compel the resignation of the excise officer, and marching with a party to the house of such officer in arms, marshalled and arrayed, and committing acts of violence and outrage there, with a view to render void an act of Congress, or to prevent its execution, by force or intimidation, is a levying of war against the United States.(&) So if a body of people conspire and meditate an insurrection to resist or oppose the execution of a statute of the United States by force, they are only guilty of a high misdemeanor: but, if they proceed to carry such intention into execution by force, they are guilty of the treason of levying war, and the quantum of the force employed neither increases nor diminishes the crime; whether it be one hundred or one thousand persons, is immaterial^/) And any combination, to subvert by force, the government of the United States, violently to dismember the union, to compel a change in the administration, to coerce the repeal or adoption of a general law, or to revolutionise a territorial government by force, although this be merely a step to, or a mean of executing some greater projects,(m) is a conspiracy to levy war, and if the conspiracy be carried into effect by the embodying and assembling of men in force, and in a military posture, for the purpose of executing the design, it is treason by levying war.(w) But if the intention of such conspiracy be merely to defeat the operation of a law in a particular instance, or through the agency of a particular officer, from some private or personal motive, though it is a high offence, it is not treason.(o)

To make such assemblage treasonable, it must be in force, and in a warlike posture; or, in other words, It, must be an assemblage in a condition to make war, and with such appearance offeree as would justify the opinion, that they met for that purpose; otherwise, an assemblage, be

(&) United States *v.* Vigol. 2 Dall. 346. United States v. Mitchell. 2 Dall. 355.

(I) United States c. Burr. 4 Cranch, 480. United States v. Fries, 196.

(m) United States *v.* Burr. 4 Cranch, 483.

(ft) Ib. 487.

(o) United States c. Frips. Trial, 14. Charge of IREDELL J.

the design ever so treasonable, is not treason by levying war.(p) The character of such assemblage must unequivocally appear. It is not indispensably requisite that such assemblage should have arms, nor that hostilities should have commenced, by engaging the military force of the United States, or that force or violence should be applied;(y) except, perhaps, where the design is, not to overturn the government, but to resist the execution of a law; for there the judges of the United States seem to have required this.(r) But, when a body of men are assembled for the purpose of making war against the government, and are in a condition to make that war, the assemblage is an act of levying war.(s) So, if men be enlisted, and march prepared for battle, or in a condition for action, it is an overt act of levying war, though they do not come to battle or action.*(t)* So is cruizing under a commission from an enemy, in a warlike form, and in a condition to assail those of whom the cruizer is in quest.(w)

The travelling of individuals, either separately or together, to the place of rendezvous, in pursuance of the conspiracy to levy war, but not in military form, would not, it seems, constitute levying war: but the meeting of particular bodies, and marching in a military form, or embodying in that form in the first instance, would be sufficient to constitute it.(v)

In respect to those who are to be considered as levying war, not only persons, leagued in the conspiracy, who bear arms, but those who perform the various and essential parts of prosecuting the war which must be assigned to different persons, may be said to levy war.(^) As a commissary of purchases who never saw the army, but, knowing its object, and leaguing himself with the rebels, supplied that army with provisions*;* or a recruiting officer, holding a commission in the rebel service, who, though never in camp, executed the particular duty assigned

(p) United States c. Burr. 4 Cranch, 475. 487.

(q) Ib. 475. 487.

(r) Ib. 475. 481.

(*) Ib. 4 Cranch, 475.

(t) Ib. 478.

(«) Ib.

(») Ib. 485.

(x) Ib. 472, 473. 502. Ex parte Bollman and Swartwouf. 4 Cranch.

him.(y) But this does not embrace the case of persons who perform no act in the prosecution of the war, who only counsel or advise it, or who, being engaged in the conspiracy, fail to perform their part. Whether such persons may be implicated by the doctrine, that whatever would make an accessary in felony, makes him a principal in treason, or whether that doctrine is inconsistent with the constitution of the United States, is a question not determined,^)

As a general principle, it is more safe, as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases, and that crimes, not already within the constitutional definition, should receive such punishment as the legislature, in its wisdom, may provide.(o)

Where a statute of a state declares treason against the state to consist in levying war against it, within the state, or adhering to its enemies, giving them aid and comfort there, or elsewhere, treason against such state may be committed by an open and armed opposition to the laws of the state, or a combination and forcible attempt to overturn or usurp the government.^) And indeed, the state in its political capacity may, under certain special circumstances, pointed out by the constitution of the United States, be engaged in war with a foreign enemy. But, adhering to the enemies of the United States, during war between the United States and a foreign power, is not treason against a state. Nor is treason against the United States, cognisable in the courts of a state. The Supreme Court of New York, therefore, notwithstanding a law of the state to the effect above mentioned, on motion, quashed an indictment found against the defendants, which, after setting out a state of war between the United States and Great Britain, declared and carried on under the authority of the United States, alleged, that the defendants, being citizens of the state of New York, and of

(y) United States *v.* Burr. 4 Cranch. 470.

(z) Ib. 472, 3. 501. See United States v. Fries. 199.

(a) Ex parte Bollman and Swartwout. 4 Cranch. United States v. Burr. 4 Cranch, 486.

(6) The constitution, art. 4. sect. 2. 2. seems to recognise treason against a state.

the United States, as traitors of the state of New York, did adhere to, and give aid and comfort to the enemy, by supplying them with provisions of various kinds, on board of a public ship of war, upon the high seas.(c)

An indictment for levying war against the United States, must specify an overt act, stating the place at which it was committed, and the particular manner in which the war was levied. It is not sufficient to allege generally, that the accused had levied war against the United States.(eQ The overt act laid in the indictment must be proved; for though it may

not, of itself, be the treason of which the party was guilty, it is the sole act of treason which can produce conviction on that indictment.(c) If the party were absent at the overt act, he cannot be indicted as present and convicted, on evidence that he procured the treasonable act.(f) Being present, and procuring, are distinct acts, and ought not to be charged as the same.(*g)* Those who are actually or legally present at the overt acts are principals: procurers, who are absent at the overt act, are accessaries.^) The latter cannot be convicted till some one of the former is convicted, and the record produced,-(«) and the necessity of this is not waved by the prisoner's pleading to an indictment, charging him as principal.(j) If therefore, the party be charged with an overt act at a particular place in a state, and the evidence be of an overt act by others at that place, and in another state, he cannot be considered constructively present by counselling, inciting, aiding, or procuring, such overt act.(&)

The overt act laid, must be proved by two witnesses, to have been committed within the district. The actual or legal presence of the party, or the procurement by him, must be proved by two witnesses.(7) No presumptive

(c) The People *v.* Lynch and others. 11 Johns. 553.

(d) United States v. Burr. 4 Cranch, 490.

(e) Ib. 490, 493. (f) Ib. 495.

(g} Ib. 497. 502. 505. (A) Ib. 503. *(i)* Ib. 503. 505. *(j)* Ib. 605. (fc)Ib. 491.494. (0 Ib. 496. 503.

evidence will satisfy the constitution and law. And if the indictment charge the defendant with levying war at a particular place in a state, and specify the overt act, and there is no witness who has proved his actual or legal presence, but the fact of his absence in another state is not controverted, evidence is not admissible of subsequent transactions at a different place, but the court will reject all testimony of that kind at once, generally, without deciding particularly on each witness as adduced. No testimony, in its nature coroborative or confirmatory, is admissible, if the overt act be not proved by two witnesses.^)

The words in this section, "owing allegiance to the United States," are entirely surplus words, which do not, in the slightest degree, affect its sense. The construction would be precisely the same, were they omitted. Treason is a breach of allegiance, and can be committed only by him who owes allegiance, perpetual or temporary. The 2d section, therefore, in which there are not these words, will receive the same construction, in this respect, as the first.(w)

As to evidence in treason, where a letter was circulated during an insurrection, by the leaders of the insurrection, calling a meeting, an alleged copy, proved by a witness to be conformable in substance to the original, no evidence being given that the original letter was lost, or that the copy was in all respects correct, was held not to be evidence. But it seems if such copies were circulated at the time of the insurrection, one of them would be evidence.^)

On an indictment for treason, testimony of a robbery of the mail, for which another indictment is found against the prisoner, and of which no evidence had been given that it was committed with a traitorous intention, cannot be admitted.(p)

On the trial of an indictment for treason in levying war, as the crime consists in the overt act of levying war, and the treasonable intention, evidence to either point is

(m) Ib. 506. 507.

(n) United States v. Wiltberger. 5 Wheat. 97.

(o) United States r. Mitchell. 2 Dall. 357.

(p)Ib.

relevant: and the court will not prescribe to the attorney of the United States the order in which such evidence shall be given. He may first give evidence of the treasonable intention. But such intention means, the intention with which the overt act was committed, and relevant to the overt act, not a general evil disposition, or an intention to commit a distinct fact. The latter is admissible only by way of corroboration as to the intention, and, therefore, ought to follow what it is to corroborate.^)

It seems certain, that conversations or actions at a different time and place may be given in evidence, as corroborative of the overt act of levying war, after that has been proved in such a manner as to be left to a jtary; but whether, in case where the intent cannot be inferred from the fact, and is not proved by declarations connected with the fact, among which are to be included the terms under which an assemblage was to be convened together, this defect can be supplied by extrinsic testimony, not applying the intent conclusively to the particular fact, *query.(r)*

The confession of the defendant, before a magistrate out of court, is not sufficient to convict of treason: but after the overt act of treason is proved by two witnesses, it is evidence by way of corroboration.(s)

It is intimated that though the constitution declares, that two witnesses are necessary to produce conviction, yet it may not be so strictly and absolutely necessary to authorise an indictment being found a true bill: and that though there must be two witnesses to the general charge of treason, yet, for the purpose of finding a bill, one witness may be sufficient to prove one overt act, and another to prove another.(t)

(q) United States *v.* Burr. Trial. 469, 472.

(r) Ib. Appx. 2 pt. 212. See United States v. Fries. 174.

(s) United States *v.* Fries. 171.

(f) United States *v.* Burr. Trial. 196, per MARSHALL C. J. See *contra* United States *v.* Fries. Trial, 14. Charge of IREDELL J. See further, on the subject of treason, *ante,* chapter XXV.

CHAPTER XXXIII.

Constitution. Article IV.

CONSTITUTION. ART. IV. — RECORDS AND LAWS.

