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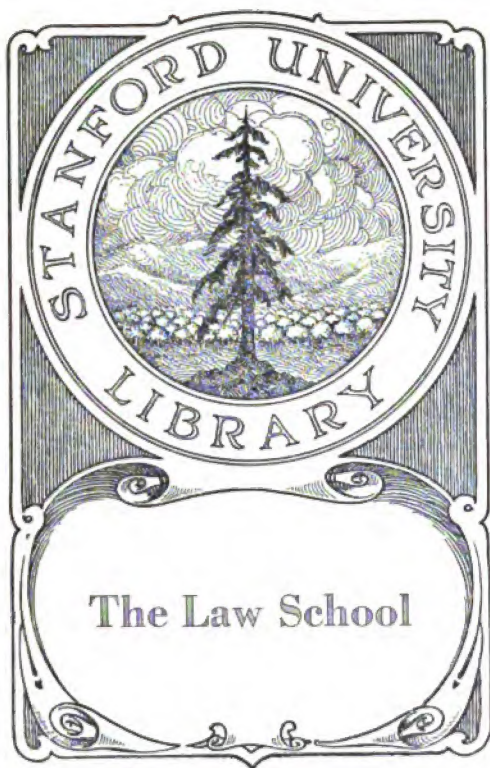
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OFFICIAL OPINIONS
OF
THE ATTORNEYS GENERAL
OF THE UNITED STATES,
ADVISING THE
PRESIDENT AND HEADS OF DEPARTMENTS,
IN RELATION TO THEIR OFFICIAL DUTIES;
AND EXPOUNDING THE CONSTITUTION, SUBSISTING TREATIES WITH
FOREIGN GOVERNMENTS AND WITH INDIAN TRIBES, AND
THE PUBLIC LAWS OF THE COUNTRY.

COMPILED, WITH NOTES AND REFERENCES,
By BENJAMIN F. HALL,
COUNSELLOR AT LAW, NEW YORK.

VOLUME I.

PUBLISHED, WITH COPIOUS INDICES AND A DIGEST,
By ROBERT FARNHAM.

WASHINGTON:
1852.

Entered according to act of Congress, in the year 1852, by
ROBERT FARNHAM,
In the Clerk's office of the District Court of the District of Columbia.

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ADVERTISEMENT.

THIS edition of the Official Opinions of the Attorneys General is designed, as well for the use of Jurists and Statesmen generally, as that of the Officers of the Government of the United States. It is believed to be a faithful compilation of all the opinions which, in view of the public interests, have been deemed proper for publication, of all the eminent lawyers who have, since the adoption of the Constitution, acted as legal advisers of the Executive. Being essentially a legal work, it is given to the public in the form adopted for the publication of the reports of the decisions of the Supreme Court.

The matter of which the work is composed will be found interesting to all intelligent readers. These opinions are important State papers, and as such, deserve a place in every public and private library. Being results of the profoundest reflections of superior minds—commencing with the administration of Washington, and covering more than sixty years of the constitutional existence of the Republic—directing the course of the Executive Department through its most imminent vicissitudes and trials, and resolving questions as various and important as have been the affairs of the Government, they are inseparably blended with, if indeed they may not be said to constitute, the most interesting passages in American history. Containing advice respecting all the various relations, obligations,

and duties of the Government, and of its numerous judicial and administrative officers, they may be esteemed inferior in consequence only to the Constitution which they defend, and the laws which they expound.

For the original matter contained in, the indices to, and the arrangement of this edition, we are indebted to the same gentleman who prepared that which was recently published in another and a less convenient form by the House of Representatives. It has been prepared with special reference to the purpose for which it is supposed to be most needed, and in the style most approved by the legal profession. Every page bears not only the name of the author of the opinion thereon, and that of the officer to whom the same is addressed, but an indication of the subject of such opinion. Every volume contains a full index to the opinions contained therein, and the subject thereof, as the same is indicated in the titles, respectively, and also a digest indicating the substance of each decision. And it will be found that the digest contains many notes and references which do not appear in the notes to the opinions on the pages where they occur.

In order that a reference to the body of the work might be convenient, the author has grouped all the decisions relating to the same principal matter, and arranged the references thereto in the indices under general and familiar heads. The multiplicity and variety of the opinions seemed to render such an arrangement necessary. Hence, all references to opinions relating to the settlement of public accounts, may be found in the indices under the head of "Accounts and Accounting Officers"—all references to opinions relating to salaries and payments for services rendered to the Government, under the head of "Compensation"—all references to opinions relating to other pecuniary demands upon the

Government, except for pensions, under the head of "Claims"—all references to opinions relating to the pensions of officers and soldiers of the army, of navy officers, seamen, and marines, disabled or otherwise, and of widows and children, under the head of "Pensions"—and all opinions relating to land offices, land districts, land surveys, land sales, land warrants, certificates, and patents, locations, reservations, and pre-emp-tions, under the head of "Public Lands," &c. Where an opinion relates to several principal matters, it will be found referred to in the index under several heads, in order that it may be the more readily found. It is believed that this arrangement will be easily understood and favorably regarded, affording as it does ample facilities for a ready reference to every published opinion.

With this explanation of the subject, purpose, and arrangement of the work, it is respectfully submitted to the public.

THE PUBLISHER.

ATTORNEYS GENERAL,
WHOSE OPINIONS ARE REPORTED IN THIS VOLUME.

HON. EDMUND RANDOLPH, OF VIRGINIA,
APPOINTED SEPTEMBER 26, 1789.

HON. WILLIAM BRADFORD, OF PENNSYLVANIA,
APPOINTED JANUARY 27, 1794.

HON. CHARLES LEE, OF VIRGINIA,
APPOINTED DECEMBER 10, 1795.

HON. LEVI LINCOLN, OF MASSACHUSETTS,
APPOINTED MARCH 5, 1801.

HON. JOHN BRECKENRIDGE, OF KENTUCKY,
APPOINTED AUGUST 7, 1805.

HON. CÆSAR A. RODNEY, OF DELAWARE,
APPOINTED JANUARY 20, 1808.

HON. WILLIAM PINKNEY, OF MARYLAND,
APPOINTED DECEMBER 11, 1811.

HON. RICHARD RUSH, OF PENNSYLVANIA,
APPOINTED FEBRUARY 10, 1814.

HON. WILLIAM WIRT, OF VIRGINIA,
APPOINTED DECEMBER 16, 1817.

OPINIONS

OF THE

HON. EDMUND RANDOLPH, OF VIRGINIA.

APPOINTED TO THE OFFICE OF ATTORNEY GENERAL OF THE
UNITED STATES SEPTEMBER 26, 1789.

INTEREST ON CERTIFICATES FOR 1791.

Interest on certificates issued pursuant to the act of Congress passed August 4, 1790, is not allowable, and the courts would embarrass a system of finance by a determination in favor of interest for the year 1791.

PHILADELPHIA, *August 21, 1791.*

SIR: In the opinion given by Mr. Bradford and Mr. Ingersoll, I find the case of Mr. Robert Buchanan to be accurately stated; but after paying a respectful attention to the sentiments of those gentlemen, I am compelled to say that I differ in the conclusion drawn from that statement, for I cannot agree that any interest is to be received upon the certificate for the year 1791.

I acknowledge that the certificate was issued in conformity with the act of Congress passed on the 4th of August, 1790, and that its silence as to interest is no objection to such a claim, if that act warrants it.

A subscription to a loan is therein proposed, payable in certificates issued for the domestic debt. Among these are some bearing an interest of six per cent., and others, called indents of interest, bearing no interest at all. Mr. Buchanan's certificate is founded upon indents of interest; and had they been subscribed, he would have been entitled to a certificate purporting that the United States owe to him, as the holder, or his assigns, the sum of \$7,500, bearing an interest of three per centum per annum.

He has not, however, subscribed those indents, but obtained the certificate from the Register of the Treasury before the 1st day of June, 1791, to wit: on the 16th of February, 1791, in pursuance of the tenth section of the above-mentioned act. Upon the construction of that section the decision depends.

Interest on Certificates for 1791.

The opinion asserts the first part of that section to be a substantive clause, and yet in the next sentence it connects that clause with the following parts of the section. The truth is, that the section itself forms one integer. The term *creditors* comprehends all holders of the domestic debt which might be subscribed to the loan, and was not. It is immediately afterwards directed that such of them as possess the original certificates should exchange them for others, to be issued by the Register of the Treasury; consequently all the non-subscribing creditors are under the necessity of making this exchange, and, being so, must submit to the conditions prescribed for it.

One of these conditions is, that the new certificate shall not only specify the specie amount of those which are cancelled, but shall be *otherwise* of the like tenor with those heretofore issued by the Register of the Treasury for the registered debt. These import that the debt bears an interest of six per centum; and it is not denied that a new certificate given in lieu of cancelled indents, cannot carry an interest of six per centum. The question, then, is, whether a new certificate, which is not upon the most sanguine construction capable of a higher interest than three per centum, is of the same tenor with one granting an interest of six per centum?

It does not seem to be correct to resort to the popular and common acceptance of the words "*like tenor*," when they are known to be peculiarly technical. Nor can I admit that this acceptance would establish in this instance a likeness of tenor between two papers, so substantially different as in three per cent. per annum. The gentlemen, by confining their exposition to popular acceptance, virtually concede the interpretation of *law* to be against them. And without entering into prolix authorities, I take the liberty of saying that in every law-proceeding which I can call to mind, it would be decided that there is a *material variance* between two such documents; and therefore that they could not be of the same tenor.

But let us not content ourselves with resting on the criticism of single words: let us rather examine the context.

It is not for me here to estimate the merit of any scheme of finance: my office is to ascertain the sense of Congress. It strikes me, then, immediately, that the principal was far more

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respected than the interest, and that the higher interest allowed to the former was intended to correspond with that stipulated by the old certificates, whereas no interest was originally stipulated on the latter. It appears probable that, being anxious that all the indents of interest should be subscribed, they might have satisfied themselves of the propriety of distinguishing between subscribed and unsubscribed indents, because interest, not being *demandable* on the face of them, might in some measure be considered as a gratuity, which the legislature might apportion at pleasure.

That such was the meaning of Congress, is confirmed by the first clause in the tenth section itself, which gives to non-subscribing creditors interest during the year 1791, *including interest* to the last day of December, 1790; thus showing that creditors whose demands would carry interest to that time by force of the contract, were the persons contemplated: of this kind were indents for interest. And this idea receives confirmation from the care used in the third section to be explicit as to certificates carrying no interest, when they are really designed.

Upon the whole I cannot persuade myself that, with these strong features, indicating the purpose of Congress, the courts of the United States would embarrass a system of finance by a determination in favor of interest to Mr. Buchanan for the year 1791.

I have the honor, sir, to be, with great esteem and respect,
your most obedient servant,

EDM. RANDOLPH.

To the SECRETARY OF THE TREASURY.

COMMISSIONERS OF THE BANK OF THE UNITED STATES.

The commissioners appointed in pursuance of the act incorporating the Bank of the United States have no power, as such, to superintend the election of directors, or to interfere therein.

PHILADELPHIA, *October 18, 1791.*

THE Attorney General of the United States does himself the honor of replying to the questions propounded by the Secre-

Commissioners of the Bank of the United States.

tary of the Treasury of the United States, in his letter of the 12th of October, 1791, as follows:

1st. The commissioners appointed in pursuance of the act incorporating the Bank of the United States have no power, as such, to superintend the election of directors, or to interfere therein.

By the first section of that act subscriptions towards constituting the stock were to be opened, under the superintendence of such persons, not less than three, as should be appointed *for that purpose* by the President of the United States. The President was to appoint them *accordingly*; and the subscriptions were to continue open until the whole of the stock should be subscribed.

The fifth section provides that as soon as the sum of 400,000 dollars, in gold and silver, shall have been actually received on account of the subscriptions to the said stock, notice thereof shall be given by the persons under whose superintendence the same shall have been made, in at least two public gazettes printed in the city of Philadelphia; that the said persons shall, at the same time, in like manner, notify a time and place within the said city, at the distance of ninety days from the time of such notification, for proceeding to the election of directors; that it shall be lawful for such election to be then and there made, and that the persons who shall then and there be chosen shall be the first directors.

These are the only clauses which relate to the commissioners.

By the former clause their authority would have been concluded as soon as the whole of the stock was subscribed.

Nor was it extended by the latter, farther than to enable them to notify the time and place for proceeding to the election of directors; that is, the time and place, when and where, the persons capacitated to elect should proceed to elect.

The commissioners will, I suppose, appear with the books, that it may be known who were the original subscribers. But this duty naturally arises from their possession of those books, which are the best evidence of the original rights. The superintendence of the election has no analogy to such a possession.

2d. But does the smallest necessity exist why the commissioners, as such, should become the judges or superintendents of the election, or in any manner intermeddle in it? Is it not familiar to the experience of every day that persons assemble, with equal privileges of suffrage, and without the pre-eminence of any one of them, in order to constitute a body for the management of business? The first step is to appoint a moderator, or chairman. In the present instance the stockholders may with ease choose one or more persons to receive and count the votes, to report the numbers, minute the proceedings, and notify to the newly-elected directors their nomination. This seems to be a completion of the work.

3d. Although in the 5th section of the act which requires the first election of directors, it is not said by whom it shall be made; yet is the connexion between that and the 4th section so intimate as to render it certain that it must be made by the stockholders or proprietors of the capital stock.

Whether these terms be synonymous or not, it is immaterial here to examine. It is sufficient to say that no man can be one or the other except by virtue of an original subscription, or an assignment duly made of that subscription. Here lies the essence of the difficulty. Can an assignment be made before the first election of directors? The scrip, it is true, may be contracted for; may be delivered into the hands of the purchaser; and the price may be actually paid. But it is a creature of the bank law, and its mode of transfer depends upon that law. Accordingly it is declared, in the 12th section, that the stock of the said corporation shall be assignable and transferable according to such rules as shall be instituted in that behalf by the laws and ordinances of the same. Now the election of directors precedes the institution of laws and ordinances concerning the assignment and transfer of stock; and therefore no assignment or transfer can, as yet, be legally made. It is true, indeed, that the delivery of scrip amounts to an agreement to transfer the stock when the laws and ordinances shall be instituted, and the seller will be compelled, in a court of law, to perform all acts which shall be hereafter necessary to the transfer. But an agreement to transfer is not an actual transfer. Hence I conclude that no holder of pur-

Commissioners of the Bank of the United States.

chased scrip can be now accepted (merely in right of his purchase) as a voter for directors.

It is proper, however, to take notice of three objections which may be urged against these positions. The first is, that the giving of a power to the corporation to ordain rules of transfer does not exclude the usual modes of transferring personal property before those rules shall be formed. The second, that the provision, that *after* the first election no share shall confer a right of suffrage which shall not have been holden three calendar months previous to the day of election, implies that *at* the first election shares assigned confer a right of suffrage; and the third, that if the present assignees be shut out, either a sufficient number of stockholders may not be found to elect, or the original subscribers, who do not retain a shilling of interest, will be admitted to a vote without any attachment to the common welfare.

To the first objection I answer, that the nature of scrip must be an acknowledgment of a certain subscription to the Bank of the United States; that it does not resemble a corporeal chattel, to which delivery constitutes a complete right, but rather a chose in action, concerning which the purchaser cannot, without the aid of a statute, use his own name judicially, but must use that of the original proprietor. Besides, the third section had already vested the corporation with ample power to regulate transfers; and the twelfth would have been nugatory had it not been intended to prevent transfers from being full alienations, without an observance of the rules to be established.

The force of the second objection is destroyed, when we recollect that, although it be admitted that at the first election, shares acquired at any time before, howsoever short, would give a vote, yet the clause undoubtedly had in view, what everybody expected, that the subscription would be filled by degrees; and, therefore, that no subscriber, even on the day preceding the first election, should be deprived of a vote. The objection is also founded on too distant an implication to counteract reasoning otherwise weighty.

The consequence of the foregoing sentiments undoubtedly is, (as a branch of the third objection expresses,) that ori-

ginal subscribers, who may have sold out, and who no longer have a fellow-feeling for the success of the scheme, will be admitted to vote.

Is this the genuine construction of the law? If it be, it is not for any man to discuss the propriety of its consequences. I confess that a consequence extravagantly absurd, ought to lead us to be confident that Congress never contemplated it. But in many of the States we meet with a similar instance with the present. In certain elections none but freeholders can vote. In this, none but stockholders or proprietors of capital stock can vote. Let it be supposed that the freeholder has agreed in writing to convey to another his freehold, has received the purchase money and delivered the possession; as in the case of scrip, the original subscriber may have agreed to sell—has endorsed upon it an assignment, and delivered it, so endorsed, to the purchaser. This agreement, as to the freehold, would be considered in the States to which I refer as giving an equitable title only to the buyer, and reserving the legal title to the vendor. So in scrip, the purchasers have the equitable, while the original subscribers retain the legal title. Who would vote in the case of the freehold? The holder of the legal title. Who, by a parity of reason, ought to vote for directors? The person who, being the original subscriber, is alone known as the holder of the legal title. I have seen none of those endorsements or writings by which scrip has been attempted to be transferred; and, therefore, will not undertake to say whether they amount to a substitution of the purchaser, as the proxy of the seller. He who claims to be a proxy ought to exhibit, if not a regular letter of attorney, at least some authentic appointment to the office. I have distinguished also between the real interest and the right of voting at the first election. Hence the conveyance of one does not absolutely involve the other. But I can conceive that the words of some of those endorsements may perhaps be broad enough to justify a demand of the rights of a proxy.

4th. The proxies, however, of no subscriber can have more votes than himself. For example, four shares subscribed by one man cannot, by being divided into the hands of four proxies, confer four votes, as would have been the case if each

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of them had subscribed a share. But what is to be done if a subscriber has appointed several proxies? He may appoint what number he pleases; but if they are divided they cannot be called the proxies of an individual, acting (if I may be permitted so to speak) integrally. To be the real proxies, then, they must concur. It may perhaps be presumed, that if the subscriber were, in the division of his shares among his proxies, to make them representatives, respectively, of so many as would give them one or more votes, each might vote by himself. But their power being that of proxies only, they cannot claim separate suffrages because they spring from the separate holding of stock in one person, or, in other words, from separate subscriptions.

5th. The fifth question being answered in the foregoing observations, I forbear to repeat the answer. But I will now recapitulate the general result.

1st. That the commissioners cannot, as such, superintend or intermeddle in the election.

2d. That the stockholders can easily of themselves provide judges of the election.

3d. That the original subscribers, whether holding interest or not, or their proxies, have the only right of voting.

4th. That proxies may be made by any authentic act.

5th. And that all the proxies of the same subscriber must concur.

I pass by the possibility of a schism between the original subscribers, or their proxies, and the assignees, as they are called, and of the election of two sets of directors; for this makes no part of your inquiry, and would be remedied by the commissioners delivering up the books and money to that set whom they think to be duly elected.

EDM. RANDOLPH.

To the SECRETARY OF THE TREASURY.

SUBSCRIPTIONS TO A LOAN.

Although the 13th section of the funding act admits that subscriptions may be made to the loan payable in the principal and interest of certain State certificates or notes, *redeemed* notes cannot be used for that purpose.

PHILADELPHIA, *November 9, 1791.*

SIR: I do myself the honor of answering your letter of the 2d instant, upon the subject of the North Carolina certificates.

The 13th section of the funding act admits that subscriptions may be made to the loan payable in the principal and interest of the certificates or notes which, prior to a certain day, were issued by the respective States as acknowledgments or evidences of debts by them respectively owing, except certificates issued by the commissioners of army accounts in the State of North Carolina, in the year 1786. These last certificates are, I presume, now out of the question.

But how can redeemed certificates be a subscription of *debt*? Is a debt once due, but now paid off, still a debt? I cannot comment upon this question with any hope of making it clearer than it is at its first appearance.

For its redeemed debt, of the foregoing description, each State will, I suppose, be a creditor of Congress; but the great settlement of accounts between the United States and the individual States must embrace that debt. The subscription excludes it, as may be more fully seen by a reference to the 17th section.

I have the honor, sir, to be, with great respect and esteem, your most obedient servant,

EDM. RANDOLPH.

To the SECRETARY OF THE TREASURY.

THE PRESIDENT AND THE JUDICIARY.

Sovereigns do not interfere with the regular course of the administration of justice where a foreigner is a party, until he shall have gone to the court of dernier resort with his case.

PHILADELPHIA, *February 22, 1792.*

SIR: I suspect from the communication of the British minister, dated February 18, 1792, that the reasons for delaying

Who privileged from Arrest.

a definitive answer to his memorial on the subject of Mr. Pagan are not rightfully understood. The principal allegations of Mr. Pagan are, that the true construction of the preliminary articles justified the seizure; that the pendency of the appeal in England ought to have stopped the proceedings of the courts of Massachusetts; that the reversal of the decree amounted to a condemnation; and that an appeal ought to have been allowed to the Supreme Court of the United States.

If the seizure were really justifiable, Mr. Pagan might probably obtain a writ of error founded on the twenty-fifth section of the judicial law. If it were not justifiable, a great part of his defence would be sapped. Now, when it is recollected that the usage of sovereigns is not to interfere in the administration of justice until the foreign subject who complains has gone with his case to the dernier resort; as the substratum of this complaint, if true, may bear a writ of error; as a writ of error is now as open as when the appeal was prayed to the Supreme Court of the United States; as three of the judges are now in this city, and all of them may be applied to in twenty-four hours; as the interposition of government can be made with equal effect after this application; and as Mr. Pagan cannot be injured by even a fruitless attempt, I am strongly persuaded that, upon reconsideration, a motion for a writ of error will be preferred. Should this step miscarry, I have no doubt that it will be proper that an answer should be returned at large, and that any relief of which the law of nations warrants a demand, will be extended to Mr. Pagan.

I have the honor, sir, to be, with true respect and esteem, your most obedient servant,

EDM. RANDOLPH.

To the SECRETARY OF STATE.

WHO PRIVILEGED FROM ARREST.

The arrest of the domestic of a public minister is illegal; all process, therefore, is forbidden, and the persons concerned in any such process are liable to fine and imprisonment.

If, however, the domestic be an inhabitant of the United States, and shall have contracted debts prior to his entering into the service of the minister, which

Who Privileged from Arrest.

are still unpaid, he is not entitled to the benefit of the act concerning crimes that gives this immunity; nor shall any person be proceeded against for such arrest, unless the name of the domestic be registered in the Secretary of State's office, and transmitted to the marshal of the district in which Congress shall reside.