ART. 4. s. 1.1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Accordingly, by the act of May 26, 1790, sect. 1. it is enacted, that the *acts of the legislatures* of the several states shall be authenticated, by having the seal of their respective states affixed thereto. The *records and judicial proceedings* of the courts of any state shall be proved or admitted in any other court, within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the Judge, Chief Justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the United States, as they have, by law or usage, in the courts of the state from whence the said records are or shall be taken.

By another act on the subject passed on the 27 March, 1804, sect. 1, all records and exemplifications of *office-books* which are or may be kept in any public office of any state, *not appertaining to a court,* shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept, or of the governor,

the secretary of state, the chancellor or the keeper of the great seal of the state, that the said attestation is in due form, and by the proper officer. And the said certificate, if given by the presiding justice of a court shall be further authenticated by the clerk or prothonotary of the said court, who shall certify under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified. Or, if the said certificate be given by the governor, the secretary of state, the chancellor, or keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made.

And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States, as they have, by law or usage, in the courts or offices of the state from whence the same are or shall be taken.

Sect. 2. provides, that all the provisions of this act, and the act to which this is a supplement, (March 26, 1790,) shall apply as well to the public acts, records, office books, judicial proceedings, courts, and offices of the respective territories of the United

States, and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, courts, and offices of the several states.

These laws, therefore, embrace,

1. Acts of the state legislatures.

2. Records and judicial proceedings of state courts.

3. Office books kept in a state office, not appertaining to a court.

1. Acts of the state legislatures.

An exemplification of an act of the legislature of one of the states, under the great seal of such state, is evidence, though not attested by the governor, or any other principal officer of the state.(a) But, it seems, the seal is indispensable: for though the acts of the legislature of Maryland were read from the statute book published by authority, to prove the incorporation of an insurance company,

(a) United States c. Johns. 4 Ball. 415.

which the prisoner was charged with design to prejudice, by destroying his vessel which had been insured by them, yet there the objection was not made,(6) and in a subsequent case, a law of the territory of Orleans, printed in *a.* small pamphlet in the English and French languages, to which no seal whatever was affixed, was held to be inadmissible on a question of bail, to shew the insolvent law of that territory, because it was not authenticated under the seal of the state of Louisiana, (which that territory afterwards became,) as the act of Congress requires.(e)

2. Records and judicial proceedings of state courts.

The " due form," intended by the acts of Congress, is that of the state or of the court whence the record conies. That this is the form intended, is inferrible from the circumstance, that Congress has prescribed none, and that it is not to be supposed that the judge, who gives the certificate, should be acquainted with any other form than that of his own state or court, which is prescribed in his own state, by positive law, or practice.(c?) The certificate of the presiding judge, is the only evidence of the fact, that the attestation is in due form.(e) And if the clerk attest, that "the foregoing is *truly taken* from the records of the court," and the presiding judge certify it to be in clue form, it is conclusive, and no other evidence can be received to show that it is not in due form.(f) But a certificate of the presiding judge, that the person whose name is signed to the attestation of a record, is a clerk of the court, and that the signature is his proper handwriting, without stating that the attestation is in due form, is not sufficient.(o-) Nor will the court inquire, in such case, whether the attestation appears on its face to be in due form, nor

whether the certificate of the judge amounts to an allegation that it is in due form, and, therefore, the law is substantially complied with.(A) Such record is not suf-

(b) Ib. Yet see Jones v. Maffet. 6 Serg. & Rawie, 523.

(c) Craig o. Brown. 1 Pet. 252.

(d) Craig c. Brown. 1 Pet. 352.

(e) Ib.

(f) Ferguson c. Harwood, 7 Cranch, 408. *(g)* Craig v. Brown. 1 Pet. 352. (h) Ib.

ficient for any purpose, either as evidence on a trial, or on a question of bail(i) So, where on an appeal in equity, from a circuit court, it appeared, that an exhibit, stated by the complainant in his bill, and denied in the answer, consisted of a certificate of a clerk of a state court, of a copy of a deed taken from the records of the court, but there was no certificate that the attestation was in due form, it was held, that the instrument so certified, could not be noticed by the court, as a copy of such deed, and, inasmuch as it was the foundation of the complainant's right, the court erred in decreeing in their favour, on such defective evidence. The decree was reversed, but as the objection was technical, and not made below, the record was remanded for further proceedings.(k)

A certificate of an affidavit taken before a magistrate, must state the place where the affidavit was taken, so as to shew that the magistrate had jurisdiction to administer the oath. If the place be omitted, it cannot be received as evidence, on a hearing before a court of the United States, on motion to commit on a criminal charge. Nor is such omission helped by the certificate being dated at a place where the magistrate had jurisdiction.(l) Thus, where the affidavit purported to be taken before B. C., a certificate annexed that B. C. was a justice of the peace, without stating that such justice was the same B. C. before whom the affidavit was taken, was held uot to be good.(m) Such certificate must be as certain and precise as the nature of the case admits of.(ra) But the certificate that a person is a magistrate, and that full faith is due to his acts, implies that he has qualified by taking the necessary oaths.(o)

It seems, that where a seal had belonged to a court, before the territory in which it is situated was erected into a state, and no new seal is provided, it might continue to be the seal of the court under the new government.(o) But if the fact be that the court, whose record is certified, has

(i) Craig c. Brown. 1 Pet. 352.

(&) Drummond's administrators v. Magruder. 9 Cranch, 122. (Z) United States *v.* Burr. 96. 98. *(m)* Ib. *(n)* Ib.

(o) Ib. 100. See also Ex parte Bollman and Swartvvout. 4 Cranch, 1!4. 129. Craig v. Brown. 1 Pet. 352.

no seal, this fact should appear either in the certificate of the clerk, or in that of the judge.(j>) And if the certificate of the clerk stated the seal affixed, to be that of a late territory, and no seal has been provided for the state, and from the impression of the seal it would seem, that it had belonged to the court before the Territory was erected into a State, and there are reasons to believe that there is an inaccuracy of expression in the clerk, *query* whether it is sufficient.^)

If the record be certified in the manner prescribed, such proof of the judgment, is of as high a nature as inspection of the record would be.(r)

This act of Congress applies only to the records of the state courts, and not to those of the United States courts. With regard to these, if offered in evidence in a state court, it remains with such court to decide on the sufficiency of the evidence. It was, therefore, held by the Supreme Court of New York in an action brought on a judgment rendered in the circuit court of the United States for the district of Massachusetts, that on the plea of *nul tielrecord,* a record under the seal of such circuit court certified by the clerk as a copy, was sufficient evidence: that being the ordinary mode of certifying such record used in Massachusetts, instead of the technical exemplification.^)

The attestation " that the foregoing is *truly taken* from the records of the court," is good, though it do not state that it was a full record, or an entire copy of any thing. But an attestation of a copy of docket entries truly taken, is not good, if no foundation is laid to shew its admissibility in the case.(if)

By declaring what faith and credit shall be given in one state to the judicial proceedings of another, Congress has declared the effect of the record.(w) And, it seems now settled, that the judgment of a state court shall have the same credit, validity, and effect in any state, which it had in the state where it was pronounced; and that whatever pleas would be good in a suit thereon in such state, and

(*p)* Craig c. Brown. 1 Pet. 352.

(?) Ib.

M Mills v. Duryee. 7 Cranch, 481.

(s) Pepoon v. Jenkins. 2 Johns. Cas. 119.

(t) Ferguson *v.* Harwood, 7 Cranch, 408.

(u) Mills *v.* Duryee. 7 Cranch, 481.

no others, can be pleaded in any court in the United States.(fl) It was therefore held, that where the defendant had full notice, and gave bail, a judgment in a state court is conclusive, and in a suit upon that judgment in the District of Columbia, the defendant could not plead *nil debet.(x)* So in a suit in the circuit court of South Carolina, upon a judgment in New York, it was held, that the defendant could not plead *nil debet.(y)* And

such judgment, it seems, is to be considered in the courts of the United States, as extinguishing the original cause of action in the same manner as in the courts of the state where it is given: for where a suit was brought, in the Mayor's Court of New York, against two defendants, one of whom was not served with process, the other appeared, and pleaded, and judgment was rendered against them both, (under an act of assembly of that state,) such judgment was held conclusive against the one who appeared, in a suit in the Circuit Court of the Pennsylvania district, and that it amounted to a complete extinguishment of the original contract, so that if the latter were made at Teneriffe, the debt, after such judgment is to be considered as arising at New York, and a discharge under the bankrupt law of Teneriffe, taking place after the judgment, does not bar the plaintiff's demand.(z)

If the judgment in the state court has been obtained against a person residing out of the state, who was never served with process, or notified of the existence of the suit, his remedy is the same and no other, as would be open to him if the suit had been brought on the judgment in the state court where it was rendered. The court in which the judgment was given would, upon motion, accompanied by sufficient proof, stay the execution and set aside the judgment. The attorney would be liable if he entered an appearance without authority, and so would the party if the attorney were not clearly able to answer in damages for the injury. If the judgment was entered by default for non-appearance on the return of the officer, he is liable

(c) Ib. Hampton *v.* M'Connell. 3 Wheat. 234.

(x) Mills *v.* Duryee. 7 Cranch, 481.

(y) Hampton *v.* M'Connell. 3 Wheat. 234. See also Armstrong *v.* Carson's executors. 2 Dall. 302. S. P.

(z) Green *v.* Sarmiento. 1 Pet. 74. Cited in Campbell v. Claudius. Ib. 484, and in Field *v.* Gibbs. Ib. 155.

for such return if false. But, if the record of such judgment against two, set forth in the declaration, state that both the defendants appeared and pleaded, a plea to such declaration that the defendant was a resident of another state, and that no process was served upon him, nor had he notice or opportunity of defence, that he never appeared or consented to the proceedings, or authorised any one to appear for him, and therefore the judgment is void, is ill upon demurrer, inasmuch as the record imports absolute verity.(a)

As to the effect of a judgment recovered in a suit commenced by attachment, if the defendant had personal notice of the suit, and afterwards appeared and took defence, any objection to the proceeding is thereby waived, and *nil debet* cannot be pleaded.(6) No action at law will lie on the decree of a court of equity for the payment of moneys.^)

3. Office books.

The whole of the record that relates to the subject matter must, it seems, be certified. For a mere extract from the book of the surveyor general of Pennsylvania, of instructions to deputy surveyors, was held not to be evidence to shew, that a survey of a district was

made by a wrong surveyor.(c?) Nor are office books evidence, to show *ex parte* proceedings of the board of property in that state, to destroy the validity of a party's title.(e)

As to the certificate of an officer of the government of the United States, where, by act of Congress, the secretary of a territory is required to furnish copies of all the executive proceedings of the governor of the territory, to

(a) Field o. Gibbs. 1 Pet. 155.