The arrest is regulated by act of Congress; the entering a public minister's house to serve an execution will either be absorbed in the arrest, as being necessarily associated with it, if that be found criminal, or, if the arrest be admissible, must be punished, if at all, under the law of nations.

PHILADELPHIA, *June 26, 1792.*

SIR: This morning I had the honor of receiving the letter of Mr. Van Berckel, with the enclosures addressed to you, complaining of the arrest of one of his servants. The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modifications on some points of indifference. Indeed a people may regulate it so as to be binding upon the departments of their own government, in any form whatever; but with regard to foreigners, every change is at the peril of the nation which makes it. Impliedly, however, the law of nations is considered by the act affixing penalties to certain crimes as being in force, and some of its subjects are thrown under particular provisions. We are, then, to determine whether the facts upon which Mr. Van Berckel remonstrates fall within these provisions; what would be the consequence of finding this to be the case; and what ought to be done to avenge an infraction of the law of nations, which may not be punishable under any merely municipal law? The arrest of the domestic servant of a public minister is declared illegal by the act concerning crimes; all process for the purpose is annulled; and the persons concerned in the process are liable to imprisonment not exceeding three years, and to a fine at the discretion of the court. If, however, the domestic be a citizen or inhabitant of the United States, and shall have contracted, prior to his entering into the service of the minister, debts still unpaid, he shall not take the benefit of the act; nor shall any person be proceeded against under the act for such arrest, unless the name of the domestic be registered in the

Who Privileged from Arrest.

Secretary of State's office, and transmitted to the marshal of the district in which Congress shall reside.

The going into Mr. Van Berckel's mansion, and serving an execution, is not animadverted upon by the federal law. These two examples of offence must, I think, be examined by different rules. In that of arresting a domestic, Congress appear to have excluded every resort to the law of nations. This must be the effect of their regulations, or else the offender would be punishable both under that and the law of nations; or at least under either, at the will of the prosecutor. But this cannot be conceived as the sense of the legislature. It is presumable that they meant to settle this subject in all points appertaining to it. Mr. Van Berckel, then, can appeal, upon the arrest, to the federal act alone; according to which, the officer arresting may protect himself, if he can with truth use the proviso contained in the 26th section.

The other branch of the officer's conduct, to wit: the entering into the house to serve an execution, will either be absorbed in the arrest, as being necessarily associated with it, if that should be found criminal; or, if the arrest be admissible, must be punished, if at all, under the law of nations, as being left untouched by the municipal act. It then becomes a question whether it be an offence, and in what degree, against the law of nations, to go into the house of a minister, peaceably to arrest a man who might be elsewhere lawfully arrested? I shall not ask what might be done if a minister were to afford an asylum to a man not entitled to protection against the civil process of the country, because here it cannot possibly be insinuated. Nor will I say that such a regard is not due to his residence as to forbid an intrusion for the purpose of arresting, by ordinary process, even an unprotected man. But even if it should be proved that the domestic could not claim the benefit of the act of Congress, the mere going into the house and executing a precept will probably sustain a prosecution; but, at best, it would be esteemed *summum jus*. On the other hand, if the officer could be mulcted for the arrest, on the principle of the arrest, the federal courts are open to all cases cognizable under the authority of the United States.

I ought not to omit for your consideration a remark ari-

Abduction and Restitution of Slaves.

sing from a comparison of the 25th and 26th sections of the act of Congress. The former renders the process void, to all intents; the latter denounces a penalty against the persons concerned in it, and furnishes the excuse in certain circumstances. Now, should Mr. Van Berckel's servant not be a citizen or inhabitant of the United States, who may have contracted the debt prior to his entering into the minister's service, the execution may be void, although the officer may be exempt from punishment. But I should doubt, upon the whole, whether, if the servant has not been registered, it might not be as well to apprise the minister of the law, and to pursue with rigor any like aggression which shall be made after the servants shall have been enrolled in your office. Perhaps it might be expedient to publish in the newspapers the 25th, 26th, and 27th sections of the law.

I have the honor, sir, to be your most obedient servant,
EDM. RANDOLPH.

To the SECRETARY OF STATE.

ABDUCTION AND RESTITUTION OF SLAVES.

The bringing away of slaves from Martinique, the property of residents there, may be piracy, and, depending upon the precise place of its commission, may only be an offence against the municipal laws.

The government may instruct the attorney for the district of Georgia to prosecute the offenders *criminaliter*, as far as the law will permit, having in view the restitution of the negroes to their true owner; and if that fail to restore them, to issue civil process with the approbation of the *owner or agent*.

PHILADELPHIA, November 1, 1792.

SIR: The Attorney General of the United States has the honor of replying to the communication of the Secretary of State, of the 28th ultimo, concerning the proceedings of Captain Hickman, in bringing away from Martinique certain slaves, the property of residents there. Judging from the documents which have been forwarded to him, the Attorney General would not hesitate to pronounce that a theft has been committed; but the fact may turn out otherwise upon confronting testimony. In like manner, the offence would seem to be a piracy; but it may prove, when its precise place of commission

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shall be fixed, to be of a mere municipal kind. Under these circumstances the government cannot give, it is presumed, any specific instructions to any officers of the United States, except to the attorney of the district of Georgia, as follows: First, to prosecute the culprits *criminaliter*, as far as the law will permit, constantly having in view the restitution of the negroes to their true owner; and, secondly, if criminal process should be insufficient to procure such restitution, to institute the necessary civil process for the like purpose, with the approbation of the owners or their agent. The last remark is made in order to impose the expense of a suit upon the individuals interested, rather than to assume any responsibility on the United States.

I have the honor to be, sir, your obedient servant,

EDM. RANDOLPH.

To the SECRETARY OF STATE.

REPRISALS.

The laws of nations do not allow reprisals except in case of violent injuries directed and supported by the State, and the denial of justice by all the tribunals and the prince.

Where error is apparent on the record of a judgment for unjustifiable seizure in a State court, a writ of error may be applied for in behalf of the aggrieved party.

PHILADELPHIA, *April* 12, 1793.

SIR: You will perceive, from the two letters of which I enclose copies, that the subject of Mr. Pagan has been for some time in my view. The former of those letters being intended for you, and containing a summary of facts, I determined to show it to Mr. Tilghman, who was Pagan's counsel, before it was sent to you, in order that he might correct any misstatement. This produced the latter letter from him to me; and I have thought it more advisable to forward both of them to you, even in the unfinished state of my own, than to reduce the case into a form which might be supposed to be less accurate. As I do not discover an essential difference between Mr. Tilghman and myself, I shall not discuss any seeming variance, but proceed upon his ideas. It is too obvious to require a diffusive exposition that the application for a writ

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of error was not only prudent, but a duty in Pagan. To this Mr. Tilghman explicitly assents, when he says that he was perfectly "satisfied of the prudence of applying for the writ of error, as Pagan could not complain of a defect of justice until he had tried the writ of error, and found that mode ineffectual." This remark becomes the more important, as it manifests that the process was not suggested as an expedient for shifting any burden from the government. Indeed, I may with truth add, that the proceedings, taken collectively, appeared to me to present a sufficient intimation of the main question to serve as a ground of decision. However, take the case under either aspect—as excluding the consideration of the main question by an omission in the pleadings and record, or as exhibiting it fully to the cognizance of the court—it never was pretended that a writ of error ought to have been granted, unless the matter was apparent on the record. Whose office was it to make it thus apparent? Of the attorney who managed the pleadings. If, therefore, he has failed to do so, we may presume that he considered the ground untenable, or was guilty of inattention. Either presumption would be fatal to a citizen of the United States; and the condition of a foreigner cannot create a new measure in the administration of justice. It is, moreover, certain that those who have been consulted on Pagan's behalf, as well as others, have seriously doubted whether a cause which has been pursued to the extent which his had reached before the commencement of our new government, was susceptible of federal relief.

The last observation opens the inquiry, what remedy ought the Supreme Court of the United States to have administered, even if the question had been fairly before them? My opinion is, that the very merits are against Mr. Pagan. In America, the construction of the armistice has been almost universally to compute the places, within which different times were to prevail, by latitude only. Am I misinformed that such an interpretation has been pressed by our ministers, and not denied by those of London? A second mode has been adopted, by describing a circle, and thereby comprehending longitude as well as latitude. Now, let either rule be adopted, and the posi-

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tion of the capture in this case will be adverse to Pagan's pretensions.

But what can be exacted from our government after repeated trials before various jurisdictions, none of which can be charged with any symptom of impropriety, and upon a subject which, to say no more, is at least equipoised? Nothing. And I appeal to the British reasoning on the Silesia loan as supporting this sentiment, in the following passages: "The laws of nations, founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage, do not allow of reprisals, except in case of violent injuries directed and supported by the State, and justice absolutely denied, *in re minime dubia*, by all the tribunals, and afterwards by the prince." "Where the judges are left free, and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful questions, different men think and judge differently; and all a friend can desire, is, that justice should be as impartially administered to him, as it is to the subjects of that prince in whose courts the matter is tried." Under such circumstances, a citizen must acquiesce. So, therefore, must Pagan; against whom even the court of Nova Scotia, within the dominions of his own sovereign, has once decided.

There are many smaller points arising from the controversy, which might be relied on. But I pass them over, from a hope that the observations already made will induce you to think, with me, that government is not bound to interpose further in the behalf of Pagan.

I have the honor, sir, to be, with respect and esteem, your most obedient servant,

EDM. RANDOLPH.

To the SECRETARY OF STATE.

SEIZURE IN NEUTRAL WATERS.

The arrest of the ship *Grange* within the capes of the Delaware was a seizure in neutral territory, and the attack of an enemy in neutral territory is absolutely unlawful.

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The neutrality of the Delaware does not depend on any of the various distances claimed in the sea by different nations possessing the neighboring shore, for here the treaty of Paris and the law of nations, together, will perhaps justify the United States in attaching to their coasts an extent into the sea beyond the reach of cannon-shot.

As the ship *Grange* has been seized in neutral waters, restitution is the duty arising from the act.

PHILADELPHIA, *May 14, 1793.*

SIR: The Attorney General of the United States has the honor of submitting to the Secretary of State his opinion concerning the seizure of the ship *Grange*.

The essential facts are—

That the river Delaware takes its rise within the limits of the United States.

That, in the whole of its descent to the Atlantic ocean, it is covered on each side by the territory of the United States.

That, from tide-water to the distance of about sixty miles from the Atlantic ocean, it is called the *river* Delaware.

That at this distance from the sea it widens, and assumes the name of the *bay* of Delaware, which it retains to the mouth.

That its mouth is formed by the Capes Henlopen and May; the former belonging to the State of Delaware, in property and jurisdiction; the latter to the State of New Jersey.

That the Delaware does not lead from the sea to the dominions of any foreign nation.

That, from the establishment of the British provinces on the banks of the Delaware to the American revolution, it was deemed the peculiar navigation of the British empire.

That by the treaty of Paris, on the 3d day of September, 1783, his Britannic Majesty relinquished, with the privity of France, the sovereignty of those provinces, as well as of the other provinces and colonies.

And that the *Grange* was arrested in the Delaware, within the *capes*, before she had reached the sea, after her departure from the port of Philadelphia.

It is a principle firm in reason, supported by the civilians, and tacitly approved in the document transmitted by the French minister, that to attack an enemy in a neutral territory is absolutely unlawful.

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Hence, the inquiry is reduced to this simple form: whether the place of seizure was in the territory of the United States?

From a question originating under the foregoing circumstances, is obviously and properly excluded every consideration of a dominion over the *sea*. The solidity of our neutral right does not depend, in this case, on any of the various distances claimed on that element by different nations possessing the neighboring shore. But if it did, the field would probably be found more extensive and more favorable to our demand than is supposed by the document above referred to; for the *necessary* or *natural* law of nations, (unchanged as it is, in this instance, by any compact or other obligation of the United States,) will, perhaps, when combined with the treaty of Paris in 1783, justify us in attaching to our coasts an extent into the sea beyond the reach of cannon-shot.

In like manner is excluded every consideration how far the spot of seizure was capable of being defended by the United States; for although it will not be conceded that this could not be done, yet will it rather appear that the mutual rights of the States of New Jersey and Delaware, up to the middle of the river, supersede the necessity of such an investigation. No. The corner-stone of our claim is, that the United States are proprietors of the lands on both sides of the Delaware, from its head to its entrance into the sea.

The high ocean, *in general*, it is true, is unsusceptible of becoming property. It is a gift of nature, manifestly destined for the use of all mankind—inexhaustible in its benefits—not admitting metes and bounds. But rivers may be appropriated, because the reverse is their situation: were they open to all the world, they would prove the inlets of perpetual disturbance and discord; would soon be rendered barren by the number of those who would share in their products; and, moreover, they may be defined.

“A river, considered merely as such, is the property of the people through whose lands it flows, or of him under whose jurisdiction that people is.” Grot. b. 2, c. 2, s. 12.

“Rivers might be held in property, though neither where they rise, nor where they discharge themselves, be within our territory, but they join to water above and below, or the sea.

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It is sufficient for us that the larger portion of water (that is, the sides) is shut up in our banks; and that the river, in respect of our land, is itself small and insignificant." Grot. b. 2, c. 3, s. 7. And Barbeyrac, in his note, subjoins, that neither of these is necessary.

"Rivers may be the property of whole States." Puff. b. 3, c. 3, s. 4.

"To render a thing capable of being appropriated, it is not strictly necessary that we should enclose it, or be able to enclose it within artificial bounds, or such as are different from its own substance; it is sufficient if the compass and extent of it can be any way determined. And therefore Grotius hath given himself a needless trouble, when, to prove rivers capable of property, he useth the argument, that although they are bounded by the land at neither end, but united to the other rivers or the sea, yet it is enough that the greater part of them—that is, their sides—are enclosed." Puff. b. 4, c. 5, s. 3.

"When a nation takes possession of a country in order to settle there, it possesses everything included in it, as lands, lakes, rivers, &c." Vattel, b. 1, c. 22, s. 266.

To this list might be added Bynkershoeck and Selden. But the dissertation of the former, *De Dominio Maris*, cannot be quoted in detachment; and the authority of the latter on *this* head may, in the judgment of some, partake too much of affection for the hypothesis of *mare clausum*. As Selden, however, sinks in influence on this question, so must Grotius rise, who contended for the *mare liberum*; and his accurate commentator, Rutherford, confirms the principles in the following passage: "A nation, by settling upon any tract of land which at the time of such settlement had no other owner, acquires, in respect of all other nations, an exclusive right of full or absolute property, not only in the land, but in the waters likewise that are included within the land, such as rivers, pools, creeks, or bays. The absolute property of a nation, in what it has thus seized upon, is its right of territory." 2 Ruth. b. 2, c. 9, s. 6.

Congress, too, have acted on these ideas, when, in their collection laws, they ascribe to a State the rivers wholly within that State.

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It would seem, however, that the spot of seizure is attempted to be withdrawn from the protection of these respectable authorities, as being in the *bay* of Delaware, instead of the *river* Delaware.

Who can seriously doubt the identity of the *river* and *bay* of Delaware? How often are different portions of the same stream denominated differently? This is sometimes accidental; sometimes for no other purpose than to assist the intercourse between man and man, by easy distinctions of space. Are not this river and this bay fed by the same springs from the land, and the same tides from the ocean? Are not both doubly flanked by the territory of the United States? Have any local laws, at any time, provided variable arrangements for the river and the bay? Has not the jurisdiction of the contiguous States been exercised equally on both?

But suppose that the *river* was dried up, and the *bay* alone remained. Grotius continues the argument of the 7th section of the 3d chapter of the 2d book, above cited, in the following words:

"By this instance it seems to appear that the property and dominion of the sea might belong to him who is in possession of the lands on both sides, though it be open above as a gulf, or above and below as a strait; provided it is not so great a part of the sea, that, when compared with the land on both sides, it cannot be supposed to be some part of them. And now what is lawful to one king or people, may be also lawful to two or three, if they have a mind to take possession of the sea thus enclosed within their lands; for it is in this manner that a river which separates two nations has first been possessed by both, and then divided."

"The gulfs and channels, or arms of the sea, are, according to the regular course, supposed to belong to the people with whose lands they are encompassed." Puff. b. 4, c. 5, s. 8.

Valin, in b. 5, tit. 1, p. 685, of his commentary on the marine ordonnance of France, virtually acknowledges that particular seas may be appropriated. After reviewing the contest between Grotius and Selden, he says: "S'il [Selden] s'en put donc tenir là, ou plutôt, s'il eut distingué l'océan des mers particuliers, et même dans l'océan l'étendue de mer qui doit être

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censée appartenir aux souverains des côtes qui en sont baignées, sa victoire eut été complète."

These remarks may be enforced by asking, What nation can be injured in its rights by the Delaware being appropriated to the United States? And to what degree may not the United States be injured, on the contrary ground? It communicates with no foreign dominion; no foreign nation has ever before had a community of right in it, as if it were a main sea; under the former and present governments, the exclusive jurisdiction has been asserted. By the very first collection law of the United States, passed in 1789, the county of Cape May, which includes Cape May itself, and all the waters thereof, (therefore within the jurisdiction of the State of New Jersey,) are comprehended in the district of Bridgetown. The whole of the State of Delaware, reaching to Cape Henlopen, is made one district. Nay, unless these positions can be maintained, the bay of Chesapeake, which, in the same law, is so fully assumed to be within the United States, and which, for the length of the Virginia territory, is subject to the process of several counties, to any extent, will become a rendezvous to all the world, without any possible control from the United States. Nor will the evil stop here. It will require but another short link in the process of reasoning to disappropriate the mouths of some of our most important rivers. If, as Vattel inclines to think in the 294th section of his first book, the Romans were free to appropriate the Mediterranean, merely because they secured by one single stroke the immense range of their coast, how much stronger must be the vindication of the United States, should they adopt maxims for prohibiting foreigners from gaining, without permission, access into the heart of their country.

The inquiry might be enlarged by a minute discussion of the practice of foreign nations in such circumstances. But I pass it by; because the United States, in the commencement of their career, ought not to be precipitate in declaring their approbation of any usages, (the precise facts concerning which we may not thoroughly understand,) until those usages shall have grown into principles, and are incorporated into the law

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of nations; and because no usage has ever been accepted which shakes the foregoing principles.

The conclusion, then, is, that the Grange has been seized on neutral ground. If this be admitted, the duty arising from the illegal act is restitution.

EDM. RANDOLPH

To the SECRETARY OF STATE.

OPINIONS

OF

HON. WILLIAM BRADFORD, OF PENNSYLVANIA:

APPOINTED JANUARY 27, 1794.

CAPTURE WITHIN THE UNITED STATES.

When the decree of a judge raises a presumption against the jurisdiction of the courts of the United States, in cases of capture, it will not be improper for the district attorney to cause the necessary depositions to be taken *de bene esse*, to be used by the Executive in case the appellant does not prosecute his appeal or the decree be affirmed.

PHILADELPHIA, February 8, 1794.

SIR: I have paid attention to the letter of the attorney of the United States for the district of New York, enclosed in yours of the 31st ultimo. As the decree of the judge, though not final, raises a presumption against the jurisdiction of the courts of the United States, in cases of capture said to be made within the limits of our territory, I am of opinion that it will not be improper for the district attorney to cause the necessary depositions to be taken *de bene esse*, to be used by the Executive in case the appellant should not prosecute his appeal, or the decree should be confirmed. It will prevent much trouble of collecting witnesses who may be absent at a future day, and will be a proof of the disposition of the Executive to avoid any unnecessary delay.

I will pay attention to the plea filed in the case *Carital vs. Clinton, &c.*, as soon as possible. Were it not too late, (as I presume it is,) there seems to be ground for a plea in abatement, on account of the variance between the declaration and the writ: the one being *in case*, (as I am informed,) and the other in trespass *vi et armis*; and the former laying the offence with a *simul cum*, while the writ is only against G. Clinton and Aquila Giles. But were it still possible to abate the plaintiff's writ, I am inclined to think it would be best to meet the question, and justify the conduct of the defendants.

I have the honor, &c.,

WM. BRADFORD.

To the SECRETARY OF STATE.

Evidence of Capture.

EVIDENCE OF CAPTURE.

Captures must be determined upon competent evidence, and no rules for determining the competency of evidence are more proper than those which prevail in courts of admiralty, and which, being founded on general and universal principles, are essential to a safe and pure administration of justice.

The master of a captured vessel, by the usage of admiralty, is a competent witness.

PHILADELPHIA, *February 12, 1794.*

SIR: I have the honor to inform you that I have carefully examined the papers which you transmitted to me, for the purpose of reporting whether the ship William, captured by the French schooner Citizen Genet, was taken in any place within the territory or protection of the United States.

In deciding upon facts of this kind, some rules must be adopted for ascertaining the competency of the evidence offered; and none appear more proper than those which prevail in the courts of admiralty, and which, being founded on general and universal principles, are essential to a safe and pure administration of justice.

Examining by this test the papers offered in evidence, scarcely any of them will be admissible.

Those offered by the consul of France consist of copies of depositions remaining in the consulate of France, made by Pierre Dalton, Thomas Connolly, and Daniel Osburn, all of them officers on board the Citizen Genet at the time of the capture of the ship.

Waiving, therefore, any objection arising from the want of the original depositions, these are evidently *ex parte* affidavits, made by persons *directly interested* in the event of the decision.

The evidence offered by the English consul (besides the deposition of James Legget) is—1st. A copy of the affidavit of John Whitesides, taken in the district court of Pennsylvania, on the bill filed by Finlay and others against the ship William, &c.; but I consider this as inadmissible, it being *ex parte*, and taken in a court which disclaims any jurisdiction of the cause. 2d. The depositions of John Williams and Thomas Butler, pilots, of Norfolk, in Virginia, taken *ex parte*, and certified by a public notary of that place. They are provisionally offered; but, for the cause aforesaid, are not competent evidence.

 Respect due to Consuls.

The only affidavit which remains is that of James Legget, the master of the ship William at the time of her capture. This appears to have been duly taken before B. Morgan, esquire, authorized for that purpose by the attorney of the United States for the district of Pennsylvania; and I am of opinion, that, according to the usage and principles of the court of admiralty, he is a *competent* witness; but how far his credibility may be affected by his interest, is open for consideration.

Having, therefore, such slender evidence to proceed upon, I beg leave to request your opinion whether it is expected I should report upon the facts as they appear upon this single affidavit; and also to suggest for your consideration the propriety of communicating to the parties concerned the incompetency of the evidence that is offered, before any further proceedings are had.

I have the honor, &c.,

WM. BRADFORD.

To the SECRETARY OF STATE.

 RESPECT DUE TO CONSULS.

A riot before the house of a foreign consul by a tumultuous assembly, requiring him to give up certain persons supposed to be resident with him, and insulting him with improper language, is an offence not within the act of the 30th of April, 1790, for the punishment of certain crimes against the United States.

A consul is not a public minister, nor entitled to the privilege attached to the person of such an officer. As the law now stands, the offence in question cannot be legally prosecuted in the courts of the United States. If, however, the grand jury will present the offence in that court, it will be the duty of the district attorney to reduce the presentment into form, and the point in controversy will thus be put in a train for judicial determination.

PHILADELPHIA, *February 20, 1794.*

SIR: By the correspondence between the British consul at Norfolk and the attorney of the United States for the district of Virginia, which you transmitted to me for consideration, it appears that a question has arisen, whether a riot committed by a number of persons tumultuously assembled before the house of a foreign consul, requiring him to deliver up certain persons supposed to be resident with him, and insulting him

Respect due to Consuls.

with improper language, can be the subject of prosecution in the courts of the United States. I have now the honor to state to you my opinion on that point, agreeably to your request.

Upon the best consideration I can give the subject, I am satisfied that this offence is not within the act of the 30th April, 1790, for the punishment of certain crimes against the United States. The only section which in any degree relates to it, is that which prescribes the punishment "for any infraction of the laws of nations, by offering violence to the person of an ambassador or other public minister:" but this cannot reach the offence in question, because it is now fully settled that a consul is not a public minister. He is not considered as such by the writers on the law of nations, because he is not in any degree invested with the representative character; and it has, more than once, been judicially determined that he is not entitled to the privileges attached to the person of every public minister. The constitution of the United States also distinguishes between them, where it extends the judicial power "to all cases affecting ambassadors, other public ministers, and consuls." The same distinction is carefully observed in the 13th section of the act establishing the judicial courts of the United States.

An argument in favor of the jurisdiction of these courts over offences of the kind in question, seems to result from the clause in the constitution just referred to; but it may be observed, that these words (sufficiently indefinite in themselves) have received a construction, and seem to be limited to prosecutions "or suits *against* consuls," and to "suits in which a consul shall be a party." It may be further remarked, that by the constitution the Supreme Court is to have original jurisdiction "in all cases affecting ambassadors, other public ministers, and consuls." If this be construed necessarily to include *criminal* offences against consuls, it would, as the courts are constituted, defeat the provisions of the very next clause, which directs "that all crimes shall be tried in the State where they are committed."

I therefore coincide in opinion with the district attorney, that, as the law now stands, the offence in question cannot be legally prosecuted in the courts of the United States. But, sir,

Duties of District Marshals.

if the party injured is advised or believes that the federal courts are competent to sustain the prosecution, I conceive he ought not to be concluded by my opinion or that of the district attorney. If he desires it, he ought to have access to the grand jury with his witnesses; and if the grand jury will take it upon themselves to *present* the offence in that court, it will be the duty of the district attorney to reduce the presentment into form, and the point in controversy will thus be put in a train for *judicial* determination.

I have the honor, &c.,

WM. BRADFORD.

To the SECRETARY OF STATE.

DUTIES OF DISTRICT MARSHALS.

Marshals are not required by law to execute the sentence of a French consul, arising under the 12th article of the convention with his Most Christian Majesty and the United States.

NEW YORK, *March 6, 1794.*

I HAVE considered the twelfth article of the convention between his late Most Christian Majesty and the United States of America, and also the act of Congress concerning consuls and vice-consuls, as far as it prescribes the duty of the marshals of the United States; and it is my opinion that the marshals are not bound by law to execute any sentence of a French consul, arising under the said article.

RICH. HARRISON,

Attorney United States for the New York District.

PHILADELPHIA, *March 14, 1794.*

I have considered the convention and acts above referred to, and I perfectly coincide in the opinion given by the attorney of the United States for the district of New York.

WM. BRADFORD.

Patents for Lands in Vincennes.

PATENTS FOR LANDS IN VINCENNES.

The act of 3d March, 1791, directing the laying out of tracts to inhabitants of Vincennes, did not authorize either the President or the governor to make any conveyances for the allotments; and if patents are necessary to confirm the titles, it yet remains with Congress to direct by whom they shall be issued.

MARCH 25, 1794.

SIR: In answer to your inquiry whether the President of the United States, or the governor of the Western Territory, ought to issue patents for the lands granted to the inhabitants of Vincennes, upon the Wabash river, I have now the honor to state to you my opinion.

It appears that Congress, by their resolve of the 20th June, 1788, directed that three tracts of land should be laid out in the form of parallelograms, for the benefit of these inhabitants; which were to be distributed among them by lot, in the proportion of 400 acres for each family, and immediate possession given; but no title could be acquired until they had resided thereon three years from the time of such distribution.

By the act of 3d March, 1791, the governor of the Western Territory is "directed to *lay out* three tracts of land, agreeably to the said act of 20th June, 1788;" but he is not authorized to make any conveyances or patents to the settlers for their respective allotments.

It is remarkable that he is empowered to carry the first part of the said resolve into complete effect, and to confirm the title of the settlers to other lands claimed by them; and, also, to make grants of land, not exceeding 100 acres, to certain settlers who had not obtained any donation land under the former acts. The opinion of Congress may therefore be *inferred*, that the governor of the Western Territory is the proper officer to issue the patents or grants in question; but if that *was* their opinion, they have not *expressed* it; nor are the words of the act broad enough to implicate any such power.

I am also of opinion that there is nothing in the constitution or laws that invests the President with authority to issue patents to these settlers.

If, therefore, patents are thought necessary to confirm the titles which the individuals have acquired by allotment and

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residence, agreeably to the provisions of the resolve of the 20th June, 1788, it remains with Congress to direct by whom they shall be issued.

I have the honor to be, &c.,

WM. BRADFORD.

To the SECRETARY OF STATE.

PATENTS UNDER THE ACT OF 1787.

Persons having land allotted to them under the act of 29th August, 1787, are not entitled to patents until provision shall be made for issuing them.

APRIL 29, 1794.

SIR: I perceive, by the letter of the secretary of the Western Territory, that the settlers who are desirous of obtaining patents for their donation lands are not those referred to in my letter of the [25th March,] but such as are entitled, and have had them laid out, under the resolve of Congress of the 29th August, 1787. These persons, however, are in the same situation as the former, so far as relates to a confirmation of their rights by patent: there being no authority for granting patents to them vested either in the President or in the governor of the Western Territory.

I have the honor to be, &c.,

WM. BRADFORD.

To the SECRETARY OF STATE.

SUITS AGAINST FOREIGNERS.

The late governor of Guadaloupe, who had caused a vessel to be seized and condemned by authority assumed as such officer, being prosecuted in the court of Pennsylvania, whilst here as a prisoner of war on parole, is not more exempt than any other foreigner (not a public minister) from suit and arrest.

If the circumstances attending the seizure were such as will constitute a defence, they must be pleaded in the action. If the seizure were an official act, done by the defendant under color of the powers vested in him as governor, they will be an answer, as the extent of defendant's authority can be determined only by the constituted authorities of his own nation.

PHILADELPHIA, June 16, 1794.

SIR: I have attentively considered the request made by the minister of the French republic, that the suit commenced in the

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court of this State against the late governor of Guadaloupe may be stopped. The ground of this request is, that the cause of action arose from the seizure and condemnation of a vessel, made at Guadaloupe, under the authority of the governor, by virtue of the powers vested in him as such. It is added, that the governor arrived here as a prisoner of war to the British forces, (on parole;) and that his voyage to France is prevented only by the arrest which has been made.

From this state of facts, it does not appear to me that the defendant has any legal claim to be privileged from arrest; nor have the judges, on that ground, any power to stay the proceedings against him, without the consent of the plaintiff. With respect to his suability, he is on a footing with any other foreigner (not a public minister) who comes within the jurisdiction of our courts. If the circumstances stated form of themselves a sufficient ground of defence, they must, nevertheless, be regularly *pleaded*; and the court will not hear them upon motion, for the purpose of quashing the writ or setting aside the arrest.

But, sir, if his being *obliged to give bail* be the circumstance which prevents his departure for France, it is probable he may be relieved from it, by citing the plaintiff before a judge of the court from whence the writ issued, to show his cause of action. I am inclined to think, if the seizure of the vessel is admitted to have been an official act, done by the defendant by virtue, or under color, of the powers vested in him as governor, that it will of itself be a sufficient answer to the plaintiff's action; that the defendant ought not to answer in our courts for any mere *irregularity* in the exercise of his powers; and that the *extent* of his authority can, with propriety or convenience, be determined only by the constituted authorities of his own nation. If this principle can be made evident to the judge, he will discharge the defendant from his bail, and the plaintiff would probably prosecute his suit no further.

But, be this as it may, it is evident that this is not a case for the interposition of the government; and that Mr. Collot must defend himself by such means as his counsel shall advise.

I have the honor, &c.,

WM. BRADFORD.

To the SECRETARY OF STATE.

Habeas Corpus.

HABEAS CORPUS.

A writ of habeas corpus may be awarded to bring up an American subject unlawfully detained on board a foreign ship-of-war; the commander being fully within the reach of, and amenable to, the usual jurisdiction of the State where he happens to be.

JUNE 24, 1794.

THE Attorney General has the honor to report to the Secretary of State that he has not been able to meet with any case in the English reports, from which it appears that a *habeas corpus* has been actually awarded to bring up an English subject illegally detained on board a foreign ship-of-war. Whether this be owing to no such detention having taken place, or to any modern courtesy of applying to the minister of the proper nation, before redress is sought in the usual course of law, the Attorney General cannot determine; but he is satisfied that a British subject, detained on board such foreign vessel in the ports of that kingdom, is entitled to this writ, and that the commander may be legally compelled to obey it. It is a writ extensively remedial; and, in Bourn's case, even before the *hebeas corpus* act, it was declared to be "a prerogative writ, and that it concerns the king's justice to be administered to his subjects; for the king ought to have an account why any of his subjects are imprisoned, and *it is agreeable to all persons and places.*" Hence it has been awarded to every part of the king's dominions—to places usually privileged, and where, in ordinary cases, the king's writ does not run.

The ports and harbors of England are a part of the kingdom. The jurisdiction of the nation is as complete over them as over the land itself; and the laws of nations invest the commander of a foreign ship-of-war with no exemption from the jurisdiction of the country into which he comes. Indeed, it cannot be conceived that any sovereign power would permit its subjects to be imprisoned in its own territory, by foreign authority or violence, without using the most effectual means in its power to procure their enlargement. Even the house of a foreign minister cannot be made an asylum for a guilty citizen, nor (it is apprehended) a prison for an innocent one. And, though it be exempt from the ordinary jurisdiction of the country, yet,

Discharge of a Cruiser.

in such cases, recourse would be had to the interposition of the extraordinary powers of the State. The commander of a foreign ship-of-war, however, cannot claim that extraterritoriality which is annexed to a foreign minister and to his domicile; but is conceived to be fully within the reach of, and amenable to, the usual jurisdiction of the State where he happens to be.

The Attorney General, therefore, conceives that a writ of *habeas corpus* might be legally awarded in such case, although the respect due to the foreign sovereign may require that a clear case be made out before the writ be directed to issue.

WM. BRADFORD.

DISCHARGE OF A CRUISER.

A vessel under arrest, to prevent her from cruising against belligerent powers, may be discharged on the order of the President, communicated to the marshal having her in custody.

The expenses occasioned by the arrest should be paid by the owner, and be made a condition of the delivery; and the suit commenced by him ought to be withdrawn before any indulgence is granted.

JULY 5, 1794.

THE Attorney General has the honor of reporting to the Secretary of State, that, agreeably to his request, he has examined the letter of the 27th ultimo from the district attorney of New York, with a view to determining "whether the sloop Republican may with propriety be discharged, and in what form."

As this vessel appears to have been arrested merely for the purpose of preventing her from cruising and committing hostilities against some or one of the belligerent powers; as that object has been attained, and the owner has requested that she may be restored,—the Attorney General is of opinion that this vessel may with propriety be delivered up. A formal pardon cannot be necessary or proper in this case; but the delivery may be effected by an order, communicating the determination of the President to the marshal in whose custody the vessel is. It is reasonable that the expenses occasioned by the detention of vessels thus circumstanced should be paid by the owner whose misconduct has occasioned the arrest, and that

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the payment of these be made a term of the delivery; but as the time of detention has, in this particular case, been very considerable, it is possible that these expenses may be greater than (under the circumstances stated in the district attorney's letter) the President would deem it proper to require. Perhaps, therefore, the payment of one-half of the expenses may, under those circumstances, be dispensed with; or it may be proper to delay the order until the amount of the expenses be known. The suit commenced by the owner against Governor Clinton ought also to be withdrawn before any indulgence is experienced from the government.

WM. BRADFORD.

To the SECRETARY OF STATE.

SUITS AGAINST FOREIGNERS.

The government will not interfere with a private action against a foreigner for receiving a negro on board his ship.

The defendant in such a case is on a footing with every other foreigner not a public minister, in respect to his suability, and he must answer or demur to the allegations against him. If he have a good defence under the treaty of peace, he must plead it in the usual course of judicial proceedings; and until the regular course of such proceedings shall have failed to do justice to a foreigner, there can be no just ground of complaint to the President.

PHILADELPHIA, *July 26, 1794.*

THE Attorney General has the honor to report to the Secretary of State that he has attentively considered the request made by the minister of his Britannic Majesty, that the government would interpose to stay the suit brought in the State of New York against Captain Cochran, by Mr. Rose, a citizen of South Carolina. The ground of this request is, that the suit is brought "on account of a negro, whom the plaintiff pretends to be his property, and to have been received on board his Britannic Majesty's ship *Carolina*, when she was under the command of Captain Cochran, at Charleston, during the war, and at the period of the evacuation of that place."

The Attorney General is of opinion that it does not appear from this state of facts that the defendant has any legal claim to be privileged from arrest, or the government any au-

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thority to interfere, so as to stay the proceedings against him, without the consent of the plaintiff. He is, with respect to his suability, on a footing with every other foreigner (not a public minister) who comes within the jurisdiction of our courts, and he must answer or demur to the allegations against him. If he has (as the minister contends) a good defence under the treaty of peace, he must nevertheless appear and plead it in the usual course of judicial proceedings. The court will not determine the merits of the cause on motion; but when all the facts are before them, there is no doubt but they will faithfully declare the law which arises upon them, and afford to the defendant every protection to which he is entitled under the treaty of peace. Until the contrary appears—until injustice is done to him—there can be, it is apprehended, no just ground of complaint from the British minister.

The Attorney General would only add, further, that if the defendant has been maliciously and vexatiously held to bail, (as is suggested,) and without probable cause, he may obtain redress at law.

WM. BRADFORD.

To the SECRETARY OF STATE.

SUITS AGAINST FOREIGNERS.

The term "prosecutions," employed in the sixth article of the treaty with Great Britain, imports a suit against another in a criminal cause; such prosecutions being conducted in the name of the public, the ground of them being distinctly known as soon as they are instituted, and being always under the control of the government.

AUGUST 5, 1794.

SIR: I understand, by your note of the 1st instant, that the opinion given in the case of Captain Cochran has been transmitted to the British minister; and I learn, with regret, that it has not been perfectly satisfactory to him. He apprehends that the particular expression, in the sixth article of the treaty, which declares that, for the causes there specified, "no further prosecutions shall be *commenced*," has been overlooked. I have the honor to assure you, sir, that, on my part, the force

Suits against Foreigners.

of the expression was fully considered; and even allowing it greater latitude than I am inclined to give it, the result, as to the interference of the government, will be precisely the same.

The term "*prosecution*," in its most natural and usual acception, imports a suit against another in a *criminal* cause: such prosecutions being conducted in the name of the public, commenced by some public officer, and the ground of them distinctly known as soon as they are instituted. They are always under the control of the government, who may stay them in their first stage, and even cause the officer who has wantonly or maliciously commenced them to be punished.

This is not the case in *civil* suits. Supposing it admitted, by a liberal construction, that such are comprehended under the general description in the sixth article of the treaty; yet how can the precise ground of a civil suit be discovered *as soon* as it is *instituted*? and, till it be discovered, how can the government interfere? The forms in which a suit at law is conducted are so general, that the plaintiff is not obliged to disclose thereby that his action is interdicted by the treaty. The government has no method of compelling him to disclose it in the first stages of the suit; and till it does appear on the record, or on the trial, no notice can be regularly taken of it. When it *does* appear, it is presumable that justice will be done. So far, therefore, as the government is implicated, a suit cannot be considered as commenced for the prohibited causes, until they be actually disclosed; and as it belongs to the judiciary, in a case like this, to construe the treaty, the citizen has a right to take the opinion of the judges whether the case he makes out comes within the prohibitions of it.

In this situation of things, although the government be ever so "desirous to guard against every violation of the treaty of peace between the two countries, and to repress any practices in its citizens which involved such a violation," how is it possible that government should prevent a citizen from commencing a suit at law, which (whatever suggestions the defendant may make) may turn out to be free from exception? If the minister of his Britannic Majesty will have the goodness to point out in what manner the executive authority of England could repress the commencing of such suits in that country, I

 Libellous Publications.

shall cheerfully revise my opinion; the laws in both countries being, on this point, nearly the same. A general proclamation commanding the observance of the treaty, I presume, cannot be pointed at, because *that* has already issued; and an injunction of the observation of this specific article would be not only unusual, but improper; because it has not yet regularly appeared that it had been violated, and because a proclamation should not attempt to give any interpretation of this article; without which, it could have no greater effect than the general proclamation already mentioned.

I have the honor, &c.,

WM. BRADFORD.

To the SECRETARY OF STATE.

LIBELLOUS PUBLICATIONS.

Any malicious publication tending to render another ridiculous, or to expose him to public contempt and hatred, is a libel; and in the case of a foreign public minister the municipal law is strengthened by the law of nations, which secures the minister a peculiar protection, not only from violence, but also from insult.

PHILADELPHIA, September 17, 1794.

SIR: Agreeably to your desire, I have considered the three paragraphs published in Greenleaf's New York Journal on the 13th instant, under the head of "communications," (which are referred to in the letter of Mr. Hammond,) with the view of determining whether they can be considered as libellous.

Assuming it as a fact, that, by "the British Solomon," in that publication, the British minister is intended to be designated, I am of opinion that those paragraphs are *prima facie* libellous, and may be made (if in point of prudence it be deemed advisable) the subject of a *criminal* prosecution.

It is clear that, even in the case of a *citizen*, any malicious publication tending to render him ridiculous, or to expose him to public contempt and hatred, or to injure him in his profession, is deemed a libel; and in the case of a foreign public minister, the municipal law is strengthened by the law of nations, which secures the minister a peculiar protection, not only from violence, but also from insult. To represent in the public

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prints, such an officer as a contemptible person, to style him an incendiary jack-in-office, to charge him with deceiving the nation which sends him, and with inspiring another foreign minister with fears of being killed by certain citizens of the United States, is, no doubt, a publication that may be made the subject of legal prosecution.

In giving this opinion, I confine myself strictly to *legal* considerations, and waive any discussion of the prudence of commencing a prosecution for publications of this kind.

I am, &c., &c.,

WM. BRADFORD.

To the SECRETARY OF STATE.

FOREIGN TRIBUNALS.

A nation ought not to interfere in the causes of its citizens brought before foreign tribunals, except in a case of the refusal of justice or of palpable injustice. The opinion of a British judge, directing a plaintiff who had been a British subject, but who had taken the oath of allegiance to the government of the United States, to be nonsuited on the ground that the contract which formed the subject-matter of the suit was unlawful between British subjects, and regarding the plaintiff as such, is founded on the ancient and standing laws of Great Britain, which can be altered only by the legislative power of the nation.

When a suitor applies to foreign tribunals for justice, he must submit to the rules by which those tribunals are governed.

PHILADELPHIA, *November 4, 1794.*

SIR: The case of Mr. Green, upon which you request my opinion, appears to be in substance as follows:

Mr. Green being a subject of his Britannic Majesty, emigrated to America after the treaty of peace in 1783, and, by his residence, and taking the requisite oaths, became a citizen of the United States. He afterwards entered into a contract with certain British merchants established at Ostend, and, on a failure on their part, brought an action against them in the Court of King's Bench in England. On the trial of the cause, the judge directed the plaintiff to be nonsuited; being of opinion that such a contract was unlawful between British subjects, and holding the plaintiff to be such. Mr. Green, conceiving

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himself to be aggrieved, solicits the interposition of the government to cause justice to be done to him.

I apprehend, sir, that these facts do not authorize any complaint from the United States, or formal demand on the executive authority of Great Britain. It seems to have grown into a rule, "that a nation ought not to interfere in the causes of its citizens brought before foreign tribunals, excepting in the case of a refusal of justice—palpable and evident injustice—or a violation of rules and forms." In the case stated, the opinion of the judge is founded on the standing and ancient laws of Great Britain, which can be altered only by the legislative power of the nation. The decision could not be otherwise; and when a suitor applies to foreign tribunals for justice, he must of necessity submit to the rules by which those tribunals are governed. How far the difficulties which may arise from the British government strictly enforcing the principle "that a natural-born subject cannot divest himself of his allegiance" may deserve the attention of government, in case any negotiations for a treaty of commerce should be commenced, is another question, upon which it is not proper I should offer any opinion.

In addition, it may be observed, that it is upon a *definitive* sentence alone that a complaint of injustice can regularly be founded. The opinion of a judge at *nisi prius* (a nonsuit, voluntarily submitted to by the plaintiff, and no motion for a new trial made) cannot, with propriety, be made the subject of discussion. If such a plaintiff be not satisfied with the justice of the opinion, it is his duty to put the cause in such a situation that its merits may be examined in the court of the last resort.

There are other reasons which oppose themselves to Mr. Green's request; but, having had the honor of conferring with you on this subject a few days ago, I forbear enlarging upon it at present.

I have the honor, &c., &c.,

WM. BRADFORD.

To the SECRETARY OF STATE.

Judicial Discretion.

JUDICIAL DISCRETION.