(b) Mayhew *v.* Thatcher. 6 Wheat. 129. See Mills *v.* Duryee. 7 Cranch, 481. Opinion of JOHNSON J. Phelps v. Holker. 1 Dall. 261. Kilburn *v.* Woodworth. 5 Johns. 37. Kibbec. Kibbe. Kirby, 110. Belts *v.* Death. Addison's Rep. 265, as to judgments on foreign attachment. As to the conclusiveness of a decree in chancery, see Hopkins *v.* Lee. 6 Wheat. 100.

(c) Hugh *v.* Higgs. 8 Wheat. 697. This suit was brought in the circuit court of the District of Columbia, in which there is a court of equity.

(d) Griffith's lessee v. Evans. 1 Pet. 166.

(e) Ib. See also Brown's lessee «. Galloway. Ib. 291.

the president, every six months, a certificate from the secretary of state of the United States, under seal of his office, that certain persons were appointed justices of peace for a county in the territory, as appeared by the official returns of the secretary of such territory, " remaining in the office of this department," is sufficient evidence,(f) though such certificate do not state, that such magistrates have taken the requisite oaths: for this will be presumed, if they are found acting as magistrates.*(g)*

Constitution. Art. 4. — Citizens.

Art. 4. sect. 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

It was contended in a case in Maryland, in the year 1797, that the laws of that state, authorising the proceeding by attachment against the property of persons not citizens of that state, to compel a payment of their debts, though liable to be dissolved by entering special bail, was a violation of this section: but the general court, (CHASE and DUVAL J.) gave it as their opinion, that this section meant, that the citizens of all the states should have the peculiar advantage of acquiring and holding real as well as personal property, and that such property should be protected and secured by the laws of the state, in the same manner as the property of the citizens of the state is protected. It meant, that such property shall not be liable to any taxes or burdens, which the property of the citizens is not subject to. It may also mean, that, as creditors, they shall be on the same footing with the state creditor, in the payment of the debts of a deceased debtor. It secures and protects personal rights. And they decided, that the law in question was not incompatible with the constitution of the United States.(h)

By the resolution of Congress of the 2d March, 1821, providing for the admission of Missouri into the union, it was declared to be on condition, that a particular clause in her constitution should not be construed to authorise

(f) Ex parte Bollman and Swartwout. 4 Cranch, 114. 129.

(g) Ib-

(A) Campbell v. Morris. 3 Har. &. M'Hen. 535.

the passage of any law, and that no law should be passed in conformity thereto, by which any citizen of either of the states in the union, should be excluded from the enjoyment of any of the privileges and immunities, to which such citizen "was entitled, under the constitution of the United States. This clause, (the 4th clause of the 26th section of the 3d article of the constitution of Missouri,) directed the legislature of the state to pass laws, " to prevent free negroes and mulattoes from coming to and settling in the state."

It has been also held, that the above clause of the constitution means only, that citizens of other states shall have *equal* rights with the citizens of a particular state, and not that they shall have different, or greater rights. Their persons and property must be in all respects, subject to the laws of such state. It does not therefore, affect the right of the legislature of a state, to grant to individuals an exclusive privilege of navigating the waters of such state, by means of steam boats.(f)

For all national purposes embraced by the constitution of the United States, the states and the citizens thereof are one: in all other respects the states are necessarily foreign to and independent of each other. Hence a bill of exchange drawn in one state on a person living in another is to be considered in reference to the laws of the United States as a foreign bill of exchange.(y)

Constitution. Art. 4. — Fugitives.

Art. 4. sect 2. 2. A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

The act of 12th February, 1793, sect. 1. provides, that whenever the executive authority of any state in the union, or of either of the territories northwest or southwest of the river Ohio, shall demand any person as a fugitive from

(i) Livingston *v.* Van Inghen. 9 Johns. Rep. 507. See also on this subject. Murray *v.* M'Carty. 2 Munf. 393.
(j) Buckner *v.* Finley. 2 Pet. S. C. Rep. 586.

justice, of the executive authority of any such state or territory to which such person shall have fled, and shall, moreover, produce the copy of an indictment found or an affidavit made before a magistrate of any state or territory as aforesaid, charging the person so

demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged fled, it shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear; but if no such agent shall appear within six months from the time of the arrest, the prisoner shall be discharged, and all costs, or expenses incurred in the apprehending, securing or transmitting such fugitive to the state or territory making such claim, shall be paid by such state or territory. By sect. 2, any agent appointed as aforesaid who shall receive the fugitive into his custody shall be empowered to transport him or her to the state or territory from which he or she shall have fled. And if any person shall by force set at liberty or rescue the fugitive from such agent while transporting as aforesaid, the person or persons so offending shall on conviction be fined not exceeding five hundred dollars, and be imprisoned not exceeding one year. It has been held in South Carolina,(&) that the demanding, apprehending, and conveying away fugitives from justice under these provisions of the constitution and laws are ministerial acts wholly intrusted to the management and discretion of the executive authority: that the making the demand, the transmission of the documents, the mode of their authentication, their validity and legal operation, are exclusively of executive cognisance, and that the judicial authority of the state from which they are sent hag no control or jurisdiction over the subject. Where, therefore, certain persons were brought up before a judge of

(k) State of South Carolina ex parte Willard and wife ads. Thejstata of New York. Decided by Judge RAY, July 14th, 1814. Philadelphia Daily Advertiser Aug. 4. 1814.

that state by *habeas corpus,* who were under arrest by order of the executive of South Carolina for the purpose of being delivered to an agent of the executive of New York, who had demanded them as fugitives from justice in that state, bills of indictment being found against them in New York for bigamy, their discharge was moved for on various grounds, but the judge decided that he had no power or authority to discharge the prisoners, or in any way whatever, to interfere with the mandate of the executive: and that it must be considered as a case excepted out of the state habeas corpus act by the operation of the constitution and laws of the United States.

Art. 4. sect. 2. 3. No person, held to service or labour in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.

By the act of 12th February, 1793, sect. 3, when a person held to labour in any of the United States, or in either of the territories on the northwest or south of the river Ohio, under the laws thereof, shall escape into any other of the said states, or territory, the person to whom such labour or service may be due, his agent, or attorney, is hereby empowered to seize or arrest such fugitive from labour, and to take him or her before any judge of the circuit or district courts of the United States, residing or being within the

state, or before any magistrate of a county, city, or town corporate, wherein such seizure or arrest shall be made, and, upon proof, to the satisfaction of such judge or magistrate, either by oral testimony, or affidavit, taken before, and certified by a magistrate of any such state or territory, that the person so seized or arrested, doth, under the laws of the state or territory from which he or she fled, owe service or labour to the person claiming him or her, it shall be the duty of such judge or magistrate, to give a certificate thereof to such claimant, his agent, or attorney, which shall be sufficient warrant for removing the said fugitive from labour, to the state or territory from which he or she fled. By sect. 4, any person, who shall knowingly or willingly obstruct or hinder such claimant, his agent, or attorney, in so seizing or arresting such fugitive from labour, or shall rescue such fugitive from

such claimant, his agent, or attorney, when so arrested, pursuant to the authority herein given or declared, or shall harbour or conceal such person, after notice that he or she was a fugitive from labour as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars: which penalty may be recovered by, and for the benefit of such claimant, by action of debt, in any court proper to try the same; saving, moreover, to the person claiming such labour of service, his right of action for, or on account of the said injuries, or either of them.

Under the foregoing provisions of the constitution, and act of Congress, it has been decided in Pennsylvania, by the Supreme Court of that state, that if a female slave escape from Maryland into Pennsylvania, and afterwards become pregnant in the latter state, and be there delivered of a bastard child, such child, under the above provisions, and the acts of assembly of the state of Pennsylvania, is born free: the court declaring, that the constitution and act of Congress embrace, in such case, only the person escaping, and not the issue.(f)

If a fugitive slave commit any public offence in another state, and be detained under the authority of the government of such state, the right of the master must yield to a paramount right.(m)

So it has been held, by the Supreme Court of Pennsylvania, that this provision of the constitution is not to be construed, so as to exempt slaves, escaping into another state, from the penal laws of the latter. If such slave be guilty of felony, or of riots, violent assaults and batteries, or other offences, which, though not felonious, are dangerous to the peace of the commonwealth, they are subject to prosecution, and punishment. And where the slave had absconded from Maryland, and was committed to goal in Pennsylvania on a charge of fornication and bastardy, committed in the latter state, and an agent of the master came on to receive him, inasmuch as fornication is treated as a crime by the law of Pennsylvania, and where it is accompanied with bastardy, security is required for the maintenance of the child, the court remanded

(l) Commonwealth v. Holloway. 2 Serg. & Rawle, 306. 11 Niles's W. Reg. 28, (1816.) S. C. See ib. 46.

(m) Glen *v.* Hodges. 9 Johns. 67. Supreme Court of New York.

the slave to prison, to answer the charges of fornication and bastardy.(w) But a fugitive slave cannot contract a debt in another state, so as to impair the right of the master to reclaim him. If, therefore, a person contract such debt with the fugitive slave in the state to which he fled, and, on the master's coming to reclaim him, sue out an attachment against such slave, for the debt, on which the slave is arrested by an officer, and forcibly detained and imprisoned, although the laws of such state prohibit slavery, trespass lies, in a court of the state where the master resides, to recover damages for the injury.(o)

From the whole scope and tenor of the constitution and act of Congress, it appears, that the fugitive is 1o be delivered up on a summary proceeding, without the delay of a formal trial in a court of common law. If a certificate be given by a state judge, agreeably to the act of Congress, after a hearing, such certificate is a legal warrant to remove the slave: and no writ of *ho mine replegiando* afterwards lies, on the part of the slave, in a court of the state where such certificate is given, to try his right to freedom. Such writ is a violation of the constitution. If the slave, in such case, has a right to freedom, he may try it in the state to which he is removed. Where, therefore, a judge of a state court, after a hearing on *habeas corpus,* gave a certificate agreeably to the act of Congress, and the slave sued out of the Supreme Court a *homine replegiando,* against the keeper of the prison where he remained, the court quashed the writ.(jo)

Constitution. Art. 4. — Territories.