The refusal of a district judge to issue a warrant under the ninth article of the convention between France and the United States, cannot be interfered with by the Supreme Court; the latter having no control over a district judge exercising legal discretion

PHILADELPHIA, *March 21, 1795.*

SIR: In conformity to the instructions contained in your letter of the 7th October last, I embraced the earliest opportunity of bringing before the Supreme Court of the United States the question which has arisen in consequence of the interpretation given by the district judge of New York to the ninth article of the convention between France and the United States. As the refusal of the judge (founded on this interpretation) to issue a warrant against Henry Barré could not be re-examined on a writ of error, the only method in which it appeared possible to obtain a revision of it was by applying to the Supreme Court for a *mandamus*. In order to accelerate the determination, I proposed to Mr. Lawrence that the main question should be fully argued on the *motion*, without waiting for a *return of the writ*, which could not be made before the first Monday in August next. He cheerfully concurred in the proposal, and expressed his willingness to submit to the earliest decision that could be obtained. The letters (copies of which I have the honor to enclose) afterwards passed between us.

A motion was accordingly made that a writ of *mandamus* should be issued, directed to the district judge of the district of New York, commanding him to issue a warrant against Henry Barré. The letters of the minister of France, of the vice-consul, and of the judges, were all laid before the court; and the question arising on them, to wit: "whether any evidence other than the ship's roll or register would be sufficient to authorize the judges to issue the warrant which was demanded," was fully discussed; two counsel being heard against the motion. In the course of the argument, some of the judges expressed a doubt whether this was a case in which the court were authorized to issue a *mandamus*, and a further day was given to hear counsel on that point. On a second argument, the court were of opinion that, as the act of Congress

 Appeals to the Supreme Court.

had made each district judge (within his district) the competent judge for the purposes expressed in the ninth article of the convention, and as Judge Lawrence had a right to decide the question arising on it, and had decided accordingly, the Supreme Court had no authority to interfere with his decision, or control the judge in the exercise of that legal discretion which was vested in him. Therefore, as an interpretation on the article in question could not be given in the regular exercise of their judicial authority, they declined intimating any opinion on it.

I have only further to add, that, until Congress shall authorize a revision of the proceedings of the district judges on this article, or shall declare the judges of the Supreme Court to be competent judges for the purposes expressed in it, I do not perceive any method in which a uniformity of decision on it can be secured.

I have the honor, &c., &c.,

WM. BRADFORD.

To the SECRETARY OF STATE.

 APPEALS TO THE SUPREME COURT.

An appeal lies to the Supreme Court from the decree of a district judge, deciding that he has no jurisdiction over a particular subject. District Judges are not the exclusive judges of their own jurisdiction: if the Supreme Court be of opinion that they have jurisdiction, they must conform to its judgment.

PHILADELPHIA, *May 9, 1795.*

SIR: I have been honored with your letter of the 7th instant, in which you request my opinion upon the steps which the government of the United States ought to pursue, in consequence of the representations of the minister of the French republic on the subject of the appeals entered from the decree of the district judge of Georgia, in the case of the two vessels brought in as prizes to a French privateer.

The minister seems to apprehend that there is some inconsistency in allowing an appeal when the judge decides that he has no jurisdiction to determine whether they are lawful prizes

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or not. But it must be observed that this opinion of the judge arises from his having previously decided on some material facts stated in the libel, and decreed that the French privateer was not armed nor equipped in any port of the United States, and was navigated and manned principally by French citizens. But, sir, had it been a simple question of jurisdiction, and had the judge decided that he had no jurisdiction whatsoever of the cause; yet, by the laws of the United States, an appeal from such sentence would have been authorized, because he is not the exclusive judge of his own jurisdiction; and, if the Supreme Court should be of opinion that he *has* jurisdiction, he must conform to their judgment, whatever his private sentiments may be. Besides, where an appeal is lawful, the refusal of the inferior judge to allow it will not prevent the superior court from proceeding on the appeal; and if it be not lawful, and allowed, the superior court, on application to them, will dismiss it.

Being, therefore, of opinion that the proceedings in these causes have been regular, I presume they must wait the usual course of judicial decision; and that any previous interference on the part of the Executive would be improper and unavailing. The papers transmitted to me are herewith returned.

I have the honor, &c., &c.,

WM. BRADFORD.

To the SECRETARY OF STATE.

BREACH OF NEUTRALITY.

Acts of hostility committed by American citizens against such as are in amity with us, being in violation of a treaty, and against the public peace, are offences against the United States, so far as they were committed within the territory or jurisdiction thereof; and, as such, are punishable by indictment in the District or Circuit courts. Acts of the kind occurring in a foreign country, however, are not within the cognizance of our courts.

The *high seas* are within the jurisdiction of the district and circuit courts of the United States: wherefore, if such an offence be committed thereon by American citizens, such courts will take notice of it, and the offenders may be legally prosecuted in either of those courts, in any district where the offenders may be found.

The offence in question being committed out of the territories of the United

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States, cannot be noticed by our courts; the offenders must be dealt with abroad, and, after proclamation by the President, will have forfeited all protection from the American government.

JULY 6, 1795.

THE Attorney General having perused and considered the memorial of Zachary Macaulay, the acting Governor of the Sierra Leone Company's colony of Sierra Leone, on the coast of Africa, and of John Tilly, the agent of Messrs. John and Alexander Anderson, proprietors of Bance island, addressed to Lord Grenville, and enclosed in the communication from his Britannic Majesty's minister plenipotentiary to the Secretary of State, has now the honor of reporting his opinion thereon.

It is stated by the memorialists that certain American citizens trading to the coast of Africa, on the 28th of September last, voluntarily joined, conducted, aided, and abetted a French fleet in attacking the settlement, and plundering or destroying the property of British subjects on that coast.

The Attorney General concurs in the opinions which have heretofore been given on this subject. He conceives that acts of hostility committed by American citizens against such as are in amity with us, being in violation of a treaty, and against the public peace, are offences against the United States, so far as they were committed within the territory or jurisdiction thereof; and, as such, are punishable by indictment in the district or circuit courts. It has been heretofore declared by the judges of the circuit court to be their joint and unanimous opinion, that, the United States being in a state of neutrality relative to the present war, such acts of hostility committed by a citizen are an offence against this country, and punishable by the laws of this country.

So far, therefore, as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States. But crimes committed on the high seas are within the jurisdiction of the district and circuit courts of the United States; and, so far as the offence was committed thereon, I am inclined to think that it may be legally prosecuted in either of those courts, in any district wherein the offenders may be found. But some

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doubt rests on this point, in consequence of the terms in which the "Act in addition to the act for the punishment of certain crimes against the United States" is expressed. But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States; and as such a suit may be maintained by evidence taken at a distance, on a commission issued for that purpose, the difficulty of obtaining redress would not be so great as in a criminal prosecution, where *viva voce* testimony alone can be received as legal proof.

The Attorney General begs leave further to remark, that this offence being committed out of the territories and waters of the United States, the government does not seem bound to do more than has already been done by the President, who, by his proclamation of the 22d of April, 1793, warned all citizens of the United States against all such proceedings; declaring that all those who should render themselves liable to punishment under the laws of nations, by committing, aiding, or abetting hostilities against any of the said parties, would not receive the protection of the United States against such punishment; and that he had given instructions to those officers to whom it belongs to cause proceedings to be instituted against all persons who should, within the cognizance of the courts of the United States, violate the laws of nations with respect to the powers at war, or any of them.

All which is submitted.

WM. BRADFORD.

To the SECRETARY OF STATE.

OPINIONS

OF

HON. CHARLES LEE, OF VIRGINIA:

APPOINTED DECEMBER 10, 1795.

NEUTRALITY.

It is the right of an enemy to purchase goods and instruments of war of a neutral nation, but it may be denied by a law passed; yet, if the reason of its passage were to impede the military operations of either belligerent power, and to favor the other, such conduct would be a breach of neutrality.

A citizen of a neutral State who, for hire, serves on a neutral ship, employed in contraband commerce with either of the belligerent powers, is not liable to any prosecution for so doing, by the municipal laws of his own State; nor is he punishable personally, though taken in the act, by that belligerent nation to whose detriment the prohibited trade would operate.

PHILADELPHIA, *January 20, 1796.*

THAT an enemy may come into the territory of a neutral nation, and there purchase and thence remove any article whatsoever, even instruments of war, is a law of nations, long and universally established. Horses are, and for a long time have been, an article of commerce from the United States; and, though they are by certain treaties an article of contraband, as by the treaty with France, yet, according to the above principle, they may be purchased and exported by the enemies of France. To deny a right to either of the belligerent powers to carry on this trade, without denying it to both, would be a departure from that line of perfect neutrality which the United States have invariably observed. It is true, this right may be denied to all nations, by a law to be passed for that purpose at this time; but, if the reason for passing such a law be to impede the military operations of either belligerent power, and to favor the other, it is manifest that such conduct would be a breach of neutrality; consequently, while the French and the British are equally permitted to purchase horses, and export them from any of the States, as they heretofore have been and now are permitted, neither have any just cause of complaint. Indeed,

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I may add here, that, if the individual citizens of the United States carry on a contraband commerce with either of the belligerent powers, neither can charge it upon the government of the neutral nation as a departure from neutrality. Forfeiture of the goods and ship, is the penalty annexed to such acts by the law of nations; and if this were not so, it would be in the power of individuals to involve the neutral nation in war, against its will.

It is not considered as a *duty* imposed upon a nation by a *state of neutrality* to prevent its seamen from employing themselves in contraband trade. Nor are there to be shown any instances where a neutral nation has exercised, or attempted to exercise, its authority in restraining practices or employments of this kind; and the reason is, that it would be found very embarrassing to the executive power, and at the same time very oppressive to the liberty of the citizen, and generally nugatory. If a citizen of a neutral State, for hire, serves as a mariner on board of a neutral ship employed in contraband commerce with either of the belligerent powers, he is not liable to any prosecution or punishment for so doing, by the municipal laws of his own State; nor is he punishable personally, according to the laws of nations, though taken in the fact, by that belligerent nation to whose detriment the prohibited trade would operate. In such a case, the contraband merchandise, and the vessel too, (unless excepted by treaty,) may be seized and confiscated; and thus the owner of the property is punished by the loss of it; but the mariner, rendering personal service, suffers no penalty or loss whatever—unless, perhaps, a loss of his wages shall ensue from a disappointment in the freight. But it is not prohibited to a neutral vessel to carry provisions to the fleets or armies of either enemy, except to a besieged place, for its relief under exigent circumstances; and, according to this rule, it is lawful for the citizens of the United States to carry in their own vessels flour and other provisions from their own country to the fleets and armies of Britain, as well as France, which are expected at St. Domingo.

Mariners may be said to be citizens of the world; and it is usual for them, of all countries, to serve on board of any merchant ship that will take them into pay; and this practice, from

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the manner of their livelihood, seems, for obvious reasons, founded on convenience, and, in many instances, on necessity. A citizen of a neutral nation has a right to render his personal service as a sailor on board of any vessel whatever employed in mere commerce, though owned by either of the belligerent powers, or the subjects or citizens of either. Nothing hostile can be imputed to such conduct, which, consequently, must be deemed consistent with neutrality. If such conduct be lawful, no restrictions can be warranted tending to interfere with the occupations that individuals may pursue for their emolument or livelihood. In the acts of Congress passed for the punishment of crimes against the United States, it is observable that *mariners* are forbidden to serve on board of a foreign ship-of-war, letter-of-marque, or privateer, but are left at liberty to serve on board a vessel merely commercially engaged. (Laws United States, vol. 3, p. 97.) I have not found any stipulation in any treaty which prohibits such occupation on board a foreign merchant ship, either in war or peace. If the French government or British government, or any other sovereign power, will, by their agents, purchase ships in the United States, and load them with provisions for the use of their fleets or armies, those ships are to be considered as commercially employed. If they be not *attached* to the naval or military expeditions, as part thereof, in accompanying the fleet, or closely following the army from place to place, for the purpose of furnishing supplies, there can be no pretext for restraining the American sailors from hiring on board of them, for the purpose of gaining a support in their customary way of occupation. Should a question arise, whether a foreign vessel, carrying supplies of provisions, be *attached* to an armament or not, it must be decided from the circumstances of each case, which it is impossible to enumerate. It may be noted, that the receiving and obeying orders issued under the authority of the commander of any expedition, might be deemed decisive proof of such vessel being *attached* thereto. If a citizen of a neutral nation were to go on board a merchant vessel of the enemy thus certainly attached to a military enterprise, knowing the object, and with intent to further it as a mariner, it ought to be deemed irregular, and ought to be prosecuted and punished; and such

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doings may properly be interdicted and prevented. However, this is not alleged to have been committed; nor is there reason to believe it will be committed by American citizens, in favor of the British nation.

If a neutral mariner, who renders service in a neutral ship carrying on unlawful and contraband trade with a belligerent power, cannot be punished for so doing, it may be inferred with certainty that such neutral mariner, rendering the like service in an enemy-ship employed in lawful commerce with the neutral country, ought not to be punished, unless the service be rendered in a ship attached to, and making a part of, the hostile armament, with intent to aid the hostility.

The vessels in Virginia which it is said have been lately purchased by British agents, and loaded with provisions, and manned with American seamen, though they are to transport the provisions to the fleet in the West Indies, are not, in consequence thereof, to be considered as attached to, or making a part of, that fleet to which they are to go, so as to make it unlawful for American seamen to navigate them.

I need scarcely to add that this doctrine is to be applied alike to all nations, under similar circumstances; and I believe has been practised during the present war by American seamen, with respect to both France and Great Britain.

CHARLES LEE.

To the SECRETARY OF STATE.

PATENTS FOR INVENTIONS.

Specifications for inventions should be such as to convey to all the world the nature of the invention.

PHILADELPHIA, *February* 10, 1796.

SIR: Upon examining the specification of Elisha Perkins, of his method of removing pains and inflammations from the human body by the application of metallic substances, I doubt whether it be so distinct, intelligible, and certain, as it ought to be before a patent is granted. In all cases, the object of the law is to acquire and distribute useful knowledge; which in no case will be obtainable, unless the invention be so explained that other persons besides the author may understand and use

Powers of the Executive.

it; more especially, when the alleviation of human misery is intended, care should be taken to have a plain and thorough exposition of the art.

Mr. Perkins has not specified in express language—

1st. Whether *all* metals will produce the like effect; and if not, he should describe what sort only will produce it; and how it is to be *composed*, if it be a compound of metallic substances.

2d. What shape and size the instrument ought to have, to be most operative; and whether the point ought to be very sharp, and whether it be the better for being the more sharp.

3d. The words, “applying a pointed piece of metal to the part affected, and drawing it across and from the part to some of the muscular,” &c., so vaguely describe the manner of using it, that there is danger of misunderstanding the directions; and if misused, the instruments may be very mischievous. I think it a good general rule, that a thing capable of doing good if judiciously used, may be very pernicious if misapplied. I wish Dr. Perkins to remove these doubts by a more full and particular specification.

I am, &c.,

CHARLES LEE.

To the SECRETARY OF STATE.

POWERS OF THE EXECUTIVE.

The President cannot appoint a commissioner to make a treaty with Indians, for the purpose of extinguishing their title to lands within the United States, without the advice of the Senate.

PHILADELPHIA, *May* 26, 1796.

THE Attorney General is of opinion that the President alone, and without the advice of the Senate, cannot appoint a commissioner to hold or make a treaty with an Indian tribe, for the purpose of purchasing and extinguishing their title to land within the limits of the United States. The 12th section of the act to regulate trade with the Indians, passed the 19th instant, prohibits every person, *who is not employed under the*

 Execution of Treaties.

authority of the United States, from negotiating any such treaty or convention, directly or indirectly.

The expression *under the authority of the United States* cannot mean any other thing than the constitutional authority of the United States, which it is considered cannot be bestowed on any person but by the President, with the advice of the Senate.

CHARLES LEE.

To the SECRETARY OF STATE.

 EXECUTION OF TREATIES.

Commissioners to execute a treaty must all agree to the same, subscribe their names, and attach their seals thereto.

ALEXANDRIA, *July 23, 1796.*

SIR: I take the earliest opportunity of acknowledging your letter of the 19th, and of communicating my opinion upon the questions propounded by Mr. Howell.

1st. The authority of the commissioners appointed in pursuance of the 5th article of the treaty with Great Britain cannot be duly and legally executed by a majority of them; but they must all agree in their decisions, which must be signed and sealed by them all.

2d. If the two commissioners appointed on the part of Great Britain and the United States disagree in the choice of the third, each is to propose one person; and of the two names so proposed, one shall be drawn by lot. Neither of the original commissioners has a *discretionary* power to withhold his nominee, or to refuse to draw by lot for the third commissioner, according to the terms of the article. For either to refuse to perform this act, would be a breach of the trust and an abuse of the power committed to them.

I am, &c., &c.,

CHARLES LEE,

Attorney General United States.

To the SECRETARY OF STATE.

Reparation of prize ships.

REPARATION OF PRIZE SHIPS.

It is reasonable, as applicable to all nations, to permit a portion of a prize cargo to be sold under the superintendence of the public officers for reparation of the ship: as to France, it is within the 19th article of the treaty of 1778.

As to the sailing, the prize-ship should be permitted to sail whenever the captors wish: a deception on the collector and naval officer affords no ground for detaining it.

PHILADELPHIA, November 15, 1796.

SIR: The four questions propounded to you by the minister of the republic of France, in his letter of the 12th October, are severally answered in your letter of the 24th of the same month, agreeably to the opinions I have formed on those subjects.

I will barely observe, relative to one of the questions, which at first sight seems doubtful, that to permit a part of a prize cargo to be sold for the *necessary* reparation of the prize-ship, under the actual superintendence of our public officers, is reasonable in itself, as applicable to all nations; and as to France, seems to be within the provision of the 19th article of our treaty of 1778 with that nation; the benefits of which cannot be, and never were intended to be, impaired by anything in our treaty of 1794 with Great Britain. Therefore, the 24th article of the last-mentioned treaty may be considered as inoperative upon this question. But if it were to be considered as operative upon it, I think the article should receive rather a liberal than a literal interpretation; and cases of necessity and distress ought to be deemed out of the meaning and intent of it.

The prize-ship should be permitted to sail whenever the captors wish, though their conduct has been illegal, and though the French consul at Charleston has highly misbehaved in holding a court within the United States for condemning the capture as prize, and in causing a sale to be made under his authority. If a deception has been practised with success on the collector and naval officer, as to the goods, yet this affords no ground for detaining the ship. These officers appear to have acted honestly and honorably in this affair; and if they have been mistaken in believing it their duty to detain the prize-ship, under the particular circumstances which had occurred, until they should receive *explicit* instructions from the higher authorities, they are not liable to any censure; nor ought the

Territorial Rights—Florida.

United States to be responsible to the captors for the loss which happened to a part of the goods by the conflagration in Charleston. If the captors had acted legally and fairly, no difference would have taken place between them and the public officers at that city; and they have been fortunate in obtaining an exportation of any of the goods in neutral bottoms, when the captured ship is actually repaired and fitted for sea; which alone would have been authorized to export these goods, if the collector of the customs had been duly and truly informed of the condition of the prize-ship.

I am, &c., &c.,

CHARLES LEE.

To the SECRETARY OF STATE.

TERRITORIAL RIGHTS—FLORIDA.

It is an offence against the laws of nations for any persons, whether citizens or foreigners, to go into the territory of Spain with intent to recover their property by their own strength, or in any manner other than its laws permit.

For the recovery of their property in Florida, and for redress of injuries done there, our citizens must apply to the tribunals of that Province.

If a Spanish subject who has violated the territorial law of Florida shall be within the United States at the time of demand for him as a subject and fugitive from justice, he ought to be given up for trial and punishment; yet there is no law directing the mode of proceeding.

If the commandant of the island of Amelia were arrested in Georgia at the suit of an individual, the United States have no power to interfere; if, however, the suit be a public prosecution in the name of the State of Georgia, or of the United States, it would be proper for the Executive to interfere.

The treaty with Spain does not extend the jurisdiction of our courts to offences committed in Spain, nor *vice versa*; and according to the common law, the commandant of the island of Amelia is not liable to any public prosecution before any of our courts for his transactions in Florida.

PHILADELPHIA, January 26, 1797.

SIR: The letter of the minister of Spain, of the 11th of this month, representing a violation of the territorial rights of his Catholic Majesty, by William Jones, and others his associates; and also complaining of the arrest and prosecution of Don Onofre Gutierrez y Rosa, commandant of the island of Amelia, has been, agreeably to your request, duly considered.

It is an offence against the laws of nations for any persons, whether citizens or foreigners, inhabiting within the limits of

Territorial Rights—Florida.

the United States, to go into the territory of Spain with intent to recover their property by their own strength, or in any other manner than its laws authorize and permit. If William Jones, a Spanish subject, had been apprehended in Florida, as he might lawfully have been, he might have been treated and punished for the transgression as a subject of Spain, according to the laws of that province. So, too, the Americans who joined, aided, and abetted him in the misdemeanor, were amenable to the laws of the province where they committed the offence, and might have been apprehended, tried, and punished there, according to those laws. William Jones, and the Americans who accompanied him, are less excusable when it is recollected that, by the 20th article of the treaty between Spain and the United States, free access to the courts of justice in each nation is stipulated and reciprocally granted to the inhabitants of the other; consequently, to the tribunals in Florida our citizens are bound to apply for recovery of their property in that province, as well as for the redress of injuries done them there; and more especially William Jones, a Spanish subject, ought to have applied to them respecting his runaway slaves.

The constitution gives to Congress, in express words, the power of passing a law for punishing a violation of territorial rights, it being an offence against the law of nations, and of a nature very serious in its consequences. That the peace of mankind may be preserved, it is the interest as well as the duty of every government to punish with becoming severity all the individuals of the State who commit this offence. Congress has passed no act yet upon the subject, and Jones and his associates are only liable to be prosecuted in our courts at common law for the misdemeanor; and if convicted, to be fined and imprisoned. The common law has adopted the law of nations in its fullest extent, and made it a part of the law of the land.

If a demand were formally made that William Jones, a subject and fugitive from justice, or any of our own citizens, heinous offenders within the dominion of Spain, should be delivered to their government for trial and punishment, the United States are in duty bound to comply; yet, having omitted to make a law directing the mode of proceeding, I know not how, accord-

Territorial Rights—Florida.

ing to the present system, a delivery of such offender could be effected. To refuse or neglect to comply with such a demand, may, under certain circumstances, afford to the foreign nation just cause for war; who may not be satisfied with the excuse that we are not able to take and deliver up the offenders to them. This defect appears to me to require a particular law.

It is not distinctly stated by the minister, whether the commandant of the island of Amelia was arrested in Georgia at the suit of an individual prosecuting for himself, or at the suit of the State of Georgia, or of the United States. If the suit be of the first description, the United States have no power to interfere, but the laws are to have their course. Though the commandant went from Florida into Georgia, by the orders of the governor, he remained, according to the laws of nations, liable to be arrested at the suit of an individual; the immunities or privileges such as an ambassador is permitted to enjoy not being attached to him, by reason of that particular function which he was sent to perform. However uncivil the treatment he has received may appear, neither the law of nations, nor any law of the United States, forbids such a functionary from being sued by an individual, even though the suit be without sufficient cause, or otherwise not maintainable. Supposing, in the present case, the action to have been brought by the individual for a tort committed out of the jurisdiction of the United States, in a foreign country, by a foreign officer, under the orders of the sovereign authority: in my opinion, it cannot be sustained. Yet, I do not admit that any right exists in the government of the United States to interpose; and the bail cannot be discharged, but in the ordinary forms, according to the laws of Georgia. But, if the suit be a public prosecution, in the name of the State of Georgia, or of the United States, it is proper for the Executive to interfere;—in the former case, by writing to the governor of that State, requesting him to cause the necessary steps to be taken for dismissing it; or, in the latter, by directing the district attorney of the United States to the same purport.

The 20th article of the treaty is not construed to extend the jurisdiction of our courts to offences committed in Spain, or *vice versa*; and it is well established, that, according to the doctrine of the common law, the commandant is not liable to any

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public prosecution before any of our courts for his transactions in Florida.

Though some inconveniences may occasionally occur to foreign officers, such as the commandant of a fort or district, who come into the United States upon public business, unless they are exempt from arrests at the suit of individuals, by some special law to be made for that purpose; yet I am not satisfied that the subject is of so much concern that legal provision of that import ought to be made.

Probably the instances will rarely happen when any inconvenience shall be experienced from the law as it now stands. It might, however, serve to satisfy the minister and his nation, with whom the most sincere friendship is desired, if such a law were to be passed, in consequence of the remonstrance he has thought proper to make on this occasion; and in other respects it might be found conducive to an harmonious intercourse between the public officers along our frontiers. But a similar exemption should prevail in the Spanish dominions as to our officers who go there on public missions.

I am, &c., &c.,

CHARLES LEE,
Attorney General.

To the SECRETARY OF STATE.

LIBELLOUS PUBLICATIONS.

Certain letters addressed to Philip Fatio, and published, concerning the King of Spain and his minister plenipotentiary here, are libellous, and the editor is indictable.

A malicious defamation of any person, and especially a magistrate, by printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule, is a libel.

If a foreign ambassador commit an offence in our country, it belongs to the President, not to an individual citizen, to take notice of it.

PHILADELPHIA, *July 27, 1797.*

SIR: I have examined the complaints of the minister of Spain against William Cobbett, editor of Porcupine's Gazette, which he has made to you in his letter of the 21st instant. The several letters addressed to Philip Fatio, published on the 14th, 15th, and 19th of July, to which he has referred, do, in my

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opinion, contain libellous matter against his Catholic Majesty, and against Carlos Martinez de Yrujo, his minister plenipotentiary here; for which the editor is indictable in the circuit court of the United States for the district of Pennsylvania. The prosecution is, consequently, to be committed to Mr. Rawle, the attorney of the United States for this district; to whom you will please to write, and send a copy of this letter.

That it may appear upon what ground this opinion has been formed, I will make a few remarks.

A libel is defined to be a malicious defamation of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule.—4 Bl. Com. 150.

According to this definition, it is manifest that each of those letters may be deemed libellous. As yet, in the United States, the line between the freedom and the licentiousness of the press has not been distinctly drawn by judicial decision. With respect to national concerns among ourselves, as well as with respect to foreign nations, our presses have been unlimited and unrestrained. If on those subjects the liberty of the press can be excessive, or carried to licentiousness, it must be admitted that, in many instances, licentiousness of the press has prevailed in our country. It is important that this subject should be understood, when it is considered that the public mind is in a great degree formed by the press, and that the public opinion is in a great measure directed by the press.

Lord Mansfield has said "that the liberty of the press consists in printing without any previous license, subject to the consequence of law;" and in this definition I concur with the learned judge. It will, then, be no infringement of the liberty of the press to bring a printer before the tribunal of justice to answer for his publications:—if innocent in themselves, he will not be punished; if otherwise, the injury should be redressed.

An ambassador, or other representative of one foreign nation residing in another, is entitled to be treated with respect, so long as he is permitted to continue in the country to which he is sent, and especially ought not to be libelled by any of the

citizens. If he commits any offence, it belongs, in our country, to the President of the United States to take notice of it, and not to any individual citizen. The President may dismiss him, or desire his recall; or complain to his sovereign, and require satisfaction.

An affront to an ambassador is just cause for national displeasure, and, if offered by an individual citizen, satisfaction is demandable of his nation. It is not usual for nations to take serious notice of publications in one nation containing injurious and defamatory observations upon the other; but it is usual to complain of insults to their ambassadors, and to require the parties to be brought to punishment. I shall not anticipate the defence which Mr. Cobbett may make, but mean only to say that he should be prosecuted; leaving the event to the proper tribunal.

It was considered by me whether the trial could be had in the Supreme Court, and I think it cannot.

By the constitution, it is declared that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress from time to time may establish, and shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made or to be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls, &c., &c. 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 other cases, appellate jurisdiction, &c.—3d art., 1st and 2d sections.

The act to establish the judicial courts of the United States, passed on the 24th September, 1789, gives to the Supreme Court exclusive jurisdiction of suits and proceedings against ambassadors or other public ministers, so far as is consistent with the law of nations. It also gives original, but not exclusive, "jurisdiction of suits brought by ambassadors or other public ministers, or in which a consul or vice-consul shall be a party."—Section 13.

Thus it appears that the constitution has given to the Supreme Court a *capacity* to hold criminal jurisdiction in all cases affecting ambassadors, which expressions comprehend a libel of an

Diplomacy.

ambassador; but that no law exists calling into action this constitutional capacity. A criminal prosecution for a libel upon an ambassador is not a suit brought by him, but is a proceeding of the United States; and therefore it is not within the 13th section of the act which has been mentioned. At the August term, (1796,) after mature consideration, it was determined by four judges of the Supreme Court, that, with regard to the judicial power of the United States granted by the constitution, it remains inactive and unexercisable until by law it is drawn into action.

I am also of opinion that an ambassador is not liable in any case, according to the law of nations, to answer either criminally or civilly before any court of the foreign nation to which he is sent. Conformable to this principle is the 25th section of the act for the punishment of certain crimes, passed on the 30th April, 1790.—Vol. 1, p. 111.

Hence it seems evident that the Supreme Court has not an original *criminal* jurisdiction in any case whatever, though it is capable of having such jurisdiction in cases affecting ambassadors—such as an assault, or libel, or other crime done to an ambassador—whenever a law shall be passed for such purposes.

I am, &c., &c.,

CHARLES LEE.

To the SECRETARY OF STATE.

DIPLOMACY.

A foreign minister should correspond with the Secretary of State on matters which interest his nation, and not through the press of our country. He has no authority to communicate his sentiments to the people of the United States, by publications in manuscript or print.

PHILADELPHIA, *July 27, 1797.*

SIR: You will observe that my letter of this date contains an answer to yours of the 24th instant upon one of the subjects which you submitted to my consideration; and I shall now give my opinion on the other.

The Chevalier de Yrujo, in sending a translation of his letter to you of the 11th instant, to Benjamin Franklin Bache

Misdemeanor.

and William Cobbett, and directing it to be printed, deviated from propriety. A foreign minister here is to correspond with the Secretary of State on matters which interest his nation, and ought not to be permitted to do it through the press in our country. He has no authority to communicate his sentiments to the people of the United States, by publications either in manuscript or print, which he shall write and circulate while resident among us; but his intercourse is to be with the Executive of the United States only, upon matters that concern his mission or trust. His conduct in this instance I deem a contempt of the government, for which he is reprehensible by the President.

I cannot discover that this letter is libellous on the government or any public officer, though it may be charged with a degree of indecency and insolence.

The publication of it by Mr. Bache first, and Mr. Cobbett afterwards, cannot be considered as criminal, unless in the light of a contempt to the government of the United States; for they ought not to have joined the minister in the act. I am of opinion, therefore, that no prosecution of either of the editors can be maintained for a libel in this instance, and that no legal prosecution of either of them is advisable.

I am, &c., &c.,

CHARLES LEE.

To the SECRETARY OF STATE.

MISDEMEANOR.

It is a misdemeanor to plot and combine to disturb the peace and tranquillity of the United States, and to draw them into a war with a foreign nation.

PHILADELPHIA, *July 28, 1797.*

SIR: Being informed that William Blount was lately met on the road, a few miles beyond Staunton, in Virginia, and that some of the citizens intended to pursue him and arrest him, and bring him back to Staunton, I think it advisable that you should transmit there some evidence that will authorize him to be taken into legal custody, and dealt with according to law.

Mr. Archibald Stewart, at or near Staunton, is a gentleman

Misdemeanor.

of reputation and ability at the bar, and is recommended to be employed as counsel for the United States in this instance, to whom may be enclosed the following papers:

1. The warrant issued by Judge Peters, which was not executed, and can be only executed within the State of Pennsylvania. This will be evidence that the proper affidavits have been made before him for arresting William Blount; and, of itself, would be sufficient evidence to a justice of the peace in Virginia to issue a new warrant directed to any proper officer in Virginia, for arresting and bringing William Blount before him or some other justice of that State.

2. Lest the warrant above mentioned may be deemed insufficient for authorizing a new one, as above stated, let the affidavit of Major Stagg, proving the authenticity of the letter of William Blount, dated 21st April last, and the sworn copy of Carey's deposition, accompany the warrant.

Should Mr. Blount be arrested in Virginia, and imprisoned for want of bail, application must be made to Judge Griffin for a warrant to the marshal of Virginia for removing him to Philadelphia; there to be delivered to the marshal of Pennsylvania. For this proceeding, I refer to the judicial act, 24th September, 1789, section 33.

The charge being a misdemeanor, in plotting and combining to disturb the peace and tranquillity of the United States, and to draw them into a war with a foreign nation, as also in retaining an officer of the United States in an enterprise unlawful by common law, and perhaps by the act of June 5th, 1794, Mr. Blount may be bailed by any justice of the peace for appearing before the circuit court of the United States for the district of Pennsylvania. In this State the offence was partly and principally committed; and therefore the trial must be here.

All the expenses are to be paid by the United States, for delivering the prisoner here, as well as the compensation to Mr. Stewart for his services.

If Mr. Blount is not arrested in Virginia, you should desire the papers to be returned to you, as they may be used in another State.

I am, &c., &c.,

CHARLES LEE.

To the SECRETARY OF STATE.

Consular Privileges.

ASSURANCE OF PARDON.

The district attorney may assure a counterfeiter who shall disclose his accomplices, and produce the plates and counterfeited paper, of a pardon; but the mere disclosure is not enough.

PHILADELPHIA, *November 18, 1797.*

SIR: I concur with you that Pardon Smith may be pardoned by the President, if he will previously disclose to the attorney of the United States in Massachusetts district the name of the offender at New York who was *particeps criminis* in the counterfeiting, and will also cause to be produced and delivered to the attorney the plates and paper which he says are concealed and may be obtained by him. The district attorney may be instructed to assure, by promise, a pardon to him when these conditions shall have been performed; and may be directed to do what is necessary for obtaining the plates and paper. Merely to discover the name of the offender in New York is not enough, in my opinion, to entitle the convict to pardon; and the grant of pardon should be deferred till an answer shall be received from the attorney of the district, informing you of the result of the intended discovery of the plates and paper.

I am, &c., &c.,

CHARLES LEE.

To the SECRETARY OF STATE.

CONSULAR PRIVILEGES.

A consul is not privileged from legal process by the general law of nations, nor is the French consul-general by the consular convention between the United States and France.

Though a consul, for a transaction in which he acted as the commercial agent of his government, the President has no constitutional right to interpose his authority, but must leave the matter to the tribunals of justice.

PHILADELPHIA, *November 21, 1797.*

SIR: I have taken into consideration the letter of citizen Letombe, consul-general of the French republic in the United States of America, bearing date the 16th instant, with the several papers which accompanied it.

The United States have acknowledged citizen Letombe in the character of consul-general; and thus only they know him. As such, he is not privileged from legal process, either by the

Condemnation of Prize.

general law of nations, or by the consular convention between the United States and France; and, if he is authorized to represent the republic of France in any ministerial character, he has never yet so offered himself or been received. The second article of the convention seems to me to preclude all doubt respecting the suability of the consul-general. The immunities and privileges annexed to his office are there distinctly enumerated; and, in all other respects, he is subject to the laws as our own citizens are. Though the transaction which has given rise to the suit instituted by John Coffin Jones was not of a private character, but of a public nature, which concerned the republic of France, and in which the consul-general acted as the commercial agent of the republic; yet the President of the United States has no constitutional right to interpose his authority, but must leave the matter to the tribunals of justice.

It does not belong to me, in my public capacity, to advise how the consul-general may proceed to relieve himself from the obligation of giving bail; yet, having a wish that every inconvenience may be avoided by him, consistent with the laws of our country, I will venture to suggest that the right to hold him to bail, or to recover the debt from him, cannot, in my opinion, be maintained; and as to the former, any one of the justices of the Supreme Court is competent to decide at his own mansion, whenever application shall be made. The reason for this opinion is, that it evidently appears the contract was founded on the credit of the French republic only, and not on the private credit of citizen Letombe.

I am, &c., &c.,

CHARLES LEE.

To the SECRETARY OF STATE.

CONDEMNATION OF PRIZE.

A captured vessel must be brought within the jurisdiction of the country to which the captor belongs, before a regular condemnation can be awarded.

DECEMBER 19, 1797.

THE Attorney General has considered the case of the English ship John, as represented in the note of the Secretary of State dated yesterday.

Patents for Virginia Lands.

If it be a rule established by the laws of nations, (which the Attorney General thinks is the case,) "that a captured vessel must be brought within the jurisdiction of the country to which the captor belongs, before any regular condemnation can be awarded," it must follow that the ship John has not yet been legally divested from the original British owners, who, in case of recapture, on paying salvage will be entitled to restitution; or, in case the ship should be found in any of the British dominions, might recover her in an action of *detinue*.

The rule before mentioned is designed to prevent piracy and other unjust seizures on the high seas, which it is the interest of all nations to prevent.

As to the United States, they have a right to order the ship out of their territory; and, until regularly condemned, they may refuse to permit her to remain in their ports. Perhaps it will be most prudent to be passive.

It need scarcely be added, that, in the opinion of the Attorney General, the ship John ought not to be either bought, or employed for any purposes whatsoever, on account of the United States.

CHARLES LEE.

To the SECRETARY OF STATE.

PATENTS FOR VIRGINIA LANDS.

Patents under the act of June 9th, 1794, for lands in Virginia, cannot be issued until the claimant shall have first complied with the laws of Virginia to which the act refers.

PHILADELPHIA, *December 21, 1797.*

SIR: I have considered the question proposed in your letter of the 16th instant, which I did not receive until the 19th.

The act of June 9th, 1794, provides and requires that patents be issued in those cases where the laws of Virginia have been complied with, and every applicant for a patent must produce "a survey, agreeably to the laws of Virginia," for the tract to which he is entitled, to the Secretary of the Department of War. If a survey be produced, and it be not according to the laws of Virginia, a patent ought not to be granted. Whether a survey be agreeable to the laws of Virginia, is subject to the decision, in the first instance, of the Secretary of War, as the

Patents for Virginia Lands.

act requires it to be produced to him,—which must be understood to be for some useful purpose; and this would answer no useful purpose, unless he can investigate and decide that question, and can prevent a patent from issuing in any case where it shall appear to his judgment that there has not been a compliance with the laws of Virginia.

A law was passed in Virginia at the October session, 1783, entitled “An act for surveying the lands given by law to the officers and soldiers on continental and State establishments, and for other purposes,” to which I take leave to refer you. This prescribed many things to be done for a fair appropriation among the claimants of the lands set apart for the military bounties; and particularly how the locations of warrants, in order of priority, were to be made. It is suggested by Gen. Morgan, in his caveat, that the surveys upon which patents are sought by R. C. Anderson, Massey O’Bannion, and W. Lytle, have not been made in conformity with this law, but in a manner injurious to his and other officers’ rights; and, therefore, that the emanation of the patents should be stayed until an investigation shall be made into the question whether these surveys have or have not been made agreeably to the laws of Virginia. The information of General Morgan is not on oath; yet it is notice to the Secretary of State of his objection, and may justify him in desiring the Secretary of War to make the proper inquiry, with whom affidavits should be lodged verifying the objections to be made by any credible person acquainted with the truth of them, before any person authorized to administer an oath. I pretend not to pass any opinion, now, whether the allegations of General Morgan be well or ill founded; they being left open to inquiry and proof before another tribunal.

To answer your question more distinctly, I add, that if the parties applying for patents comply with the act of Congress of the 9th of June, 1794, the issuing of patents ought not to be delayed. But no person can be said to comply with this act of Congress, who has not complied with the laws of Virginia to which it refers, and with which it requires a compliance. General Morgan alleges that there has not been a compliance with the laws of Virginia, and solicits an inquiry

Actions against Foreigners.

into this allegation before patents are issued in certain cases, which he describes. The request is, in my opinion, reasonable in itself, and tending to promote justice.

I have, &c., &c.,

CHARLES LEE.

To the SECRETARY OF STATE.

ACTIONS AGAINST FOREIGNERS.

The President will not interfere with judicial proceedings between an individual and the commissioner of a foreign nation where the controversy may have a legal trial. But a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judicial tribunal in the United States.

PHILADELPHIA, *December 29, 1797.*

SIR: I have taken into consideration your letter of the 23d, enclosing the note of his Britannic Majesty's minister, and the copy of Henry Sinclair's memorial, complaining of two suits now depending against him in a court of law at Alexandria.

If the cause of action is fully and truly stated in the memorial, Henry Sinclair, upon a plea to the jurisdiction of the court, ought to prevail before the court; for it is as well settled in the United States as in Great Britain, that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States.

Though this be so, yet, according to the constitution and laws of the United States, the Executive cannot interpose with the judiciary proceedings between an individual and Henry Sinclair, whose controversy is entitled to a trial according to law, and to whom it is hoped justice will be impartially and speedily administered.

The principle on which the interference of the President might be thought proper is the same that has been settled in the case of General Collot, and I believe in some other cases; in all of which there has been one and the same opinion against the power of the Executive to interfere.

I am, &c., &c.,

CHARLES LEE.

To the SECRETARY OF STATE.

TREATY WITH GREAT BRITAIN.

Public officers should furnish authenticated copies of documents in their custody when demanded, and should assist in bringing forward testimony according to the duties of their several stations, and individuals should not refuse to give testimony.

PHILADELPHIA, *January 3, 1798.*

SIR: I have considered with attention the representation bearing date the 16th of December last, made by his Britannic Majesty's minister, of the difficulties which the creditors alluded to in the 6th article of the treaty of amity, commerce, and navigation have experienced, and are likely to experience, in obtaining proofs necessary to substantiate their claims before the tribunal appointed under the treaty. It was neither known nor imagined by me, before I read the communication of the minister, that clerks or other persons holding offices of record have refused to furnish authenticated copies of documents in their custody, or that individuals would refuse to give testimony against the debtors. I hope instances of this kind have been rare, and will not occur again.

I am persuaded that both the honor and interest of the United States concur in a speedy and due execution of the 6th article of the treaty, and that it is reasonable and proper to pass a law to enable the claimants to produce regular testimony of the various facts which the treaty requires to be proved. It is expressly stipulated "that the commissioners shall have power to examine all such persons as shall come before them, on oath or affirmation; and also to receive in evidence, according as they may think most consistent with equity and justice, all written depositions, or books, or papers, or copies or extracts thereof; every such deposition, book, or paper, or copy or extract, being duly authenticated, either according to the legal forms now respectively existing in the two countries, or in such other manner as the said commissioners shall *see cause to require or allow.*" This stipulation implies that public officers should furnish copies of papers when demanded, and should assist in bringing forward testimony according to the duties of their several stations; and, also, that individuals should not refuse to give testimony. To aid and facilitate the

Extradition.

true operation of this provision, when difficulties occur in the United States, is an obligation of good faith; and I believe will otherwise promote their interest. It is my opinion, therefore, that a law ought to be passed, with the proper regulations for removing the difficulties complained of, (but not exactly as suggested by the British minister,) by enforcing individuals to give testimony, and all public officers to do their duty, to the end that this article may be carried into full execution according to justice and its true intent.

I have the honor, &c., &c.,

CHARLES LEE.

To the PRESIDENT OF THE UNITED STATES.

EXTRADITION.

A requisition from the British minister is not authorized by the 27th article of the treaty of 1794, unless the persons demanded are charged with murder or forgery committed within the jurisdiction of Great Britain.

PHILADELPHIA, *March 14, 1798.*

SIR: I have considered the affidavits of William Brigstock, —, *alias* John Johnson, and Yellis Mandeville. Neither of these states where the crime of murder or piracy was committed,—whether within the jurisdiction of England or any of the British dominions, or whether on the high seas. I have supposed the latter; and if this be the fact, it is plain that the requisition of the British minister is not authorized by the 27th article of the treaty of 1794, which is confined expressly to persons who are charged with murder or forgery committed within the jurisdiction of either nation, and who seek refuge in the other—meaning their territorial jurisdiction, respectively.

The criminal tribunals in the United States are fully competent to try and punish persons who commit murder on the high seas, or piracy, as may appear from the 8th, 9th, and 10th sections of the act of 30th April, 1790. One of the persons (Brigstock) is a citizen of the United States; and it is not to be reasonably expected that his country will not exercise the right of trying him, as he is already in the hands of its officers of justice. The other two, perhaps, are citizens also, and entitled to the like treatment exactly that Brigstock is. But,

Treason.

supposing them to be foreigners, the stipulation in the 27th article is not applicable to their case; and as they are triable in the courts of the United States, and in the custody of our laws for trial, I deem it more becoming the justice, honor, and dignity of the United States, that the trial should be in our courts.

Suppose it was not the British nation, (whose system of jurisprudence is humane, fair, and just,) but the French, Spanish, or Prussian, that had made the requisition: would it be right to comply with it? I think not; and on a matter of this kind, the same measure should be meted by us to all nations, especially where our own citizens are concerned, and treaties do not require a different rule.