Art. 4. *s. 3.* 2. Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States, and nothing in this constitution shall be so construed, as to prejudice any claims of the United States, or of any particular state.

This section is adapted to the territorial rights of the

(n) Commonwealth *v.* Holloway. 3 Scrg. <fc Rawle, 4.

(o) Glen *v.* Hodges. 9 Johns. 67.

(p) Wright *alias* Hall v. Deacon. 5 Serg, & Rawle, 62.

United States beyond the limits or boundaries of any Of the states, and to their chattel interests. It is not to be applied to a fortress within the limits of a state, which has never been ceded to the United States, though it has been occupied by them, with the tacit consent of the state, as a military post, for the purpose of defence and protection;^) or, though the title thereto be vested in the United States, by deed from the former proprietary of the soil of the state.(r)

And so, it seems, land held by the United States, within the limits of one of the states in existence at the adoption of the constitution, as a purchaser from an individual, without

any cession by the legislature, under art. 1. 8.16. is to be governed in respect to the title, by the same rules as if it were held by an individual, namely, the *lex loci rei sil(K.(s}*

In erecting a new state out of a territory, it is usual for Congress to stipulate for certain rights, as to the lands within the same thereafter held or conveyed by them. The power of governing and of legislating for a territory, is the inevitable consequence of the right to acquire and to hold territory. Moreover, under this section, Congress possessed and exercised the absolute and undisputed power of governing and legislating for the territories erected in Louisiana after its purchase. Congress gave them a legislative, an executive, and a judiciary, with such powers as it was their will to assign to those departments, respectively. In assigning the judicial power in a territory, Congress is not restrained by the limits prescribed in the third article of the constitution. It has power to give a district court of the United States, established in such territory, jurisdiction over a case brought by or against a citizen of the territory, though he be not a citizen of a state. Its jurisdiction depends entirely on the will of Congress, as expressed in their laws. And it was accordingly held, by the Supreme Court, that when Congress passed the act of the 2d March, 1804, vesting in the district court of Orleans territory, the same jurisdiction

(q) The People *v.* Godfrey- 17 Johns. 225.

(r) Commonwealth *v.* Young. 1 Hall's Journ, of Jurisprudence, 47 Supreme Court of Pennsylvania, Sept. T. 1818. (*) United States *v.* Crosby. 7 Cranch, 115.

and powers, which were by law given to, or might be exercised by, the judge of Kentucky district, they intended that the citizens of the territory of Orleans, might sue or be sued in that court, though not citizens of a state, and, therefore, that court had jurisdiction, though the suit was against a citizen of the territory.(t) But, it seems, the restrictions in the acts of Congress, as to who may sue in a circuit court, or a district court acting as such, and as to suits by assignees, were applicable to such suits.(u)

(t) Seré *v.* Pitot. 6 Cranch, 332.

(u) Ib. See *ante,* 103. 115. Act of September 24th, 1789, section

CHAPTER XXXIV.

Constitution. Article VI.

CONSTITUTION. ART. VI. — SUPREME LAW.

ART. 6. s. 2. This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

This declaration marks the characteristic distinction between the government of the union and those of the states. The general government, though limited as to its objects, is supreme with respect to those objects.(a)

An act of Congress, contrary to the constitution of the United States, is null and void. The constitution is a superior and paramount law, which cannot, be altered by the legislature; and courts of justice, when called on to decide a case in which the constitution and law are opposed, are bound to enforce the constitution as paramount, and to declare the law void, or modify it according to the constitution, if the case admit it. The question, whether an act of Congress was constitutional, has been discussed in the Supreme Court, in a variety of cases,(6) and in

(a) Cohens v. Virginia. 6 Wheat. 381.

(b) Hylton v. The United States. 3 Ball. 171. Marburys. Madison. 1 Cranch, 137. Martin «. Hunter's lessee. 1 Wheat. 304. Loughborough v. Blake. 5 Wheat. 317. Cohens v. Virginia. 6 Wheat. 264. United States o. Smith. 5 Wheat. 158. M'Culloch e. Maryland. 4 Wheat. 316. Osbornc. U. S. Bank. 9 Wheat. 738, and others.

Marbury *v.* Madison,(c) the judicial act of September 24th, 1789, so far as it authorised the Supreme Court to issue a mandamus to an officer of the United States, was declared to be the grant of an original jurisdiction, in a case not warranted by the constitution, and, therefore, void. So, where an act of Congress, passed on the 23rd March, 1792, entitled, an act to provide for the settlement of the claims of widows and orphans, barred by the limitations heretofore established, &c., imposed on the judges of the circuit courts, and of the district courts, where no circuit court was holden, the duty of determining the arrears of pension that ought to be paid to disabled noncommissioned officers, soldiers, and seamen, residing in their districts, and, for that purpose, required them to examine the case, in the manner prescribed, to ascertain the degree of disability, and certify the result, and their opinions, to the secretary of war, reserving to the secretary a power to withhold the name of such person, and report the same to Congress, if he suspected imposition or mistake, and, for these purposes, prolonged their session five days, the judges of the circuit courts declined executing the act, (most of them altogether, JAY C. J. GUSHING J. and DUANE D. J., agreeing to proceed as commissioners,) on the ground that the act of Congress was an unconstitutional requisition of duties not properly appertaining to the judicial department, and subjected their decisions to the revision of an executive officer, and was therefore void. The act was shortly afterwards repealed.(J) So, the language of the 25th section of the act of September 24th, 1789, giving a writ of error from the Supreme Court of the United States to the highest state courts, in cases where is drawn in question the validity of a treaty, &c., was restrained by the court so as to conform to the constitution, which confines the judicial power to *cases arising under* treaties, &c.(e) And the words of the 11th section of the act of September 24th, 1789, giving the circuit

(c) 1 Cranch, 173. *ante,23.* 28.

(d) Note toHayburn's case. 2 Ball. 410. The act of 28th February, 1793, transferred the duties, in a different shape, to the district judges, or commissioners appointed by them. See *ante,* 75. 375.

(e) Art. 3. section 2. 1. Owings v. Norwood. 5 Cranch, 344. ante, 63.

courts cognisance of all suits of a civil nature where an alien is party, were held to be confined to controversies between a state, or a citizen of a state, and aliens, agreeably to the terms of the constitution.(f)

In like manner, if the law of a state be repugnant to, or incompatible with the constitution of the United States, or laws made in pursuance thereof, or treaties, it is void; and the validity of the state laws in these respects has been inquired into, and decided upon, in a variety of cases.^) It seems, however, that this power of declaring an act of Congress or a law unconstitutional, will be exercised only in a clear case.(7&)

A law passed in pursuance of the power of exercising exclusive legislation over the district that became the seat of government, (the District of Columbia,) is within this clause, as fully as any other law passed by Congress; and a law of a state, made to defeat the objects it has in view, is void. But such law will be confined to the local limits of the district, if that appears to have been the intention of Congress, in passing it; especially, if it go to defeat the penal laws of a statc.(z)

A law passed by a state, laying a tax which is to operate solely on a bank chartered by Congress, located in the territory of such state, is unconstitutional and void. It is incompatible with the clause, declaring the laws of the United States to be the supreme law of the land, and with the exercise of the constitutional powers of the United States; since, if a state might tax such bank, it might tax every other object of property existing under, and necessary to the due execution of the laws of the United States, such as the mint, the mail, patent rights, custom house

(f) Mossman *v.* Higginson. 4 Ball. 11. Hodgson «. Bowerbank. 5 Cranch, 303. *ante,* 115.

(g) Georgia *v.* Brailsford. 3 Ball. 1. Ware v. Hylton. 3 Dall. 199. Calder v. Bull. 3 Dall. 380. Cooper tv. Telfair. 4 Dall. 14. Fletcher e. Peck. 6 Cranch, 135. New Jersey *v.* Wilson. 7 Cranch, 164. Terrett *v* Taylor. 9 Cranch, 52. Town of Pawlet v. Clark. 9 Cranch, 335. McCulloch *v.* Maryland. 4 Wheat. 316. Dartmouth College *v.* Woodward. 4 Wheat. 518. Sturges *v.* Crowninshield. 4 Wheat. 122. M'Millan *v* M'Neil. 4 Wheat. 209. Farmers and Mechanics Bank *v.* bmith. 6 Wheat. 131. United Slates *v.* Brigantine William. 4 Hall's Law Journ. 255. *ante,* 363.

(h) See the cases above cited, and *ante, 3b3.*

(i) Cohens v. Virginia. 6 Wheat. 264.

papers, and judicial process, and all the means employed by the government, to an extent which would defeat the ends of the government. A state can tax only the people and property of such state, and objects brought within its jurisdiction, but not objects within it introduced by virtue of an act of Congress, constitutionally made; for these are protected by a paramount authority, which the state is restrained from impugning. In these objects are involved the common interests of the people of the union, who are not represented in, and have no control over, the state authority; but are protected, in each state, in the fair enjoyment of these objects, by a sanction which the people of every state have agreed to,

and are bound by. Such tax, is a tax on the instrument employed by the government of the union to carry its powers into execution, and necessary and proper for carrying on the fiscal operations of the government. But a state may, by law, tax the real property of such bank, in common with other real property within the state; or the interest held by the citizens of such state, in common with the property of the same description throughout the state.(&)

It has since been decided that a tax on government stock of the United States is a tax on the contract, a tax on the power to borrow money on the credit of the United States and repugnant to the constitution, and therefore an ordinance of the corporation of Charleston to levy a tax of twenty-five cents on the hundred dollars on all personal estate within the limits of the city, consisting of bonds, notes, insurance stock, and six and seven per cent, stock of the United States, was, as respected the latter, repugnantto that clause in the constitution authorising Congress to borrow money on the credit of the United States.(7)

It may be seen, by the cases formerly referred to/m) that the state courts have exercised the right of declaring acts of Congress to be contrary to the constitution of the United States, and so far void. Such decisions, it would seem, are, in most instances, liable to revision by writ of error in the Supreme Court of the United States, as be-

(Je) M'Culloch *v.* Maryland. 4 Wheat. 310. Osborn v. U. S. Bank. 9 Wheat. 859.

(I) Weston *v.* The City council of Charleston. 2 Pet. S. C. Rep. 449.