I think the evidence of that kind, that the prisoners should be committed for trial in New Jersey; and it is my sincere wish that, if guilty of the horrid crime of which they are accused, they may be convicted, and may suffer the punishment of our law.

I am, &c., &c.,

CHARLES LEE.

To the SECRETARY OF STATE.

TREASON.

It is treason for a citizen or other person not commissioned, within the United States, to abet France during a maritime war with her.

BUCK TAVERN, *August 21, 1798.*

SIR: Having taken into consideration the acts of the French republic relative to the United States, and the laws of Congress passed at the last session, it is my opinion that there exists not only an *actual* maritime war between France and the United States, but a maritime war *authorized* by both nations. Consequently, France is our enemy; and to aid, assist, and abet that nation in her maritime warfare, will be treason in a citizen or any other person within the United States not commissioned under France. But in a French subject, commissioned by France, acting openly according to his commission, such assistance will be hostility. The former may be tried and punished

Prize Ship and Crew—How to be disposed of.

according to our laws; the latter must be treated according to the laws of war.

I have thought it my duty to make this communication in consequence of the information you received from Rhode Island, of the intentions of a Frenchman, whose name I do not now call to mind, who is said to be somewhere in this country, on the business of buying ships and supplies of a military kind, for the West Indies. He should be apprehended and tried as a traitor, unless he has a commission, and acts according to it; in which case he should be treated as an enemy, and confined as a prisoner of war.

I have the honor, &c., &c.,

CHARLES LEE.

To the SECRETARY OF STATE.

PRIZE SHIP AND CREW—HOW TO BE DISPOSED OF.

If the prize be a pirate, the officers and crew are to be prosecuted in the circuit court of the United States, without respect to the nation to which each individual may belong.

If it be regularly commissioned as a ship-of-war, the officers and crew are to be detained as prisoners, except such as are citizens of the United States.

Citizens of the United States who aid a nation with whom we are at war on the high seas, against the United States, are guilty of treason.

Offenders against the United States may be arrested, imprisoned, or bailed, agreeably to the usual mode of process in a State, but can be tried only before the court of the United States having cognizance of the offence.

Proceedings against the ship and cargo are to be had before the district court of the United States, according to the laws of Congress and the usage and practice of courts of admiralty in prize causes.

ALEXANDRIA, *September 20, 1798.*

SIR: I take the liberty of writing to you on an interesting subject, concerning which you will perhaps hear from the Secretary of State.

According to the account given in the Norfolk paper of the 15th, it seems propable that the ship *Nigre*, prize to the *Constitution*, will be found to be a pirate. If, after due inquiry, (which you are requested to make, and for that purpose to go to Norfolk,) it shall appear to be the case, the officers and crew, and all others on board having any agency in the ship, are to

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be prosecuted (witnesses excepted) in the circuit court of the United States for the district of Virginia, according to the laws of the United States, without respect to the nation to which each individual may belong, whether he be British, French, American, or of any other nation.

On the other hand, if the ship is regularly commissioned and authorized by France as a public or private ship of war, all the officers and crew are to be detained as prisoners, at the expense of the United States—except such as are citizens of the United States, or of some one of them, who may be tried for treason in adhering to, and aiding, the enemies of the United States. After mature consideration of the decrees of France, and of the laws of the United States, and the conduct of each nation to the other, it is my opinion that the two nations are in a state of maritime war; and, consequently, that the citizens of the United States who aid and adhere to France in acts of hostility on the high sea, against the United States and their fellow-citizens, are guilty of treason. Perhaps this opinion may be found erroneous; if so, such citizens, if acquitted of treason, may be indicted for felony, under the 9th section of the act passed 30th April, 1790, entitled "An act for the punishment of certain crimes against the United States."

I conceive the law of Virginia, which requires the examination before a county or corporation court, of criminals triable in the State courts, does not apply to criminals triable before the courts of the United States in the Virginia district. Upon this point, reference may be had to the 23d section of the 20th chapter of the acts of Congress of 1789. By this section, an offender against the United States is, agreeably to the usual mode of process against offenders in such State where he is found, to be arrested and imprisoned, or bailed, as the case may be, for trial before the court of the United States having cognizance of the offence. The *arrest* is to be agreeably to the usual mode of process in the State; the *imprisonment* or *bailment* is also to be agreeably to the usual mode of process in the State; but the *trial* is to be only before the court of the United States having cognizance of the offence. The examination preparatory to the trial is to be before a magistrate, who is to send to the clerk's office of the court, copies of the process and

Service of Process on a British Ship-of-war.

the recognizances of the witnesses, for their appearance to testify. To admit a different construction of this section, would be to admit a different mode of *trial* of the same offence against the United States, in their courts, as it might happen to be cognizable in one district or in another; for the examination before a county or corporation court, according to the law of Virginia, is a species of trial that gives a chance of acquittal unknown in other States. Besides, the text of the Virginia law seems to be confined to offenders amenable to the courts of the State.

Against the ship and cargo, proceedings are to be had before the *district* court of the United States in Virginia, according to the laws of Congress and the usage and practice of courts of admiralty in prize causes.

It will afford me satisfaction to receive from you a statement of facts relative to this ship, and your ideas on the matters of law which have been the subject of these remarks.

I am, &c., &c.,

CHARLES LEE.

To THOMAS NELSON, Esq.,

District Attorney U. S., Yorktown, Virginia.

SERVICE OF PROCESS ON A BRITISH SHIP-OF-WAR.

It is lawful to serve either civil or criminal process upon a person on board a British man-of-war lying within our territory.

MARCH 11, 1799.

THE Attorney General most respectfully reports to the President of the United States, as follows:

The incidents relative to his Britannic Majesty's packet *Chesterfield*, commanded by Captain Jones, are understood to produce a question whether judicial process may be lawfully served on board a public ship-of-war belonging to his Britannic Majesty, lying alongside a wharf in the city of New York, within the territorial jurisdiction of the State of New York.

This question is deemed of great moment to be rightly settled; and, therefore, it has been very maturely considered with reference to the general laws of nations, the treaty of London

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between the United States and Great Britain, and the laws and usages of the United States.

It may be assumed, as a doctrine perfectly and incontrovertibly established, that the judicial power of a nation extends to every person and every thing in its territory, excepting only such foreigners as enjoy the right of extraterritoriality, and who, consequently, are not looked upon as temporary subjects of the State. "The empire, united to the domain, establishes the jurisdiction of the nation in its territories or the country that belongs to it. It is that, or its sovereign, who is to exercise justice in all the places under his obedience, to take cognizance of the crimes committed, and the differences that arise in the country."—Vattel, b. 2, sec. 84. "When a nation takes possession of certain parts of the sea, it enjoys the empire as well as the domain, for the same reason we have alleged in treating of land. These parts of the sea are within the jurisdiction or the territory of the nation; the sovereign commands there; he makes laws, and may punish those who violate them; in a word, he has the same rights there as on land, and, in general, all those given him by the law of the State."—Vattel, b. 1, sec. 295.

"In general, all the rights which relate to the internal government belong absolutely to the sovereign, and extend to every person and every thing in the territory."—Martens, b. 3, ch. 3, sec. 1. "The supreme police extends to every person and every thing in the territory: foreigners are subject to it, as well as the subjects of the State, excepting only such *foreigners* as enjoy the right of extraterritoriality, and who, consequently, are not looked upon as temporary subjects of the State."—Idem, sec. 3, p. 85. "One of the most essential rights in the hands of the sovereign, is the judiciary power. It extends indiscriminately to all who are in the territory, and the sovereign only is the source of it; but it must be remembered that there are *persons* whose extraterritoriality exempts them from this jurisdiction, such as foreign princes and their ministers, with their retinue."—Idem, sec. 19, p. 102.

According to the general rule established by these citations, every ship, even a public ship-of-war of a foreign nation, at anchor in the harbor of New York, is within the territory of

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the State of New York, and subject to the service of judicial process. If an exemption from this rule is claimed by a foreign ship-of-war, it is incumbent on such ship to set forth and maintain clearly and satisfactorily its right to the exemption, or it must be deemed within the general rule. The officers and crew of a public ship-of-war, being admitted into the United States, are entitled to be treated with hospitality and kindness; but this does not, in reason, require that the ship should be exempt from judicial process; and more especially when they are bound by every kind of obligation to act in conformity to the laws of the country which affords them and their ship its sovereign protection while within its jurisdiction.

It is expressly provided by the twenty-third article of the treaty of London, that "the ships-of-war of each of the contracting parties shall at all times be hospitably received in the ports of the other; *their officers and crews paying due respect to the laws and government of the country.*" This is conceived to be declaratory of the usage of nations; and here it may be observed, that hospitality, which includes protection, is to be enjoyed upon condition that the laws and government of the country are respected. To disobey judicial process authorized by law, or to resist it, on board of the ship, is inconsistent with a due respect to the laws and government of the country. The article further stipulates that "the officers shall be treated with that respect which is due to the commission which they bear; and, if any insult should be offered to them by any of the inhabitants, all offenders in this respect shall be punished as disturbers of the peace and amity of the two countries."

Here the two nations seemed to have defined the benefits and favors to be reciprocally enjoyed by the officers and crews of the ships-of-war of each, when in the territory of the other; and, from the omission to stipulate an exemption from legal process while on ship-board, it may be inferred such exemption was not to be expected.

By the seventeenth section of the act of the 4th August, 1790, it is made unnecessary to report and enter at the custom-house any ship-of-war, or any ship-employed by any prince or state as a public packet for the conveyance of letters and despatches, not permitted by the laws of such prince or state

to be employed in the transportation of merchandise in the way of trade; and, pursuing the spirit of this law, the President's instructions, dated 4th of August, 1793, to the custom-house officers, forbid them to inspect *any vessel of war in the immediate service of the government of a foreign nation* until further order; declaring, for a reason, that the propriety of inspecting such a vessel was not *without question in reference to the usage of nations*.

In the summer of 1794, under the authority of the collector of New York, some of the officers of the custom-house, as the affair was represented by the French minister to the American government, entered on board the ship *Favorite*, a national ship-of-war of France, and seized arms and ammunition on board of her belonging to the French republic, suspected to be intended for exportation, contrary to law, and insulted the French flag in an outrageous manner. Mr. Fauchet complained of this proceeding as an infraction of the law of nations, which nothing could justify, and demanded justice of the authors. The President answered, that he highly disapproved that a public vessel of war, belonging to a foreign nation, should be searched by officers of the customs upon a suspicion of illicit commerce; that the ground of suspicion should have been represented to the consul of that nation, or the commander of the vessel; and that general instruction would be given to pursue this course in future, with a view that, if it should be ineffectual, the government of the United States may adopt those measures which the necessity of the case and their rights may require; that the prosecution should be discontinued, and the property restored. And the President hoped this reparation of what was passed, and the precaution against the future, would induce the minister to approve the decision, which, from a sense of justice, would lead him to waive any further measures, and that an insult to the French flag would not be permitted with impunity; but, in this case, the alleged circumstances of insult did not with sufficient certainty appear.

Prior to this a short time, the British minister had complained of a violation of the laws of nations, in the case of the *Nautilus*, by certain persons authorized by the legislature of Rhode Island. He asserted that, by the usage of nations, it was not

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lawful to search a foreign ship-of-war in the harbors of the United States. The position was not admitted on the part of the United States, but in a manner denied; but, from the particular circumstances of the case, it was unnecessary to decide finally upon it.

Whatever conclusions may be drawn from these transactions in favor of a foreign ship-of-war being exempt from the inspection or search of the custom-house officers of this country, they furnish but a feeble argument in favor of the exemption of such a ship from all judicial process, civil and criminal. There is a manifest difference between the two cases. The President, possessing the supreme executive power, may regulate, control, and direct all inferior executive officers in the performance of their offices; but may not interpose his power to the obstruction of a minister of justice in the ordinary course of proceeding. The former is properly cognizable in the executive, and the latter in the judiciary department of government.

But whatever doubts might be otherwise entertained on the present question, they are dispelled by the sense of Congress as expressed in the 7th section of the act passed 5th June, 1794, entitled "An act in addition to the act for the punishment of certain crimes against the United States." It enacts, "that, in every case in which any process, issuing out of any court of the United States, shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruiser, or other armed vessel of *any foreign prince or state*, or of the subjects or citizens of such prince or state, it shall be lawful for the President of the United States to employ such part of the land and naval force of the United States, or of the militia thereof, as shall be judged necessary," &c.—Laws of the United States, vol. 3, p. 92.

Here the lawfulness of serving judicial process upon a person on board a foreign ship-of-war within the United States, is undeniably acknowledged by necessary and unavoidable implication. With this view of the subject, the Attorney General is humbly of opinion that it is lawful to serve civil or criminal process upon a person on board a British ship-of-war lying in the harbor of New York, adjacent to a wharf, and within the territory of the State of New York. If this be law-

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ful, the conduct of Captain Jones is in no small degree reprehensible, who is represented to have assaulted the ministerial officer of justice as he was leaving the ship, by attempting to remove the plank and throw him into the water.

It is submitted to the President whether it would not be expedient for a law to be passed, regulating judicial proceedings relative to foreign ships-of-war in the American ports; and particularly exempting them in future from the service of civil process on account of debt or contract.

All which is most respectfully submitted by

CHARLES LEE,

Attorney General.

To the PRESIDENT OF THE UNITED STATES.

SUITS AGAINST MARSHALS.

The United States may maintain an action of debt on the bond given by a marshal for misfeasance of himself or deputies, and a jury may assess the damages. Individuals injured by his official misconduct, may use the name of the United States in prosecuting a suit on the bond to recover satisfaction.

PHILADELPHIA, *February 4, 1800.*

SIR: If the marshal or his deputy commit a misfeasance in office to the injury of the United States, compensation may be obtained for the United States by an action of debt upon the bond given by the marshal in pursuance of the 27th section of the judicial act, which suit may be brought against the marshal and his sureties jointly, or either of them. The jury will assess the damage; and, in such cases, the district attorney is to prosecute the suit.

But if the misfeasance in office occasions an injury to *an individual citizen*, it belongs not to the district attorney to prosecute such a suit, unless particularly employed by the injured party. I conceive it is implied that an individual injured by the official misconduct of the marshal may use the name of the United States in prosecuting a suit upon the bond, and may recover satisfaction for the injury done him. In similar cases relative to sheriffs, the State laws provide expressly that the bond may be sued by individuals sustaining

Suits against Marshals.

injury, and it would be prudent to amend the act of Congress by a new clause of the purport enclosed, to be added to the 27th section.

I am, very respectfully, sir, your most obedient servant,
CHARLES LEE.

To OLIVER WOLCOTT, Esq.,
Secretary of the Treasury.

OPINIONS

OF

LEVI LINCOLN, OF MASSACHUSETTS:

APPOINTED MARCH 5, 1801.

CONFIRMATION OF CERTAIN GRANTS IN INDIANA.

The governor cannot be justified in confirming any of the unauthorized grants, unless actual improvements were made under them previous to the 3d of March, 1791; nor can he by law be justified in making a discrimination between the persons still holding their original grants, and those who have had such grants confirmed by former governors, or who have purchased under such confirmation, and made improvements, unless such improvements were made previous to the said 3d of March.

WASHINGTON, *December 29, 1801.*

SIR: In answer to your note enclosing a letter from the governor of the Indiana Territory, permit me to state opinions respecting the subject, which are the result of attention and consideration. The provisions of the act of the 3d of March, 1791, (which is very incorrect, and out of which the governor's questions arise) have a reference to matters which were objects of the resolve of Congress of June 20th, 1788. This resolve confirms to the ancient settlers of the Territory, who had professed themselves citizens of the United States, the land which they possessed on or previous to 1783, and which had been allotted to them according to the laws and usages of the government under which they had respectively settled. The resolve also provides for the donation of an additional 400 acres of land to each family which was then (*on the 20th of June, 1788*) living at certain villages within the Territory; but they were not to alienate, or to have a title, until there had been a residence of at least three years within the district, subsequent to the allotment of the same land. Here is described a second set of persons who were to hold land under this resolve, namely, *those who lived at certain villages on June 20th, 1788.*

The 1st section of the law of the 3d of March, 1791, gives

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400 acres of land to each person who, in 1783, was a head of a family, either at Vincennes or at Illinois, and who, after 1783, moved *from one of those places to the other*; and the government is directed to cause such land to be laid out accordingly. This third set of persons is described by the place they lived at in 1783 as heads of families, and by the place they afterwards moved to previous to the 3d of March, 1791.

The 2d section of the law secures to such heads of families who, in 1783, lived either at Vincennes or Illinois, and who, after 1783, *removed without the limits of the Territory*, the donation of 400 acres of land, made by the resolve of Congress of the 20th of June, 1788. By mistake, this resolve of Congress is referred to as of the 29th of August. The governor, on application, is directed to cause such land to be laid out to such heads of families and their heirs; and also to cause to be laid off and confirmed to such persons the several tracts of land which they may have possessed, and which, before 1783, may have been allotted to them according to the laws and usages of the government under which they respectively settled. The first part of this section of the law extends the benefit of the resolve (which confirmed the donation of the 400 acres to persons living at certain villages in 1788) to such persons as lived there in 1783, and who afterwards removed without the Territory, and makes a fourth description of characters.

The fifth and last description of persons, by the 4th section of the law, are those who had on the 1st of March, 1771, *actually improved or cultivated land* either at Vincennes or at Illinois, *under a supposed grant* of the same by any commandant or court claiming authority to make such grant; to which persons who made the improvement, or to their heirs, the governor is empowered to confirm such lands, or such part of them as he may think to be proper, not exceeding to any one person 400 acres.

The four first-mentioned classes of persons who are entitled to grants, confirmations, or the laying off of lands in the Territory, are clearly designated by marked descriptions in the law under which they claim.

The 4th section of the law of the 3d of March contemplates the creating and vesting a title to land in a description of per-

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sons who had no previous title to the same land; and they are those persons only, their heirs or assigns, who had, previous to the said 3d day of March, actually improved or cultivated under some supposed grant by some commandant or court claiming authority to make the same, but who in fact had no such authority. Most clearly none but such who had actually made improvements previous to the 3d of March aforesaid, under authorized grants as aforesaid, and their heirs and assigns, can claim by the operation of this section of the law. Those who claim a benefit of this law must bring themselves within the provisions of it. If they have other or independent titles, they are not affected by it. From a careful inspection of the deed of cession by the State of Virginia to the United States, and of the terms on which they accepted of the same, nothing can be found which will in any degree enlarge the operation of the above-mentioned law, or in any way affect it. The clause in the act of cession declaring "*that all the inhabitants of this country shall be confirmed in their titles and possessions,*" and the terms, "*according to the laws and usages of the government under which they had respectively settled,*" must, from comparing one part of the law and deed with the other, from the subject-matter, the nature of the transaction, and on obvious legal principle, be understood to mean legal titles and possessions, and authorized usages.

It is therefore clear that the governor cannot be justified in confirming any of the unauthorized grants, unless actual improvements were made under them previous to the 3d of March, 1791; nor can he by law be justified in making a discrimination between the persons still holding their original grants, and those who have had such grants confirmed by former governors, or who have purchased under such confirmation, and made improvements, unless such improvements were made previous to the 3d of March. The governor, in making the confirmation, exceeding his authority, his act was a nullity, and could not create a right, or alter the explicit provisions of law.

In respect to the granting patents of the land in question, I am inclined to think they will be unnecessary for those persons claiming under the first section of the act of the 3d of

Confirmation of certain grants in Indiana.

March. The right to 400 acres is created by the mere operation of the act itself; and when the governor has caused it to be laid out in pursuance of the same act, the title will be complete. Deeds or patents may be necessary for the residue of the land. The resolve of June, 1788, making the donation of 400 acres, provides that no person obtaining the possession thereof under the description shall have power to alienate, until he or she, or his or her heirs, shall have resided at least three years, from the time of such distribution, within that district; *and, at the end of which period, every such resident shall obtain a title to the reserved lot; and all lots not thus conveyed to residents shall revert to the United States.* A provision for a deed or patents seems to be implied by the force of the above-recited terms; and as the title depended on a three years' residence, a matter in the country, there was a necessity of a decision on that fact, and of some instrument containing the proof of it.

The 2d section of the act of the 3d of March recognises and extends the above grant, and directs the governor to cause it to be laid out, &c.; and also to cause to be laid off and *confirmed* to persons who had had lands allotted to them according to the laws and usages, &c. This act, directing the thing to be done, does not point out the mode of confirming; nor does it alter the mode of giving the title to the 400 acres, as provided for by the said resolve: of course, it would be left to pursue that mode.

I am doubtful whether the grant of small tracts of land to individuals, for personal accommodation, on our frontiers, either as a compensation for past sufferings, dangers, or services, or as inducements for their continuing in the double capacity, as it were, of military defenders and agricultural subduers of the soil on the frontiers, is within the meaning and policy of the stamp act, requiring four dollars for every grant or patent of land under the seal and authority of the United States, with the exception of lands granted for military services.

As the several governors and others have entertained different opinions and gone into different practices touching the subject-matter of this letter, I have been induced to be thus particular, and to recite the laws and the facts on which I have

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formed my opinions, that, if they are incorrect, it may appear in which way the error took place.

With great respect, &c., &c.,

LEVI LINCOLN,

Attorney General United States.

To the SECRETARY OF STATE.

GOVERNMENT LIABILITY.

The government is not bound to satisfy a judgment for damages recovered against its agent, when it is not made to appear that the property for which the suit was brought came into his hands as such agent, and where the avails of the property were retained by him and were sufficient to indemnify.

Two resolves of Congress commented upon and explained.

WASHINGTON, *January 21, 1802.*

SIR: I yesterday received yours, covering a letter dated the 16th instant, from Mr. Bingham's agent, respecting the judgment lately recovered by Cabot, and also against him, for the proceeds of the cargo of the brig Hope. The agent had previously sent me a similar letter, with a printed statement of the case. On the last trial, which was the review of a former one, the plaintiffs recovered \$34,630 25, which is \$2,860 less than was recovered on the former trial. I expected, before this time, to have learned, as matter of fact, the principles on which the question of damages, or rather the quantum, was ascertained. It is obvious, however, from the nature of the case, the state of the pleadings, and the circumstances attending the actions, that the jury were instructed by the court to make, and that they actually made, the proceeds of the cargo received by Mr. Bingham, with the interest thereof, the measure of the damages assessed against him; making, however, reasonable deductions for expenses and disbursements. The action was in form an equitable one, it being for money had and received. By an agreement of all the parties concerned, the special matters were permitted to be given in evidence under the general issue; none were excluded; the parties were at large in the trial, on the common principles of justice and equity; and nothing more can be presumed to have been recovered than the plaintiffs, in fairness and good conscience, were

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entitled to. I am satisfied the United States ought not to be any further concerned in lawsuits on this subject; and before they pay the \$34,630 25 which is now demanded as an indemnification to Mr. Bingham, they ought carefully and fairly to examine the grounds and the principles on which the demand is placed. The representations which Mr. Bingham has uniformly made of the proceeds of the cargo coming into his hands regularly, as the agent of the United States, and of its being neutral property, not turning out eventually to be correct, have betrayed our government already into much trouble and expense. Had he possessed the property regularly, as agent, government certainly ought to have indemnified him from the cost of defending any suit which might have been brought against him. Nothing could ever have been recovered against him. The proof of his agency in that particular would have barred the action. The judgment for damages is a legal proof that he had not sufficient authority from the United States to take the property as their agent, and, of course, that they were not in strictness bound to indemnify. It is understood, also, that the courts which have repeatedly tried the cause, and the counsel who have been concerned in the management of it, have always been of the opinion that there were, originally, on the face of the papers, and the aspect of the transactions, strong reasons to doubt the neutrality of the cargo—or at least such as were sufficient to induce caution. If there has been reasonable-circumspection by Mr. Bingham in his disbursements and in furnishing the proper evidence, and if he has been indemnified from the cost of defending such suits as it has been proper for him to defend against, it is difficult to perceive on what principles he can claim an exemption from satisfying the judgment which has been recovered against him; or how he can demand of government their aid, unless they have expressly promised it.

Mr. Bingham, in his letter of 2d of February, 1779, expressly states the cargo of the brig Hope to be neutral property; that the cargo, being flour, was much wanted in the island; that he should sell it; and that the sales would be more advantageous there, than in Europe, to the concerned. The recited facts disclose the view in which the transaction was

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exhibited to government, at an early period; and also raise a strong presumption that the cargo, being 1,000 barrels of flour, sold well, at the market price, when it was in great demand, and of course without a loss. It is understood that the proceeds of the sales, on the trial, were ascertained by the testimony of a Mr. Lowell, a reputable gentleman of the law, who swore that Mr. Bingham acknowledged to him, in conversation on the subject, that he sold the flour at 144 livres per barrel. There was other evidence to prove that the flour was, in fact, or might have been, sold for about this price by Mr. Bingham. Let it be remarked, if this was not the market price, or the true price, (by which he ought to be bound, as he has long been in the possession of Mr. Lowell's evidence, and knew that it was used, and relied on, in the first trial,) he would have procured evidence to have controled it.

The resolves rested on by Mr. Bingham passed June 20, 1800, [1780,] on a memorial of his, representing the attachment of his property by two suits which were then pending. By the first of these resolves, Congress binds the government to defray all the *expenses* which Mr. Bingham might be put to, by reason of the suits then pending, or which might thereafter be brought against him in the State of Massachusetts, on account of the brig Hope, or her cargo. By the second, Congress pledged themselves to pay all such sums of money, with costs of suit, as might have been recovered against the said Bingham, in either or both of the said actions. Bingham's property was then held from him, under an attachment, by these suits. It was not safe to pay the proceeds of the sales of the flour to the plaintiffs in those actions, or to any other claimants, until it had been determined by law that they were entitled to it. It was hard, in the mean time, if Mr. Bingham had acted fairly as the agent of the United States, that the expense of determining to whom property, which had been placed in his hands in the course of this agency, ought to be delivered, should be borne by him. And until this determination was had, it was injurious to have the property held under the attachments. The only object of the second resolve is, to discharge this property from the attachment; and as this could not be done but by giving security equal to the property

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attached, Congress ordered their navy board to give such security. As Bingham recovered in these actions, the resolve has had its effect; nothing further can be demanded under it. The expenses which Congress bound themselves to defray by the first resolve, which might be occasioned by any suits afterwards brought, must be considered to be similar to those which they were to pay arising from the then depending suits; these expenses could not be considered as extending to the cost and damages, because they are provided for in the second resolve.

The reason and equity of the case can never extend the term *expenses* to mean anything further than the money expended in and about a suit, other than what may be necessary to satisfy a judgment for damages; which judgment for damages could never have been given against Bingham, but on the idea of his possessing himself of the proceeds of the cargo out of the regular course of his agency. And in no event, he being indemnified for these expenses, can he be injured. The retaining in his own hands the proceeds of the sales of the flour, and these actual proceeds, with reasonable deductions for expenses, being the measure of the damages recovered against him, he has in his own hands what must be considered as sufficient to satisfy these damages, and of course is completely indemnified. I am therefore inclined to think that government are not bound, and that they ought not to pay the judgment which has been recovered against Bingham; and that they ought not to be at any further expense on this subject, excepting to defray the expense already incurred as above explained. It is known a different opinion has been given on this subject, and this is therefore given with great deference.

I have the honor, &c., &c.,

LEVI LINCOLN.

To the SECRETARY OF STATE.

GOVERNOR OF THE NORTHWESTERN TERRITORY.

The authority of making appointments is expressly given to the governor in cases in which it is not otherwise directed, and positive provisions are not abridged by implication.

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It has been the practice of the President to appoint the three judges provided for in the ordinance, having common law jurisdiction, from an implied power; yet as the implication does not extend beyond the three, the governor is justified in his appointment of all judges and officers.

WASHINGTON, *February 2, 1802.*

SIR: After the utmost attention which I have been able to pay to the questions respecting the Northwestern Territory, which you did me the honor of submitting to my consideration, there is a difficulty in giving a decisive answer. I can find no grounds or principles for a very confident decision in, or out of, the ordinance for the establishment of that government. Nothing can be collected to aid the inquiry from the acts by which similar governments in other territories have been established, or from the journals of the proceedings of the Assembly and the governor of this Territory, although some of these very questions have been the subjects of zealous debate.

The Territory is as yet considered to be under what is called its temporary government, by the ordinance. That expressly provides that all magistrates and other civil officers shall, during the continuance of the temporary government, be appointed by the *governor*, unless otherwise therein directed. It also ordained that there should be a court appointed, to consist of three judges, who shall have a common-law jurisdiction, and reside in the district; and expressly that Congress should appoint the governor, the secretary, and all military general officers. In the twelfth paragraph of the ordinance, it is said the governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district, shall take an oath, &c. In this direction for taking the oath of office, there is a strong implication of the right of Congress, or rather of the President, to appoint these three judges; and I am informed this has been the practice. Independent of this practice, upon the mere construction of the ordinance, I should have hesitated in deciding against the right of the governor to have made even these appointments. The authority of making appointments is expressly given to the governor in all cases in which it is not otherwise directed, and express positive provisions are not usually abridged by implications. As this im-

plication does not necessarily extend beyond the three judges before named, I am inclined to think the governor is justified by the ordinance in his appointment of all other judges and officers.

It is provided by the seventh paragraph of the ordinance, that the governor, previous to the organization of the General Assembly, shall appoint such magistrates, and other civil officers, in each county and township, as he shall *find necessary* for the preservation of the peace and good order in the same; and that, after the General Assembly shall be organized, the powers and duties of magistrates, and other civil officers, shall be regulated and defined by the Assembly. After the formation of the General Assembly, they are to determine what powers and duties are necessary to be exercised in existing counties and townships, and to define and regulate the same, for the preservation of peace and good order: this seems to involve the necessity of their determining what description of magistrates and officers should possess these powers and discharge those duties. They having done this, the governor is to make the appointments. The provision in this paragraph appears to me to amount to this: that, before the General Assembly was organized, the governor was to appoint such officers as he might judge *to be necessary*; afterwards, *such* as the legislature should judge to be necessary.

The eighth paragraph of the ordinance provides, that, for the prevention of crimes, the laws to be adopted or *made* shall have force in all parts of the district; and, for the execution of processes, civil and criminal, that the governor should make proper divisions, and from time to time, as circumstances should require, lay out such parts of the district, in which the Indian title shall have been extinguished, into counties and townships; subject, however, to such alterations as may thereafter be made by the legislature. The authority which the ordinance gives to the legislature is, in general terms, to make laws in all cases for the good government of the district, not repugnant to the principles and articles of the ordinance.

The laying out of counties and towns are usually considered as legislative acts, and, in the present instances, must be con-

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sidered as appertaining to the legislature, unless, by a proper construction of the ordinance, it is secured to the governor. It being once confessedly vested in him, and, by general terms, implying no limitation in point of time, the authority must be considered as still remaining in him, unless it is taken away expressly, or by some strong implication, or by some unforeseen change of the subject-matter upon which, or of the circumstances under which, the power is exercised. The civil and criminal processes, the *execution* of which was to be the means of preventing crimes and injuries, and which was to be effected by a division of the described parts of the district into counties and townships, are recognised by the ninth paragraph of the ordinance to be such as should originate under *made* as well as under adopted laws; and if so, it implies a power in the governor to lay out counties and towns, after the General Assembly were sufficiently organized for the making of laws. This construction of the eighth paragraph is in some degree confirmed by the express limitations of the governor's power contained in the fifth and seventh, as there was the same reason for being explicit in the first as in the two last, if the same thing was intended. It to my mind appears to be further confirmed by an express power being given to the legislature to alter such townships and counties as shall have been laid out. On the idea of the authority to lay out counties being vested in the governor, after the formation of a legislature, this was necessary; otherwise, not.

The ordinance provides, that, in case of the death or *removal* from office of a representative, the governor shall issue a writ to the county or township for which he was a member, to elect another in his stead. I perceive no question on the governor's transactions respecting the election of representatives, as returned by the secretary, excepting in reference to Meigs, who is said to have left the Territory. If he had not resigned previous to the issuing of the writ for the election of a representative in his stead, I conceive the writ must be considered as issuing illegally. Knowing that some very respectable gentlemen are decidedly of the opinion that the governor has no right to lay out counties under the ordinance, I have slept many nights on my first impression on the subject; and am still in-

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clined to the opinion I have above expressed, notwithstanding anything I have been able to learn respecting the matter.

I have the honor, &c., &c.,

LEVI LINCOLN.

To the PRESIDENT OF THE UNITED STATES.

COMPENSATION FOR SEIZURE.

Where a vessel alleged to be Danish property was seized as French property, on the south side of the island of St. Domingo, and, whilst waiting examination under the protection of the American flag, was seized by a British armed ship and taken into Jamaica, and there condemned, and a claim made by the Danish subject upon the government for compensation, it was decided that the first captors were not liable for the first capture and detention long enough for examination, nor for the second capture; and that the government of the United States is not bound for the unlawful captures of its subjects.

WASHINGTON, *March 11, 1802.*

SIR: The vessel *Mercator*, alleged to be Danish property, and for the capture of which a claim is now made on the United States, was, by the armed schooner *Experiment*, belonging to the United States, seized on the 14th of May, 1800, on the south side of the island of St. Domingo, as French property. A prizemaster was put on board, and she was ordered to proceed to Commodore Talbot, then lying off Cape François, as is said, for examination. On her way, in about six hours after the capture by the *Experiment*, the *Mercator* was seized and carried into Jamaica by the General *Simcoe*, a British armed ship. When she was thus seized, she was sailing under the protection of the American flag. The prizemaster protested against this procedure in the island of Jamaica; notwithstanding, the vessel, with her general cargo, was condemned there as lawful prize to the use of the commander, officers, seamen, &c., of the British ship which captured her.

The cause of condemnation does not appear from the decree of condemnation in the court of admiralty. A copy of the record states that an appeal was claimed by the owner of the prize, and granted. These are the principal facts contained in the papers. The reasons for the first or the second capture, for the condemnation, for the appeal, or for the non-prosecution of the appeal, are not stated. There is no circumstance separate from

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the decision of the admiralty court by which it can be determined that either of the seizures was justifiable; the legal presumptions are, however, in favor of them.

The general questions which present themselves are:

1. Has a Danish subject a right, according to the laws of nations, to demand a compensation for any damage resulting from the first seizure and detention?

2. If he has, is his claim on the captain of the *Experiment*, or on the United States?

3. If on the captain, in case of his absconding or being insolvent, are the United States responsible?

It is true, by the law of nations, if the citizens of one State do an injury to the citizens of another, the government of the offending subject ought to take every reasonable measure to cause reparation to be made by the offender. But if the offender is subject to the ordinary processes of law, it is believed this principle does not generally extend to oblige the government to make satisfaction in case of the inability of the offender.

It is clear, from the situation in which the captured vessel was, that the captain of the *Experiment* was justifiable in seizing her, and detaining her long enough for an examination in a reasonable manner. There might have been probable cause for a seizure and detention, or for sending her to the commodore, (part of whose squadron the *Experiment* was;) and yet no cause, from the examination, for sending her in. If, therefore, the *Experiment* was justifiable in sending its prize to the commodore, it could not become tortious and liable from the legal or illegal subsequent conduct of the British. It can never be considered as unreasonable or wrong, when a seizure is made by a small vessel belonging to a squadron on the same station, to send the prize to the commodore in the neighborhood for examination. The measure is presumed to be in favor of a fair result on the examination. If the Danish subject has sustained an injury, or has cause of complaint, it is against the British. The first captors are not liable for the conduct of the second; much less their government. The first seizure did not expose to the second; it ought to have secured against it. On general principles, the Danish subject ought to resort

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to the British captors for his compensation; and the rather, as this would be in pursuance of the principles on which their own courts decide under similar circumstances.

But, admitting the American captor liable: on a lengthy and critical research, I can find no principle of the law of nations, or adjudication, by which the government is bound to answer in the first instance for the unlawful captures of its subjects, or become so from their insolvency or avoidance. Governments will sometimes, from policy, and under the special circumstances of the case, cause a reparation for injuries done by their subjects to others. But this is not considered to be within the great and obvious principles of national right.

It may be further observed, in reasoning on this case: if the captured vessel or her cargo was condemned as French property, that of itself is conclusive evidence of there having been probable cause for the seizure and detention by the Experiment; if on account of an illegal trade, which was detected by reason of the American detention, yet it is conceived the first captor is answerable for those consequences alone which would have resulted from his conduct, on the supposition of a fair trade and regular papers, and not for those arising from the concealed tortious acts of the complainant.

Under all the circumstances of this case, I am of the opinion that the United States ought not to interfere, unless it be to aid the sufferer, by their weight, in his application to the British government; the condemned property being taken out of their hands.

I have the honor, &c., &c.,

LEVI LINCOLN.

To the SECRETARY OF STATE.

SPANISH GRANTS IN MISSISSIPPI.

Grants made by the Spanish government, after the ratification of the treaty by which the land was ceded to the United States, are void; and though a patent were dated before, unless it were delivered before, it fails to carry the title. And although *prima facie* every deed may be presumed to have been delivered on the day of its date, the presumption may be removed by proof.

WASHINGTON, March 26, 1802.

SIR: In answer to your communications, as contained in the letter of the district attorney of the Mississippi Territory, en-

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closed by Governor Claiborne, respecting claims to vacant lands in that Territory, I can state little more than general principles, and a loose opinion on the described cases.

It does not appear from the letters what were the pleadings in the action, in which evidence of fraud in the dating of a deed was excluded; what was particularly in issue; why it was done; whether it was from the idea that the evidence was not of the proper kind, or the best which the nature of the transaction admitted of; or that the witnesses were considered as incompetent, from being interested in the question or in the case.

Nothing can be clearer than that all grants, made by the Spanish government after the ratification of the treaty by which the land was ceded to the United States, are void. A claimant, who had in fact obtained a patent or a title, before that time, under the Spanish, or since under the American government, can alone hold by his grant. There being no question of a right by mere possession in the way, (and, indeed, such a right to vacant lands can never exist against government,) the only question is, when was the patent granted? not when was it dated, or what is its date? The delivery of a deed is a consummating act, by which, and from the time of which, it takes effect and operates. Its delivery may be before or after its date. An ante-date, a subsequent date, or no date, is material only as proof of a delivery; until which, there can be no deed. But, *prima facie*, every deed shall be intended to be delivered on the day of its date, and to be made fairly and in good faith. The presumptions are, however, controllable by proof. The execution of all deeds must be proved, if their validity is questioned. Any evidence which will show any of their essential parts to be different from what they are presumed to be, and in favor of a third person, must be admissible. Delivery is a matter in the country, and an indispensable requisite, to be established by evidence foreign from the date of the deed, or anything contained in it. There is a difficulty in conceiving how evidence to this point could be excluded by the Supreme Court. The warrants of surveys, petitions, certificates, and plats under the Spanish government, and which are said to be in the offices in New Orleans, can be of no use but to show the real time of a patent's being granted. Where there are interfering

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grants, and the question is which was first made, or when they were respectively made, and there is no registry or record to decide it by, nor any statute mode of ascertaining the matter, the greatest latitude should be given for the admission of evidence, and especially in suppression of fraud.

If it should be necessary to procure evidence in possession of the Spanish government, I should suppose an application by a party interested, or by the governor of the Territory, would be abundantly sufficient for that purpose. A line from the Spanish minister at this place, on the subject, may be useful. This government will not hesitate to aid in the detection of fraud. And none will pretend that a Spanish grant of land, after their right to it ceased, or a subsequent deed with a prior date, can be good against a person claiming under a prior deed or a rightful grant.

Mention is made of an action being brought by one Green against the United States for the recovery of public lands and buildings, and in which, after a verdict for the demandant, a new trial has been granted. It is not perceived how an action could be brought against the United States. It may have been against an individual possessing, or claiming to possess, under them. As no case is stated, I do not see how government can be bound by any verdict which may be given in the case, nor can I give any opinion on the subject.

I am, &c., &c.,

LEVI LINCOLN.

To the SECRETARY OF STATE.

PATENTS FOR INVENTIONS.

Patents for inventions are confined, by law, to citizens of the United States.

WASHINGTON, *May 26, 1802.*

SIR: The authority given by law to grant patents is unquestionably confined to the citizens of the United States. The privilege is a monopoly in derogation of common right, and, as it is not, ought not to be extended to foreigners. Were it to be, it would be subject to endless abuses, privations, and embarrassments to our citizens. I have no doubt on the question.

LEVI LINCOLN.

To Mr. DANIEL BRENT.

Recapture of a Portuguese Brig.

RECAPTURE OF A PORTUGUESE BRIG.

Where a Portuguese brig had been captured by a French schooner, and thirteen days afterwards recaptured by an American vessel and taken to St. Kitts, where she was adjudged to be restored on payment of salvage, and the vessel or salvage subsequently demanded of the United States by the French minister as being provided for in the treaty with France, and not condemned at the signing thereof, it was decided that the treaty did not authorize the French government to make any demands on the United States for property thus recaptured from it, and which they are obliged to restore to the original owners on payment of salvage.

WASHINGTON, *May 26, 1802.*

SIR: The case of the Portuguese brig, which you did me the honor of submitting to my consideration, appears to be this:

On the 28th of July, 1800, she was recaptured by Captain Rogers, in the ship *Maryland*, having guns and a cargo on board.

She had been captured by a private armed schooner from Bordeaux, ordered to Cayenne, and had been in the possession of the French thirteen days.

Captain Rogers arrived with her at St. Kitts on the 20th of August. The court of admiralty of that island claiming a right, under the law of nations, of determining the cause between the parties in interest, refuse to let her be carried to America for adjudication, assume the jurisdiction of the cause as one respecting the ship of an ally captured from a common enemy by an ally, cause her to be libelled, and adjudge her to be restored on the payment of salvage.

The jurisdiction of the court seems to be submitted to by the agent for the captors, and its judgment acquiesced in; at least there was no appeal. The minister of the French government demands this vessel, or the salvage, of the United States, as being a vessel within the description of vessels provided for in their treaty with France, and as not being finally condemned at the signing of that treaty.

The brig is admitted to be Portuguese, recaptured, and to have been proceeded with as above stated.

In my view of the cause, it is not necessary to determine how far the court of admiralty is justified by the laws of nations in its proceedings, as they respect the United States or the Portuguese owners of the brig.

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The words of the treaty are, "*property captured* and not yet definitely *condemned*, or which may be *captured* before the exchange of ratifications, shall be mutually restored on the following proofs of ownership:" with respect to cargo, *certificates*; and in case of the destruction of these documents, other proof.

The property which is to be restored is designated by the descriptive term "*captured*," and is such as was capable of being condemned as French property, to the use of the captors, &c., and such as America could rightfully restore, *in rem*, without violating the laws of nations, and the rights of other nations under these laws, or under particular treaties with them. Besides,

The word *captured*, as a technical and a descriptive term, does not include the meaning, and ought not to be construed to have the effect of the term *recaptured* in the sense of the treaty. Also,

The property of an ally recaptured is incapable of being condemned, in the sense in which this term is used in the treaty; it of course is acquitted, and the judgment of acquittal is of itself an act of restoration. In no event could there be a judgment of condemnation. Further:

The described property is such that a title to restoration is capable of being proved, either by the passport of the ship or a certificate of her cargo. These documents could have an operation as proof of a right to claim restoration under the treaty, only as applicable to original French ships. In the present case, these documents prove nothing more concerning a right of demand in France than in England or in Turkey. Again:

The treaty was signed the 8th of October, 1800; previous to which, judgment had been rendered, and the property restored to the former owners, on the payment of salvage. The owners of the brig and cargo are now repossessed of their property. The act is final, as it respects all parties. Their rights are executed; there is nothing which either the party or further process can operate upon.

The French schooner took or captured the brig, subject to the chances of a recapture by its own crew, or another ship of the same nation, or by any other power at war with France.

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The moment that a recapture took place, the first captors lost all claims on the captured property, and are in the same situation as though they had never made the capture. If it had been taken a third time by another French ship, and had been carried in and condemned, these first captors would not have been considered as owners, and would not have had any claim for salvage;—of course, as the French government demands now, in right of its citizens, it can have no claim. The Portuguese had a right to get the repossession of their vessel, as against France, by any means in their power—by force, by ransom, or stratagem. This right could not be abridged in favor of France by the American recapture. This event extinguished the right of the first captors *in toto*; and it created a new right in favor of the Portuguese to have their recaptured property restored on payment of salvage, and devolved an obligation on the recaptors to restore; and this they may do without salvage, if they please.