(m) See jurisdiction of state courts and magistrates, *ante.* 280. Martin v. Hunter's lessee. 1 Wheat. 304.

ing cases arising under the constitution and laws of the United States: and thus, if circumstances require it, an uniformity of decision may generally be secured, in questions of this description.(w)

On the same principle it would seem, it was held, by the Supreme Court of Pennsylvania, that it has power to decide on the validity of an act of assembly of another state, in reference to the constitution of the United States, when the question arises in a suit before them, and becomes essential to its decision. Such decision can have no effect on the validity of the act of assembly, within the1 jurisdiction of the other state. It only affects the cause in which it arises, and no regard would be paid to it in such other state, except so far as it affects that cause/o)

As a treaty is declared to be the supreme law of the land, it is obligatory on courts; and where it affects the rights of parties litigating in court, it is as much to be regarded as an act of Congress. If, therefore, after a decree regularly condemning a prize, a treaty is made, directing the restoration of vessels so circumstanced, the appellate court is bound to decree its restoration.(/>)

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective

parties to the instrument. In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court. Where, therefore, the Florida treaty provided,

(n) A decision on a *habeas corpus* seems to be an exception, as tho law now stands. See *ante,* 67. See also *ante,* Ch. 67.

(o) Stoddart *v.* Smith. 5 Binn. 355.

(p) United States v. The Peggy. 1 Cranch, 103. *Ante,* 59. See Ware p. Hylton. 3 Doll. 244. 261. 1 Ml. 233. Act of September 24th, 1789, sect. 34.

that all the grants of lands made by his Catholic majesty before a certain day should be ratified and confirmed to the persons in possession of the lands to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic majesty, it was held that until Congress passed an act, the court must be governed by the existing laws on the subject.(^)

In respect to criminal proceedings, we have before referred to the case of Isaac Williams, an American citizen, who was charged in the Circuit Court of Connecticut, in the year 1799, on two indictments, for accepting, at Guadaloupe, in February, 1797, a commission to cruize against British vessels, contrary to the 21st article of the treaty of 1794, with Great Britain; and also, for capturing a British vessel on the 23d September, 1797, contrary to the same article, and was convicted and sentenced to fine and imprisonment on both indictments.(r) But, in a late case, it is intimated, that it is doubtful, whether a treaty is to be considered as of the same character as an act of Congress, in respect to criminal offences.(V)

This clause of the constitution, operates as well in respect to treaties made under the former confederation, before the adoption of the constitution, as to treaties concluded afterwards, and annuls any act of assembly passed by a state which is incompatible with them. Where, therefore, the fourth article of the definitive treaty of peace with Great Britain, concluded in September, 1793, provided, that creditors on either side should meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts theretofore contracted, and an act of assembly of the state of Virginia had, in 1777, authorised a payment by any citizen of that state, owing money to a subject of Great Britain, to the commissioner of the loan office of that state, whose rereceipt should discharge him; it was held, that notwithstanding such payment by a debtor, he was liable, after the peace, to the English creditor.(Y)

(q) Foster c. Neilson. 2 Pet. S. C. Rep. 314.

(r) 4 Hall's Law Journ. 461. 2 Cranch, 82. *Ante,* 273, 320. The act of 14th June, 1797, (now repealed,) provided for cases of this nature. The present act, 20th April, 1818, sect. 4, is confined to cruizing ngainst citizens of the United States, or their property.

(*) The Bello Corunnes. 6 Wheat. 171. *Ante,* 339.

(«) Ware *v.* Hylton. 3 Ball. 199.

In some instances the president, aa that branch of the government in which the executive power is vested by the constitution, and as enjoined to take care that the laws should be faithfully executed, has exercised the power of declaring the state of the nation under existing treaties, and of enforcing and carrying into effect the obligations of neutrality. Thus in April, 1793, President WASHINGTON, with the unanimous advice of the heads of departments, issued a proclamation of the neutrality of the United States, in the war then existing between France and the allied powers.(tf) And in August, 1793, the president, through the medium of the secretary of the treasury, framed a scries of rules to govern the conduct of the collectors oft he customs in relation to breaches of neutrality, with instructions to them to notify the governor and district attorney thereof, and to refuse a clearance to a vessel found contravening such rules until such vessel complied with what the governor should have decided in reference to her.(w)

The case of the ship William, which occurred in the same year has been already mentioned.(?o) Other cases afterwards arising of similar captures within the jurisdictional limits of the United States, by French cruizers, which, it was considered, the American government was bound to redress, in virtue of the treaty of peace with Great Britain,^) it was arranged, that such vessels should be detained under the orders of the French ambassador, or consuls, until the government of the United States should be able to inquire into the facts,(«/) and, after stating the evidence, the president sent it to the French ambassador, with a request of restoration, unless he had contradictory evidence, which he was requested to furnish.(z) The president subsequently declared, that he considered the United States bound to effectuate the restoration of, or to make compensation for prizes made of any of the parties at war with France, subsequent to a certain date,

(«) Marsh. Life of Washington, 404.

(v) 1 Wait's State Papers, 45, 47.

(w) Ante, 218.

(x) Wait's State Papers, 93.

(y) Ib. 144. 165.

(z)Ib. 115.119.

by privateers fitted out of our ports.(a) Instructions were afterwards given by the president, to the governors of the different states, to use all the means in their power, for restoring prizes taken by vessels illegally fitted out in this country, found within their

ports, and the aid of the custom house officers was given to them.(6) So, in relation to captures within the jurisdiction of the United States, the governors were empowered to proceed in the first instance; they were to notify the district attorney, and the attorney to notify the agents of the parties, and consuls, and recommend arbiters to be chosen by mutual consent, to decide, whether the capture were made within the jurisdiction of the United States; according to which, the governor might proceed, and deliver the vessel to the one party, or the other. If no agreement took place, depositions were to be taken, and transmitted to the president, for the information and decision of the president.(c) In the case of three of the vessels captured, the president demanded, of the French ambassador, that they should be given up, according to the determination of the president, but this demand was refused.(o?) It was, at the same time, repeatedly declared, in the communications of the secretary of state, (Mr. Jefferson,) that no power in this country, could take a vessel out of the power of the courts, and that it was orily because they decided not to take cognisance of the case, that it resulted to the executive to interfere in it.(e) After the passage of the act of 5th June, 1794, this practice it appears fell into disuse, as the act established the jurisdiction of the courts.(f)

By the treaty of 1794, with Great Britain, art. 27, it was agreed, to deliver up to justice, all persons who, being charged with murder or forgery, committed within the jurisdiction of either, should seek an asylum within the countries of the other: provided, that this should only be done on such evidence of criminality, as according to the

o) Wait's State Papers, 136. 124. &)Ib. 166.

c) Ib. 196.

d) Ib. 200.

e) Wait's State Papers, 115. 168. See the 7th article of the treaty of 1794, with Great Britain, which provided for payment by the United States, for certain of these cases.

(f) Wait's State Papers, 333. 347. See *ante,* 219.

laws of the place where such fugitive or person so charged should be found, would justify his apprehension and commitment for trial, if the offence had been there committed. In the year 1797, Jonathan Robbins was committed to gaol in Charleston, South Carolina, on suspicion, grounded on two affidavits, of having been concerned in a mutiny on board the British frigate Hermione, in the year 1791, which ended in the murder of the principal officers, and carrying the frigate into a Spanish port; and the case being brought before BEE, district judge of the district of South Carolina, by *habeas corpus,* the prisoner was, on motion in behalf of the British consul, delivered over by the judge to an officer of a British armed vessel and carried to Jamaica. The district judge held, that a treaty was the supreme law of the land, and that the 3d article of the constitution, extended the judicial power to cases arising under treaties, though there was no act of Congress vesting such jurisdiction.^ *g)* When, however, this case, which attracted much public attention, was discussed in Congress, it was defended as a case proper for executive, and not for judicial determination. It was contended that

(g) Case of Jonathan Robbins. 1 Hall's Journ, of Jurisprudence, 25. See it stated, ib. 27, by Judge BEE, that the judiciary had, in two instances, in South Carolina, where no provision was expressly stipulated, (by act of Congress,) granted injunctions to suspend the sale of prizes, by virtue of existing treaties, and that if it were otherwise there would be a failure of justice. One of the cases here referred to, is probably that of The consul of Spain *v.* The consul of Great Britain, (BEE'S Adm. Rep! 263,) where the Circuit Court of South Carolina, on a bill filed, granted an injunction to stop the sale of a Spanish prize, taken on the high seas by a British frigate, and brought into Charleston, the Chief Justice holding, that as there was no treaty that authorised the sale, nor any permission of the government shewn, an attempt to sell was inconsistent with the sovereignty of the United States. The injunction was granted, till further order of the court, unless permission should be sooner obtained from the president of the United States. See another case in 1796, (Moodie *v.* Ship Amity, ib. 89,) where the district court refused an injunction, to stop the sale of a British vessel captured by a French armed vessel, holding, that the treaty with France excluded all jurisdiction in such cases.

See tho principles nowsettled asto the jurisdiction of the courts ofthe United States, *ante,* 28. 34. 74. 104. 12S. 129. 355. 356. The act of 13th February, 1801, sect. 11, (now repealed,) gave the circuit court cognisance of all cases in law and equity, arising under the constitution and laws of the United States, *and treaties made, or which should be made, under their authority.*

President ADAMS, who on the application of the British ambassador, had directed the secretary of state to write to Judge BEE, communicating the president's advice and request, that the seamen might be delivered up to the consul or agent of Great Britain, if such evidence of the fact were adduced as was required by the treaty, had the power to decide the question, whether the person charged should be delivered up under the treaty.(^)

If a treaty stipulate for the restoration of property captured during the war, and not yet definitively condemned, it seems, restoration is an executive act, when viewed as a substantive act, independent of and unconnected with other circumstances, though courts are also to regard the treaty as the supreme law, on the question of affirming or reversing such condemnation.(Y)

In the year 1796, after the treaty with Great Britain was ratified by the president and senate, and was proclaimed by the president; it became a question, how far, under the constitution, a treaty was binding on Congress as a legislative body. In the discussion of this question in the house of representatives, it was contended on the one hand, that a treaty was a contract between the two nations, which, when made by the president, by and with the advice and consent of the senate, was binding on tho nation, and that a refusal by the house of representatives to carry it into effect, was breaking the treaty, and violating the faith of the nation. On the other hand, it was contended, that a treaty which required an appropriation of money, or any act of Congress, to carry it into effect, was not, in that respect, obligatory, till Congress had agreed to carry it into effect, and they were at full liberty to make or withhold such appropriation or act, without being chargeable with violating the treaty, or breaking the faith of the nation. Accordingly, the house of representatives passed a resolution, calling on President WASHINGTON, to lay before them the instructions to the minister, (Mr. Jay,) who

(h) Speech of C. J. MARSHALL, when a member of the house of representatives of the United States. 5 Wheat. Append. 4 Waite's State Papers, 302. See also Bee's Admiralty Reports, 266, where the order for

the delivery of Robbins purports to be " in consideration of the circumstances, and at the particular request of the president of the United States." Mr. MARSHALL'S Speech is also published there.

(i) United States *v.* Schooner Peggy. 1 Cranch, 109. See Ware r. Ilylton. *3 Dull.* 279. *Ante,* 357.

had negotiated the treaty with Great Britain, and tho correspondence and documents, except so far as, on account of the pending negotiation, they were improper to disclose. The president declined a compliance with the request; stating, among other reasons, that a treaty, duly made by the president and senate, became the law of the land, and was obligatory; that the assent of the house of representatives was not necessary to the validity of a treaty, and, therefore, the papers requested could not come under the cognisance of the house of representatives, except for the purpose of impeachment, which was not stated to be their object. The house of representatives, thereupon, passed resolutions, disclaiming the power to interfere in making treaties, but asserting their right, whenever stipulations were made on subjects committed to Congress by the constitution, to deliberate on the expediency of carrying them into effect: and in legislating on several treaties then before them, they struck out the words, " that provision ought to be made by law," and substituted words which declared merely the *expediency* of passing the necessary laws.(j)

In the session of 1815-16, the question as to the effect of a treaty, arose again in Congress, and was elaborately discussed in both branches. A commercial treaty had been made at London, in the month of July preceding, between the United States and Great Britain, by which it was agreed to abolish the discriminating duties on British vessels and cargoes, then existing under the acts of Congress, and a bill was passed in the house of representatives, particularly enacting the same stipulations as the treaty contained. But it was rejected in senate, that body having passed a bill of their own, which simply *declared,* that so much of any act of Congress as was contrary to the treaty, should be deemed and taken to be of no force or effect. This bill was amended in the house, by striking out the words, " and declared," and substituting the original bill, which the senate had rejected: these amendments were, however, rejected in the senate, and the difference between the two houses terminated in the appointment of committees of conference, by whose recommendation the above mentioned amendments of the house

(j) 5 Marsh. Life of Wash. 651. 660. 664.

were relinquished, and the bill passed as proposed by the senate in a declaratory shape, with some modifications, not affecting the principles in dispute.

It belongs exclusively to the government, to recognise new states that arise in the revolutions of the world. Until such recognition, either by our own government, or that to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered. The rival chiefs in the island of St. Domingo were, therefore, not considered foreign princes or states, within the act of 5th June, 1794, prohibiting the fitting out any ship for the service of one foreign state or prince, to cruise against another.(&)

A treaty need not be stated in pleading: for it is the supreme law of the land of which all courts must take notice.(T)

It seems, the authority to declare a treaty to have been violated, and to be therefore void, belongs only to Congress; the judiciary cannot exercise it.(m) Whether the judiciary have power to declare an article of a treaty to be unconstitutional, and therefore void, *query.(n)*

A construction of the constitution in relation to a different department of the government, has been given by the legislative department, in the passage of an act of Congress. Thus, in the first Congress, when the bill for establishing the department of secretary of foreign affairs, (which, by a subsequent act, was made that of the secretary of state,) was pending in the house of representatives, the question arose, by whom such officer should be removable. The bill contained a clause, making him expressly removable by the president, and was agreed to in committee in that shape: but, lest the power of removal might, thereafter, appear to be exercised by virtue of a legislative grant only, and in order to shew the opinion of the house, that it was by fair construction, fixed in the

(k) Gelstone. Hoyt. 3 Wheat. 324. See United States *vl* Palmer. 3 Wheat. 630. *Ante,* 337.

(I) Martin *v.* Hunter's lessee. 1 Wheat. 360.

(m) Ware c. Hylton. 3 Ball. 361. IREDELL J.

(n) Ib. 237. CHASE J. See the case of Jonathan Bobbins. \ Hall's Journ, of Jurisprudence, 13, where it was contended that the 27th article of the treaty of 1794, with Great Britain was unconstitutional; and United States *v.* Schooner Peggy. 1 Cranch, 109.

president, by the constitution, this clause was afterwards struck out, and in the second section it was provided, that there should be in the said department an inferior officer to be called chief clerk, " who, whenever the said principal officer shall *be removed from office by the president of the United States,* or in any other vacancy," shall have charge of papers, &c.(o) The bill was thus passed into a law, after an animated discussion, thereby clearly implying the power of removal to be solely in the president, and this construction, on an important point, has ever since prevailed^//)

(o) Act of July 27, 1789, sect. 2.

(p) 5 Marsh. Life of Washington, 199, 200. Debates of the first session of Congress, 1789. See *ante,* 372. The same language was used in the second section of the act of the 7th August, 1789, for establishing the department of war. See, also, the 7th section of the act to establish a treasury department, the 2d September, 1789.

CHAPTER XXXV.

Constitution. Article V.

CONSTITUTION. ART. V. — MAKING AMENDMENTS.

ART. 5. Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid, to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress. *Provided,* that no amendment, which may be made prior to the year 1808, shall, in any manner, affect the first and fourth clauses in the 9th section of the first article; and, that no state, without its consent, shall be deprived of its equal suffrage in the senate.

It is not necessary that an amendment to the constitution, proposed in Congress, and adopted by two-thirds of both houses, should be submitted to the president for hia approbation.(a)

(a) HolUngsworth c. Virginia. 3 Dall. 378.

CHAPTER XXXVI.

Constitution, — Amendments.

CONSTITUTION. AMENDMENTS. — ART. II.

ART. 2. The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state.

The Supreme Court having decided, that assumpsit might be maintained against a state by a citizen of another state,(a) the state of Massachusetts, being sued among others, proposed this amendment to the constitution, and it was duly ratified.(6) It has been assigned as the reason of its adoption, that all the states, when the constitution was adopted, were greatly indebted, and an apprehension was extensively entertained, that suits would be brought for these debts in the courts of the United States, and that the states would not be left to adjust them, or other claims against them.(c)

A suit between individuals, where a state is not necessarily a defendant, and has had neither possession of, nor property in the money sued for, is not within this amendment, although a state suggest a title in itself to the sum demanded. As where the suit was brought by certain individuals against others in the district court of the district of Pennsylvania, as a court of admiralty, to recover money which the former court of

appeals, under the confederation, had decreed to belong to the plaintiffs, but which a state claimed, and in opposition to the decree of the court

(a) Ante, 25.

(&) 1 Tucker's Black. 153.

(c) Cohens *v.* Virginia. 0 Wheat. 400.

of appeals, the marshal of the state court of admiralty had paid the money to the judge of that court, who delivered it to the defendant's testator, then treasurer of the state, who received it for the use of the state, but gave a bond of indemnity to the judge, invested the money in certificates, and annexed a memorandum thereto, that the certificates would be the property of the state, when the state released him from the bond of indemnity, which certificates he afterwards funded in stock of the United States. The property remained in his possession after he ceased to be treasurer, and in that of his executors, until after the institution of the suit, when the state, by act of assembly compelled a payment to them by the executors, undertaking to indemnify them, and to defend them against process to recover the money. It was determined, that the property was held by the testator as an individual, and not as treasurer, and never belonged to the state, nor was in its possession, and the suit not being against the state, the court had jurisdiction.(c?)

The legislature of the state of Ohio, on the 8th February, 1819, passed an act, to levy and collect a tax upon each office of discount and deposit established by the bank of the United States within that state, namely, one at Cincinnati, and the other at Chilicothe. One of the defendants, Osborn, the auditor of the state, in conformity with the provisions of the act, (notwithstanding an injunction from the circuit court of the United States, previously served upon him,) in September, 1819, issued his warrant to the other defendant, Harper, who entered the banking house at Chilicothe, and forcibly took therefrom 100,000 dollars. On a motion to the circuit court, for a rule to shew cause, why an attachment should not issue against the defendants, for a contempt, in disregarding the injunction, it was objected, that the proceedings were against the auditor of the state of Ohio, and were in effect suing the state; that they went to control the collection of state revenue; prohibit the state officers from executing the laws of the state; and that, under the above article of the amendments, the court had no jurisdiction: but the court decided, that a suit against a state officer

(d) United Slates *v.* Peters. 5 Cranch, 115. See also *ante,* 24,

is not necessarily a suit against a state; and though he acts by virtue of a law of the state, yet if that law be unconstitutional it is a nullity, and he is individually responsible; that if a state passes a void law, an officer acting under it may be enjoined, and the law taxing the branch bank being unconstitutional, according to the decision of the Supreme Court of the United States in the case of M'Culloch *v.* the state of Maryland,(e) the court had jurisdiction; and the rule was made absolute.(f)

On appeal to the Supreme Court of the United States, the latter court decided it to be a rule which admitted no exception; that in all cases where jurisdiction depends on the party, it is the party named in the record: consequently the 11th amendment is of necessity limited to those suits in which a state is a party on the record.(g-)

A writ of error from the Supreme Court of the United States to a state court, to remove a judgment in which a state is plaintiff, for the purpose of re-examining the question raised below, whether that judgment is in violation of the constitution or laws of the United States, is not a suit commenced or prosecuted, within the meaning of this amendment, and will be sustained. Whether a writ of error in such case, the effect of which would be to restore the party to the possession of a thing which he demands, would be within the amendment, is not decided.(h) Nor is a writ of error within this amendment, which is sued out from the Supreme Court to bring up a judgment in a state court, rendered in favour of a state against one of its own citizens: for the prohibition against commencing or prosecuting a suit against a state, is limited to one commenced or prosecuted " by a citizen of another state, or by a citizen or subject of a foreign state."(i) As the amendment does not comprehend controversies between two or more states, or between a state and a foreign state,

(e) 4 Wheat. 316. *ante,* 404.

(f) Bank of the United States v. Osborn and Harper. Nat. In tell. October 7, 1820, and Niles's Reg. It appears a similar decision was had in Kentucky.

(g) Osborn *v.* U. S. Bank. 9 Wheat. 857.

(A) Cohens v. Virginia. 6 Wheat. 412.

(i) Ib. 412.

the jurisdiction of the court still extends to these cases/;') It is also said, that this amendment is confined strictly to suits at law, or in equity, and does not comprehend suits of admiralty and maritime jurisdiction.(A)

The circumstance that a state is a corporator in a bank chartered under its laws, does not exempt such bank from being sued in the courts of the United States, by virtue of this amendment. The state must be party on record. By becoming a corporator, it lays down its sovereignty and acts on a footing with other corporators. U. S. Bank *v.* Planters Bank. 9 Wheat. 904.

Art. 5. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

If, in a capital case, the jury are unable to agree, the court may, in their discretion, discharge them from giving any verdict upon the indictment, without the consent of the prisoner, and such discharge is no bar to a subsequent trial for the same offence. They ought, however, to exercise this power with great caution, and where there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. United States *v.* Perez. 9 Wheat. 579.

Art. 7. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

Where a state law provided that an occupying claimant should not be evicted until fully paid the value of all lasting and valuable improvements by him made, unless he refused to pay the person setting up and proving an ad-

(j) Ib. 406.

(k) United States v. Bright and others. 3 Hall's Law Journ. 225. WASHINGTON J.

verse and better title, the value of the lands without the improvements, and directed the court to appoint commissioners to make such valuation, it was held that in ejectment in a court of the United States in that state, commissioners could not be appointed, but the party might apply to the equity side of the court to appoint commissioners, and to enjoin execution of the judgment till its decree should be complied with.(l)

(l) Bank of Hamilton c. Dudley's lessee. 2 Pet. S. C. Rep. 525.

APPENDIX.

FEES.

BY the 2d section of the act of September 24th 1789 it was enacted, that until further provision should be made' and except when by that act or other statutes of the United States it was otherwise provided, the rates of fees except fees to judges in the circuit and district courts in suits at common law, should be the same in each state respectively as were then used and allowed in the Supreme Courts of the same. And the rates of fees in causes of equity and of admiralty and maritime jurisdiction, should be the same as were then or had been last allowed by the states respectively in the court exercising supreme jurisdiction in such causes. This act was suffered to expire at the end of the session of 1791-2.(a)

It was supplied by the acts of SthMay, 1792, and March 1st, 1793. The 2d section of the act of March 1st, 1793 provided express fees and compensations to the marshals clerks of the supreme, circuit, and district courts, grand and petit jurors, witnesses, and district attorney.(b) This section was repealed by the

2d section of the act of 28th February, 1799, which enacts that the compensation to the several officers therein mentioned shall be as follows viz: '

To the *marshals* of the several districts of the United

(a) See *ante, 30,* (b) See *post.*

States, for the service of any writ, warrant, attachment, or process, issuing out of any courts of the United States, two dollars; and in case there be more than one person named in the said writ, warrant, attachment, or process, then two dollars for each person so named. For his travel out in serving each writ, warrant, attachment, or process aforesaid, five cents per mile, to be computed from the place of service, to the court where the writ or process shall be returned; and if more persons than one are named therein, the travel shall be computed from the court to the place of service which shall be the most remote, adding thereto the extra travel which shall be necessary to serve it on the other. For each bail bond fifty cents. For actually summoning witnesses or appraisers, each fifty cents. For every commitment or discharge of a prisoner, fifty cents. For every proclamation in the admiralty thirty cents. For sales of vessels or other property, and for receiving and paying the money, for any sum under five hundred dollars, two and one half per cent; for any larger sum, one and one quarter per cent upon the excess. For summoning each grand and other jury, four dollars: *provided,* that in no case shall the fees for summoning jurors to any one court exceed fifty dollars and in those states where jurors by the laws of the state are drawn by constables or other officers of corporate towns or places, the marshal shall receive for the use of the officers employed in summoning the jurors and returning the venire, the sum of two dollars, and for his own trouble in distributing the venire, the sum of two dollars. For attending the supreme or circuit court, five dollars per day, and for attending the district court where such court has the powers and cognisance of a circuit court, five dollars per day; and for attending the district courts in other cases four dollars per day, and at the rate of ten cents per mile for his travel from the place of his abode to either of the said courts. For all other services not therein enumerated, except as should be there after provided, such fees and compensations as are allowed in the Supreme Court of the state where such services are rendered. And the annual sum of two hundred dollars as a full compensation for all extra services should be allowed to each marshal for the districts of Tennessee, Kentucky,

New Hampshire, Vermont, and Maine.(c) This fee for attending on the courts, however, was taken away from the marshal of the districts of Massachusetts, Rhode Island, Connecticut, southern district of New York and Pennsylvania by the act of 18th April, 1814, sect. 1. but restored by the act of 8th March, 1824.

The fees and compensation to the marshal where the government is a party to the suit and they are chargeable to the United States are payable by the treasury on a certificate of the court or one of the judges.(J)

By sect. 3 of the act of February 28th, 1799, the compensation to the *cleric of the supreme court,* shall be as follows, viz: for his attendance in court ten dollars per day?

and for his other services double the fees of the clerk of the Supreme Court of the state in which the Supreme Court of the United States shall be holden.

To the *clerks of circuit and district courts* in each state respectively, the same fees as are allowed in the Supreme Court of the said state, with an addition thereto of one third of said fees; and five dollars per day for his attendance at any circuit or district court, and at the rate of ten cents per mile for his travel from the place of his abode to either of the said courts. And in case a clerk of a court of the United States perform any duty which is not performed by the clerks of the state, and for which the laws of the state make no provision, the court in which such service shall be performed shall make a reasonable compensation therefor. The act of April 18th, 1814, sect. 1. however, takes away this fee for attendance from the clerks of the district and circuit courts of the districts of Massachusetts, Rhode Island, Connecticut, the southern

(c) A similar provision as to extra compensation is made in favour of the marshal of Ohio by the actof 19th February, 1803, sect. 5, of Louisiana by the act of 8th April, 1820, of the respective territories by the act of February 27th, 1813, of Indiana by the act of 3d March, 1817, of Mississippi by the act of 3d April, 1818, of the Western district of Virginia by the act of 4th February, 1819, of Illinois by the act of March 3d, 1819 The marshal of Alabama is by the act of 21st April, 1820, to receive two hundred and fifty dollars annually. The marshal of Missouri is by another act to receive an annual sum, and by the act of May 15th, 1820, the marshal of the western district of Pennsylvania and northern district of New York are to be allowed annually two hundred dollars each.

(d) The Antelope. 12 Wheat. 546.

district of New York, and Pennsylvania. It has been since restored by the act of 8th March, 1824.

The act of 28th February, 1799, sect. 4. further provides that the compensation to the *attorney of the respective districts* of the United States shall be as follows, viz: for each day which any such attorney shall necessarily attend on the business of the United States during the session of any district or circuit court five dollars: for travelling from the place of his abode to such court ten cents per mile: and such fees in each state respectively as are allowed in the Supreme Court thereof: and in the district courts his stated fees in the cases herein mentioned, shall be as follows, to wit; for drawing interrogatories, five dollars; for drawing and exhibiting libel, claim, or answer, six dollars; and for all other services in any one cause, six dollars. And the annual sum of two hundred dollars as a full compensation for all extra services shall be allowed and paid by the United States to each district attorney for the districts of Maine, New Hampshire, Vermont, Rhode Island, Connecticut, New Jersey, Delaware, Virginia, North Carolina, Georgia, Kentucky, and Tennessee.(e) By the act, however, of 18th April, 1814, the compensation allowed for attending on the courts was taken away from the district attorneys of the districts of Massachusetts, Rhode Island, Connecticut, the southern district of New York, and Pennsylvania, but restored by the act of March 8th, 1824. The 5th section of the act of 28th February, 1799, enacts that for all services in criminal cases performed by the attorney for the district of Virginia, and for which no fees are allowed by law for similar services in the courts of that state, he shall be allowed such sum or sums as the court in which the same is rendered shall consider a reasonable compensation therefor.(f)

The fees of jurors and witnesses, and cryers are estab-

(e) By the acts referred to in the proceeding note, the same annual compensation of two hundred dollars is allowed to the district attorneys of the districts of Ohio, Indiana, Mississippi, Western district of Virginia, Illinois, Alabama, Western district of Pennsylvania, and Southern district of New York: the sum of two hundred and fifty dollars per annum is allowed in the territories, and in Louisiana six hundred and fifty dollars. See the preceding note.

(f) See the act of 4th February, 1819, establishing the western district of Virginia, Sec, 3.

lished by the same act, sect. 6, 7,(g) and regulations made in the cases of informers.(/i,) The mode of recovery of fees established is pointed out in the 6th sect: of the act of 8th May, 1792.(t)

In relation to attornies and counsellors fees, the act of March 1st, 1793, sect. 4. enacted that there should be allowed and taxed in the Supreme, circuit, and district courts, in favour of the parties obtaining judgments therein, such compensation for their travel and attendance and for attornies and counsellors fees, (except in the district courts, in cases of admiralty and maritime jurisdiction,) as were allowed in the Supreme or superior courts of the respective states. This act which was originally limited in duration, was continued in force by the act of 31st 1796, for two years, and from thence to the end of the next session of Congress thereafter. Of course the period of its limitation was the 3d March, 1799. The act of February 28th, 1799, continued one of its sections, the second, and expressly repealed one other, the third, without noticing the first and fourth sections, which relate to the fees of counsellors and attornies.(&)

In admiralty cases the acts of Congress are still more explicit, as to the fees of the clerk. They were first specifically established by the 2d section of the act of 1st March, 1793, which is continued by the 3d section of the act of 28th February, 1799, and are as follows.

For drawing every stipulation, process, monition or subpœna, for each sheet containing ninety words, fifteen cents.

And for engrossing each sheet, ten cents.

Entering the return of process, fifteen cents.

Filing every libel claim, pleading, or other paper, six cents.

Copies of the pleadings, interrogatories, depositions,

(g) See ante 158, 166, 250.

(A) See *ante,* 223. (i) *Ante,* 223, 248, 250.

(k) The first section gave the following fees to the counsellor or attorney in the district court in admiralty and maritime proceedings. For drawing and exhibiting libel claim or answer, in each cause, three dollars. Drawing interrogatories, three dollars. And all other services in ?ny one cause, three dollars.

and exhibits, when required, for each sheet of ninety words, ten cents.

Entering each proclamation, fifteen cents.

Entering each default, twelve cents.

Entering every rule of court, fifteen cents.

Examining each witness, and drawing his deposition, for each sheet containing ninety words, fifteen cents.

Certifying each exhibit or writing shewn to a witness, at his examination, twenty-five cents.

Drawing every decree or decretal order, for each sheet containing ninety words, fifteen cents.

And for entering the same in the minutes, for each sheet as aforesaid, ten cents.

For drawing a record, or making a copy of the proceedings, for each sheet containing ninety words, fifteen cents.

But no pleading, deposition, exhibit, or other writing to be inserted therein *verbatim,* or in *Hæc verba,* shall be computed as part of any such draft.

Entering a record in the register, or engrossing or copying proceedings or records, to be sealed or exemplified, for each sheet of ninety words, including all the pleadings, depositions, exhibits and writings, inserted therein, ten cents.

Every certificate, twenty cents.

Entering every return of appraisement or sales, for each sheet of ninety words, ten cents.

Affixing the seal to any paper when required, twenty-five cents.

Drawing commissions to examine witnesses, for each sheet containing ninety words, fifteen cents.

And for engrossing the same, if on parchment, including the parchment, twenty cents.

And if on paper, for each sheet of ninety words, ten cents.

Swearing each witness in court, ten cents.

For every entry or writing not mentioned or described, such allowance shall be taxed as for similar services herein mentioned.

For all money deposited in court, the compensation was allowed of one and a quarter per cent. This is, however, now altered as to all cases.(l)

(I) See *ante,* Circuit Court Practice.

On the 8th January, 1795, in pursuance, of a resolution of Congress, William Bradford Esquire, the Attorney General of the United States, made to them a detailed report of the fees and regulations proper to be established in the courts of the United States.

EQUITY RULES.

The following rules of practice for the Courts of Equity of the United States, were adopted by the Supreme Court, at February term, 1822.

1. Rules shall be held monthly in the clerk's office on the first Monday in every month, for the purpose of entering all proceedings and orders which may be entered at the rules, and which are not taken or made in open court. The rules shall be held under the direction of the clerk; but either of the judges of the court may make or allow any special orders in any cause, not inconsistent with the regulations herein prescribed, which shall be entered in the rule book, and take effect acccordingly.

2. All process shall be made returnable to the next succeeding term, or to any intermediate rule day at the election of the party praying the same, and the return of the said process "executed" shall be effectual whereon to ground any subsequent proceedings. If the party be not found, a copy served by the person leaving the same shall be left with his wife, or any free white person who is a member of his or her family, at his or her dwelling-house or usual place of abode, and the truth of the case shall be returned; and whereon such process shall not be executed, the clerk is directed to issue other similar process, if the same be required by the party at whose instance the original process was sued out; and if upon such second process the party be not found, a copy shall be again left in like manner as is hereinbefore directed, and upon a second return that the party is not found, and that a copy

has been left as is herein directed, the same proceedings may be had as on process returned executed.

3. Where any person, either plaintiff or defendant, in any suit, shall be dead, it shall be lawful for the clerk during the recess of the court, upon application, to issue process to bring into court the representative of such deceased person.

4. The plaintiff shall file his bill before or at the time of taking out the *subpœna.*

5. The plaintiff may amend his bill before the defendant or his attorney or solicitor hath taken out a copy thereof, or in a small matter afterwards, without paying cost; but if he amend in a material point after such copy obtained, he shall pay the defendant all costs occasioned thereby.

6. The day of appearance shall be the rule day after the process is returned executed, or after the second return of a copy left, *if the process shall not be executed,* when the process is returnable to the rules, or the rule day next succeeding the term, where the process shall be returnable to a term of the court; arid if the defendant shall not appear and file his answer within three months after the day of appearance, and after the bill shall have been filed, the plaintiff may proceed to take his bill for confessed, and the matter thereof shall be decreed accordingly; which decree shall be absolute, unless cause be shown at the term next succeeding that to which the decree shall be returned executed.

7. If the defendant cannot be found, it shall be sufficient service of any decree *nisi,* to leave a copy thereof with his wife, or any free white person who is a member of his or her family; and if no such person be found, then it shall be sufficient service to publish the same in such paper of the district as may be designated by the court for such time as the court shall direct.

8. All process shall be executed by a sworn officer, or affidavit must be made of the service thereof, when executed by any other person.

9. Every-defendant may swear to his answer before any justice or judge of the United States, or a commissioner or master, or other person appointed by the court, or a judge of any court of a state or territory, or justice of the peace, or notary public of any state or territory.

10. If the defendant does not file his answer within

three months after the *subpœna* be returned and executed, or after a second return of a copy left having been made at least three months, plaintiff may either proceed on his bill as confessed, or have a general commission to take depositions; or he may move the court for an attachment to bring in the defendant to answer interrogatories, at his election, and may proceed to a hearing in the two last cases, as if the answer had been filed, and the cause was at issue. *Provided,* that the court may, on cause shown, allow the answer to be filed, and grant a further day for hearing. And when a party is in custody on such writ of attachment, he shall be detained in custody until he shall file his answer, or be discharged by order of the court, or one of the judges thereof.

11. No special replication to an answer shall be filed but by leave of the court, or one of the judges thereof for cause shown; and if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without costs, at the discretion of the court.

12. When a cross bill shall be exhibited, the defendant or defendants to the first bill shah"answer thereto, before the defendant or defendants to the cross bill shall be compelled to answer such cross bill.

13. The complainant shall put in the general replication, or file exceptions within two calendar months after the answer shall have been put in. If he fails so to do, the defendant may leave a rule to reply with the clerk of the court, which being expired, and no replication or exceptions filed, the suit may be dismissed with costs, but the court may, for cause, order the same to be retained on payment of costs.

14. If the plaintiff's attorney or solicitor shall except against any answer as insufficient, he may file his exceptions, and leave a rule with the clerk to make a better answer within two calendar months; and if within that time the defendant shall put in a sufficient answer, the same shall be received without costs; but if any defendant insists on the sufficiency of his answer, or neglects or refuses to put in a sufficient answer, or shall put in another insufficient answer, the plaintiff may set down his exceptions to be argued at the next term; and after the expiration of that rule, or any second insufficient answer put in,

no farther or other answer shall be received but on payment of costs.

15. If, upon argument, the plaintiff's exceptions shall be over-ruled, or the defendant's answer adjudged insufficient, the plaintiff shall pay to the defendant, or the defendant to the plaintiff, such costs as shall be allowed by the court.

16. Upon a second answer being adjudged insufficient, costs shall be doubled by the court, and the defendant may be examined upon interrogatories, and committed until he or she shall answer them; or the plaintiff may move the court to take so much of his bill as is not answered for confessed, and may file his replication, obtain commissions, and proceed to hearing in the usual manner.

17. Rules to plead, answer, reply, rejoin, or other proceedings not before particularly mentioned, when necessary, shall be given from month to month with the clerk in his office, and shall be entered in a rule book for the information of all parties, attornies, or solicitors concerned therein, and shall be considered as sufficient notice thereof.

18. The defendant may at any time before the bill is taken for confessed, or afterwards with the leave of the court, demur or plead to the whole bill, or part of it, and he may demur to part, plead to part, and answer as to the residue; but in any case in which the bill charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the fact on which the charge is founded.

19. The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

20. If a plea or demurrer be overruled,~no other plea or demurrer shall be thereafter received, but the defendant shall proceed to answer the plaintiff's bill; and if he fail to do so within two calendar months, the same, or so much thereof as was covered by the plea or demurrer, may be taken for confessed, and the matter thereof be decreed accordingly.

21. If the plaintiff should not reply to, or set for hearing any plea or demurrer, before the second term of the court after filing the same, the bill may be dismissed with costs.

22. Upon a plea or demurrer being argued and overruled, costs shall be paid as where an answer is adjudged insufficient: but if adjudged good, the defendant shall have his costs.

23. The defendant, instead of filing a formal demurrer or plea, may insist on any special matter in his answer, and have the same benefit thereof as if he had pleaded the same matter, or had demurred to the bill.

24. After any bill filed, and before the defendant hath answered, upon oath made that any of the plaintiff's witnesses are aged, infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk may issue a commission for taking the examination of such witness or witnesses *de bene* me, the party praying such commission giving reasonable notice to the adverse party of the time and place of taking such deposition.

25. Testimony may be taken according to the acts of Congress, or under a commission. Whenever a general commission shall be issued for taking depositions upon answer and replication, six months from the time of the replication shall be allowed the parties for taking their depositions; and either party at the expiration of the said six months may set the cause for hearing, and no deposition taken after that time shall be read as evidence on the hearing, unless the same was taken by consent of parties, by special order of the court, or out of the district.

26. Commissions to take depositions may be executed by any person qualified to take testimony according to the laws of the state, or by any person or persons not exceeding three, appointed or named in the commission by order of the court, or by any judge thereof in vacation. All testimony taken under a commission shall be taken on interrogatories and cross-interrogatories filed in the cause, unless the parties shall dispense therewith, which interrogatories shall be filed in the clerk's office ten days previous to a rule day, after which the defendant shall be allowed five days to file his cross-interrogatories, unless he waves his right.

27. Orders for the admission of a guardian *ad litem,* to defend a suit, may be made either by the court or one of the judges thereof.

28. Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioners appointed to take testimony, or before a master or examiner appointed in any cause by *subpœna* in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the

commissioners, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioners, master, or examiner, an attachment may issue thereupon by order of the court, or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court.

29. When a matter is referred to a master to examine and report thereon, he shall assign a day and place therefor, and give reasonable notice thereof to the parties, or to the attorney or soliciter of such party as may not reside within the district, and if either party shall fail to attend at the time and place, the master may adjourn the examination of the matter to some future day, and give notice thereof to the parties, in which notice it shall be expressed that if the party fail again to appear, the master will proceed *ex parte;* and if after receiving such notice the party shall again fail to appear, the master may proceed to examine the matter to him referred, and to report the same to the court, that such proceedings may be had thereon as to the court shall seem equitable and right.

30. The courts in their sittings may regulate all proceedings in the office, and may set aside any dismissions, and reinstate the suits on such terms as may appear equitable.

31. Every petition for a re-hearing shall contain the special matter or cause on which such re-hearing is ap-

plied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, it may be admitted at any time before the end of the next term of the court, in the discretion of the court.

32. The circuit courts may make any further rules and regulations not inconsistent with the rules hereby prescribed, in their discretion,

33. In all cases where the rules prescribed by this court, or by the circuit court, do not apply, the practice of the circuit courts shall be regulated by the practice of the high court of chancery in England.

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