If the brig had been in the possession of the American captors, unproceeded against in law at the time the treaty was signed, still the case would have been the same—she would have been the property of Portuguese; and the United States, being bound to restore her to them on their payment of salvage, could not stipulate, in violation of this obligation and of the Portuguese right, to deliver her to France; nor can they be any more bound to pay the salvage over to France, than they would be in case the brig had been owned originally by Americans, and, being captured by the French, had been recaptured by other Americans. Indeed, the term *salvage*, or a right to it, has no meaning as applied to *first captors*; nor can the term *restore*, which implies a previous possession, which, in the present case, the French, in no sense of the word, can be considered as having had.

I am, upon the whole, decidedly of the opinion that the treaty does not authorize the French government to make any demands on the United States for property recaptured from it, and which they were obliged to restore to its original owners on the payment of salvage.

I have the honor, &c., &c.,

LEVI LINCOLN.

To the SECRETARY OF STATE.

Restoration under Treaty with France.

RESTORATION UNDER TREATY WITH FRANCE.

Where a French vessel, captured and condemned as lawful prize to the captors and to the United States prior to the treaty of September 30, 1800, in moieties, and the avails of the appraised vessel and cargo were in the hands of the clerk at the date of the treaty, and one moiety paid to the captors and the other paid into the United States treasury, after the signing of the treaty, and, upon a hearing before the Supreme Court on writ of error, no bond having been given, the decree of the circuit court was reversed, and the vessel, apparel, guns, &c., ordered to be restored; and, pursuant thereto, the moiety in the United States treasury was paid over, and a claim being made for the other moiety that had been paid to the captors—decree that the United States are not liable for such moiety.

WASHINGTON, June 17, 1802.

SIR: I have the honor, in compliance with your request, to submit to your consideration my ideas respecting the case of the schooner Peggy.

This vessel, if the information I have been able to collect abroad is correct, (for it does not appear from the papers I am furnished with,) was captured in the neighborhood of a West India island, and so near the shore, and so destitute of arms, as to render it doubtful whether she was on the high seas, or an armed vessel, at the time of her capture, in the sense of the law which authorized the taking of French vessels. These are said to have been the questions on which the cause was placed, and the acquittal depended; and these are assumed as facts in considering the cause. She was libelled in the district court of Connecticut, July, 1800; and on an appeal to the circuit court on the 23d September following, was condemned, as good prize to the captors; one moiety to their use, and the other to the use of the United States. The clerk of the court held the avails of the appraised value of this vessel and her cargo, amounting to \$18,804 72, subject to the disposition of law, at the time of this condemnation.

Final decrees and judgments in civil actions, &c., in a circuit court, the matter in dispute exceeding \$2,000, may be re-examined, reversed, or affirmed, by writ of error brought to the Supreme Court, within five years from the making of such a decree; the plaintiffs in error giving to the adverse party notice of such writ at least thirty days previous to the sitting of the court to which it is made returnable, and giving also to the

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judge signing the writ of error, or the citation, sufficient security for the prosecution of the writ to effect, and to answer all costs and damages if he fail to make his plea good. Writ of error stays execution only in cases where it is sued out, and a copy thereof lodged in the clerk's office for the adverse party, within ten days from the rendition of the judgment, &c. It does not appear that this was done; it is certain no citation was served on the adverse party; and I assume as a fact, no bond for the prosecution of the writ of error was ever given.

It appears, on the 15th of April, 1801, by a representation of the clerk to the circuit court which had decreed the condemnation of the schooner *Peggy* and her cargo as lawful prize to the use of the captors and the United States, in moieties, that the above mentioned money was in his hands; that a writ of error had been issued, dated October 2, the determination of which was unknown; that the captors had requested their moiety which had accrued to them by the said decree; and that the President of the United States had ordered, so far as they were concerned, the property to be delivered to the claimants. It also appears from an application of Mr. Livingston, who acted as attorney to the claimants, who were the plaintiffs in error, that proceedings on the said writ in the Supreme Court were suspended for the want of a citation or notice to the adverse party; and that Mr. Edwards, the attorney of the United States for the same district, had acknowledged, in writing, a notice on him as attorney to the United States.

Under these circumstances, the said circuit court, on the 15th day of April, 1801, order one moiety of the said avails, after deducting the costs, expenses, &c., to be paid to the captors, and the other to be paid into the treasury of the United States. The captors were paid accordingly, and the residue was lodged or deposited in the Treasurer's office.

The Supreme Court, at their last December term, try the cause on the writ of error, and decree in the following words, viz: "The court having heard the arguments of the counsel in this cause, and mutually considered the same, do adjudge and decree: that the decree of the circuit court of the United States in this cause be, and the same is hereby, reversed; and that the schooner *Peggy* and cargo, with her apparel, guns, and

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appurtenances, be restored to the said claimants; but without costs." On this decree, the said moiety lodged in the treasury has been paid to the claimants, without any further deduction of cost or expense. The other moiety Mr. Pichon now claims, as their agent, from the United States, under the treaty.

Its 4th article provides, "that property captured, and not yet *definitively condemned*, or which may be captured before the exchange of ratifications, shall be mutually restored." And further, "that *this article* shall take effect from the *signature* of the convention; and if, from the date of the said signature, any property shall be condemned, contrary to the intent of the said convention, before the knowledge of *this stipulation shall be obtained*, the property so condemned shall, without delay, be restored or paid for." The only effect which this article can be construed as designed to have from its signature, is a description of the property which is to be considered within its operation.

The treaty was signed September 30, 1800; judgment in circuit court 23d of September; and in Supreme Court December, 1801; previous to which, the treaty had been ratified.

The principal questions are: 1st. Is government obliged by the treaty to restore to the claimants the property delivered to the captors? 2d. If not, is it obliged to do so by the law of nations or the judgment of the court, the treaty being out of the way?

The design of the convention was to provide for such cases as were not otherwise provided for; to secure the restoration of *such* a description of property to the original owners as the United States were not obliged to restore by any pre-existing laws or obligation. As to *such* property, the treaty was alone necessary—to other, nugatory. It could have for its object only such property which had not been *finally condemned* at the signing of the treaty, or such as, without its provisions, was liable to condemnation; and it can operate alone against captors who, independent of the treaty stipulation, would have had a right to hold their captured articles, and who, by *that*, are obliged to restore them. There could be no need for extending its provisions further. In other instances of captures, there were other provisions; if for a breach of the laws of trade—

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if without any authority—if as a trespass, in violation of the rights of individuals or of the nation—the remedies were under the laws applicable to such subjects, and by which the courts could restore without damages and costs. Indeed, the terms *condemned*, and which could have been *condemned* had it not been for the treaty, are *used in it* as descriptive of what is to be restored *under it*. The preamble states as its object the determination of the differences which had arisen between the two States. The words in the 4th article are, “property *captured* and not yet *definitively condemned*,” or, “which *may be captured* before,” &c.; or, “if any property shall be *condemned* contrary to the intent of the said convention, and before the knowledge of this *stipulation shall be obtained*, the *property so condemned* shall, without delay, be restored or paid for.” From which it is evident, that the property on which the treaty was meant to operate was not such as had been *finally acquitted*, or, by existing laws, as would, in a course of regular judicial proceedings, be acquitted, but such as a knowledge of the treaty stipulation would prevent a condemnation of. A French vessel, therefore, taken, not on the high seas, and unarmed, is not to be restored, under the treaty, as property within its provisions, admitting there had never been any definitive condemnation; and the proceedings of the Supreme Court seem to have been on this idea.

But if the Peggy and her cargo are included in the terms *property captured*, in the sense of the treaty, were they not definitively condemned at the time of signing the convention? A definitive judgment, decree, or condemnation, are legal terms, and have a technical meaning; they are synonymous with *final* judgment, decree, and condemnation. The words *final* and *definitive*, in law, or in common parlance, have the same meaning. A final judgment or decree is that which puts an end to a suit, by declaring that the plaintiff, or libellant, has or has not entitled himself to recover the object of his suit; and it is opposed to an interlocutory or intermediate judgment or decree. In suits in which an appeal is given by law, it is true the judgment is not considered as final until the time allowed for the appeal has elapsed. Within that time, no execution can issue. And the effect of the appeal is to suspend the judgment below. But a writ of error does not suspend the

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judgment, even where it is a *supersedeas* of the execution. In the present case, as the execution could issue on the decree in the circuit court, it is proof that it was final or definitive. Indeed, the very law which gave this writ of error provides that *final decrees* and judgments, in the circuit courts, may be re-examined, reversed, or affirmed, in the Supreme Court. It therefore has fixed the meaning of the word *final*, as applied to a decree of *condemnation*. The word *definitive* is not used in our law as *applicable* to the condemnation of captured property, but the treaty uses it as definitive of a judgment in our prize courts of condemnation of such property. It therefore can apply only to what our *law* and the *courts* consider as *their final* judgments. The decree on a writ of error is a judgment of *reversal*, or affirmation of a former judgment of condemnation, not a judgment of condemnation itself. There is one further idea on this subject: the makers of the treaty are to be presumed to have understood the subject about which they treated, and the existing laws by which it was regulated. The sense in which they used the term *definitively* is such as not only admits of, but actually supposes, some of the captured property to have been definitively condemned. On the ground that no judgment was to be considered as definitive which was liable to be re-examined by writ of error, there could not have been, nor can there be, any definitive condemnation of French property in America under the treaty—the five years for the writ of error not having elapsed. It is to my mind very clear, that the owners of the captured schooner and her cargo cannot claim a restitution of her under the treaty.

At law, the decision of the circuit court determined and fixed the original owners' claim to a restitution at their own election. If they did not give bonds, the property was to be distributed; if notice of the writ of error was not given to the adverse party, they should not be bound by it. This was not done. Under these circumstances, on strict legal principles, the court below, I conceive, were justified in making distribution. They had condemned the schooner as taken on the high seas, with arms. The treaty was not then ratified, and of course not binding. And if it had been, they having rendered a definitive judgment previous to the signature, it could have no effect on the cause. There being no bonds, admitting there had been a citation on

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the writ of error, and the treaty out of the way, the captors were entitled to a moiety of the avails of their prize. This, then, they have been put into the possession of, by the judgment of law. If that judgment has been regularly reversed, on a writ of error, those who took a benefit under it are by law bound to make restoration to those from whom they took it; the United States have done it, as it respects its moiety. By the judgment of the Supreme Court, the United States are not answerable for the other half. This is on the idea that I am right in considering the circuit judgment as definitive; or the reversal applying to a case not within the provisions of the treaty.

How far the captors ought to have been, or are, bound by an acknowledgment of the service of a citation on the attorney of the United States, to give effect to a writ of error, as against them; whether it ought to divest them of property that the law had vested in them, without having an opportunity to defend it; or whether the claimants have not, by their own *laches*, lost their law and all remedy, in not notifying them, agreeably to law, thirty days before the return of the writ of error, are questions which are for the parties to attend to, and which, as they do not involve the interest of government, I have not looked into, and am not able to decide upon. I have been thus particular, that you might possess the reasons on which the above opinions are formed. As this letter is lengthy, and I am my own copying clerk, you will be kind enough to excuse the many interlineations and erasures, which would require a transcriber to cure.

I am, sir, &c., &c.,

LEVI LINCOLN.

To the SECRETARY OF STATE.

RESTITUTION UNDER TREATY WITH FRANCE.

On a reconsideration of the case referred to in the preceding opinion and examination of the opinion delivered by the Supreme Court, giving a judicial interpretation of the treaty of September 30, 1800, with France, the preceding opinion is substantially reaffirmed.

WASHINGTON, June 25, 1802.

SIR: Since I forwarded you the papers respecting the schooner Peggy, Mr. Pichon has furnished me with the opinion of the

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Supreme Court, on which their decree was founded, and which connects their decision with the treaty. Had I seen this opinion before, I should have given my own (in deference to it) with less confidence, but still differing from it. Our convictions depend on the views we have of a subject, and the force with which evidence and reasonings impress our minds. The court give no opinion on the only questions which the record of the cause put in issue between the parties. Was the schooner Peggy armed? was she taken on the high seas? and was the decree of the circuit court *definitive* or *final* in the sense of the treaty? were the questions argued at the Supreme Court. The negative of either of the two first would, in my opinion, have controlled the conclusion which the court appear to have drawn from the negative of the last; and yet the court seem to infer that the case was within the provisions of the treaty, merely from considering the judgment which they reversed as not being final. This could not be correct, but on the idea that the treaty was designed to embrace captures of all descriptions, and was not confined to those taken under the non-intercourse laws. This construction would be injurious to sufferers who had been captured without probable cause, as it would deprive them of their claim of damages, and, on the idea of the circuit judgment being final, of the benefit of a writ of error, which might restore the property on the reversal of a final judgment.

Going out of the meaning of the term *definitive*, or *final*, as fixed by its use in the law which gives a writ of error to reverse a final judgment, into the provisions of the treaty, and it appears to me to mean the same. The opinion of the court says: "The terms used in the treaty seem to apply to the actual condition of the property, and to direct a restoration of that which is still in controversy between the parties: on any other construction, the word *definitive* would be rendered useless and inoperative. Vessels are seldom, if ever, condemned but by a final sentence. An interlocutory order for sale is not a condemnation. A stipulation, then, for the restoration of vessels not yet condemned, would, on this construction, comprehend as many cases as a stipulation for the restoration of such as are not yet definitively condemned. Every condemnation is final as to the court which pronounces it; and no other differ

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ence is perceived between a condemnation and a final condemnation, than that the one terminates definitively the controversy between the parties, and the other leaves that controversy still pending." It is necessary, to determine the exact force of this reasoning, to know the precise processes and their incidents in France, as well as in this country. If in that country there is any previous examination which condemns or exempts captured property to or from further trial, it renders the distinction necessary. The opinion admits a judgment of an inferior court is final if acquiesced in; but the foregoing construction excludes all proof of an acquiescence, if the right of bringing a writ of error militates with it, and proves it not to be final.

In cases where there is no *limitation* for a writ of error, there could be *no definitive* judgment. The present instance is limited to five years, on the judgment of the circuit court. But a writ of error may be brought on a writ of error, to correct an error in the proceedings on the *first* writ of error; of course, the judgment is not yet definitive on legal principles and on the above construction. If you look beyond that judgment, on which execution can and does issue, and puts individuals into the possession of the property which is adjudged to them, for a final judgment, it will be difficult to find it. To extend the treaty construction beyond this, would be confounding all the distinctions which it seemed to make in reference to *us*; and its *operation* would restore the *whole* of the property we had ever taken from France, however it might have been, before the making of the treaty, condemned, abandoned by its former owners, distributed, and spent. Surely our commissioners would not have stipulated to have given up all we had taken, and to have *received* but a *part* of what had been taken from *us*; nor would our government have *ratified one so unequal*, without the *attempt* to amend it. This construction also confounds and renders nugatory the distinction made between national ships mentioned in the third, and the captured property which is to be restored by the fourth article. The court, I think, are mistaken in supposing there is no ground for a distinction, on the construction which I contend for, between a *condemnation* and a *final* condemnation. A libel decided upon in a different court is liable to be carried to the circuit court by

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an appeal; the judgment appealed from is final in the first court in reference to interlocutory judgments, but not so as it respects the process. The same process goes to the circuit court; no execution can issue; and the judgment, which would have been final had there been no appeal, is as much suspended thereby as if a new trial had been granted. Not so with a writ of error to the Supreme Court. There the judgment is not suspended, and, except in the case of a bond being given within ten days, execution may issue, and the judgment be carried into complete effect. How far a bond, which would suspend the execution, would bind together the judgment in the circuit court and the writ of error; (which is, *quasi*, a new process,) so as to make them a continued one, is not now necessary to consider, as it is not our case.

But, however this general principle may be determined, it can have little or no effect on the case of the schooner *Peggy*. The Supreme Court, who were competent to decide this principle, have determined it in her case. It must, therefore, be considered as binding in this particular instance. Although they have fixed the principle for themselves, and thereby bound others, in reference to the case on which they have adjudicated, it can, I conceive, extend no farther. In all other cases in which the Executive or other courts are obliged to act, they must decide for themselves; paying a great deference to the opinions of a court of so high an authority as the supreme one of the United States, but still greater to their own convictions of the meaning of the laws and constitution of the United States, and their oaths to support them.

It appears, by a certificate of the clerk, that no bond was given by the plaintiffs in error; and indeed the distribution of the property is proof of it, by the circuit court. I have been informed that Messrs. Bayard and Griswold appeared in the Supreme Court and argued the cause for the captors; if so, it saves the want of notice to them. Government, I conceive, are not immediately, or in the event that the owners cannot recover from the captors the other moiety of the avails of the schooner *Peggy* and her cargo, liable for it. In strictness, I believe with the court—their judgment divests the property, and entitles the owners to recover from them their distributive

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shares. How far, under the circumstances of the case, it is reasonable for government to make them compensation, you are much more capable of determining than myself.

I am, &c.,

LEVI LINCOLN.

To the SECRETARY OF STATE.

BARRATRY ON PRIVATE PROPERTY IN EUROPE.

The authority of the general government to take, forcibly detain in custody, and bring to this country, from Europe, a person charged with barratry on private property, is doubtful. The offender, if he were here, would be amenable to our courts.

WORCESTER, *October 29, 1802.*

SIR: I have considered, with all the attention I am capable of, the case of Captain Clifton, which you did me the honor to ask my opinion concerning. It is believed no law recognised by nations, enacted or adopted by the United States, is particularly applicable to this case, or will render it proper for the United States to interpose. I doubt very much the authority of the general government to take, forcibly detain in custody, and bring to this country, from Europe, a person charged with barratry on private property. He being here, it appears to me clear he would be amenable to our courts. The tortious act must have originated on the high seas, or, at least, must have been so continued as to have existed on the high seas, and constituted a new act of barratry in every successive place to which the vessel was carried. If, therefore, it was a criminal offence, I conceive he would be triable by our courts; although, had such an offence taken place in a situation within the territory and exclusive jurisdiction of a foreign nation, it might be questioned. This being a civil offence—a breach of trust—there can, I think, be no doubt.

The case (from the papers) appears to me a deep-marked instance of barratry. Still it may be otherwise; and the United States are not authorized to examine into and decide on the evidence, but in regular process, exhibited to proper tribunals by the injured party. Clifton's imprisonment by the Spanish government is not adverse to the rights of the United States,

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or of their citizens, of which they complain against that government, and the actual wishes of the owners. As the United States have nothing to complain of, or to ask for, from the Spanish government, I can see no necessity for their interference. If Clifton has violated the laws of Spain, or if its laws will give a remedy to the injured owners, they are at liberty to pursue it there; if not, they will take their own means to obtain it elsewhere. If the owners are *unlawfully* detaining their master in prison, they are liable to his action. The controversy appears to be of a civil nature, between private persons; and, like all such cases, to be left to their own course, on the ordinary principles of law: a master defrauding and cheating his owners, by embezzling their ship and goods on board, being triable by a court of admiralty, and not differing in principle from any other fraud or breach of trust.

The sufferings of Clifton, as a citizen imprisoned in a foreign country, addressed to the humanity or charity of the United States, are objects of attention. He certainly ought to be brought to trial, or to be released. My opinion is, that it would be best for Mr. Pinckney (considering what has already taken place) to inform the owners, or their agents, that it is a matter involving private rights, and with which the United States cannot with propriety interfere; and that, therefore, they will pursue such measures for the redress of their injuries, in *conformity to law*, as they may judge expedient.

I am, &c.,

LEVI LINCOLN.

To the SECRETARY OF STATE.

CONFIRMATIONS AND GRANTS IN THE NORTHWESTERN TERRITORY.

Under the act of March 3d, 1791, entitling heads of families who had removed without the limits of the Territory, and occupied certain lands within five years, to the donation lands specified in said act, those persons who returned to their respective districts only, within five years, are entitled to the benefit of said provision.

WASHINGTON, *March 14, 1803.*

SIR: I have the honor to state my ideas on the questions contained in Governor Harrison's letter, which was addressed

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to yourself, and handed to me by the President. It is difficult for one to understand precisely the grounds of the governor's doubts on the supposition of Detroit being considered as without the limits of the Northwestern Territory whilst it remained in the possession of the British.

The resolve of June 20th, 1788, confirms the titles and possessions of the described lands to such inhabitants and settlers thereof, who, on or before the year 1783, had professed themselves citizens of the United States. It also provides that each of the said families then living on the said lands, who should continue to reside within their respective districts three years from the time that an additional allotment of four hundred acres of land should be made for them, as therein is specified, should have a title to the same; otherwise, not.

The act of March 3d, 1791, provided that such of the heads of the said families who were at Vincennes or Illinois in the year 1783, and who had since removed from one of those places to the other, should, notwithstanding, have the four hundred acres donation land, to be entered in either of the said districts, at their election; and the same act further provided, that the heads of the said families who had removed without the limits of the Territory, and occupied the said lands within five years, should also be entitled to the donation lands aforesaid.

This law changes the terms on which a title to the donation lands was to have been acquired, only in reference to such persons as had removed from one of these districts to the other, and to such as had removed *without* the limits of the Territory. The claims of all other persons are, as they originally were, to be decided by the provisions of the resolve.

It is clear that the Territory intended by the act is the Northwestern Territory, and not that of Vincennes, Illinois, or of the allotted lands; and that the five years mentioned by the act are to be computed from the time of its passing, and not from the time of the land claimants' departure from Vincennes or Illinois, as the governor seems to suppose.

Three descriptions of persons only appear to be entitled to the allotted donation lands—one under the resolve, and two under the act.

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Under the resolve, such heads of the aforesaid families, or their heirs, who resided within the particular described district three years after the allotment of the aforesaid lands.

By the act, first, such as had changed their residence from one of the said districts to the other, previous to the passing of the act; and, secondly, such as had removed without the limits of the Territory, and who returned to *their respective districts*, and occupied within five years, as aforesaid.

Concerning the last description of persons alone is there any question. And if Detroit, as it is conceived to be, is, in the construction of the law, within the said Territory, then those who had moved thither, although they may have returned to Vincennes, &c., within the five years, and there occupied their lands, cannot be considered within the provisions of the act. The law appears to have made no provision for such persons who had removed to places out of the land districts to places within the Territory, without having secured their title by a three years' residence, as aforesaid. These people were probably presumed, from their situation and means of information, to have been acquainted with the original terms of the donation, and, from their non-residence and non-compliance, to have abandoned their claims. As those who had removed from one of the said districts to the other had thereby evinced their design of removing into that country, they were provided for; and, as those who had gone into distant parts *without* the Territory might not have got information of the donation seasonably, under the resolve they were provided for, on condition of their returning to the district within the five years. The persons who went to Detroit were within the principles of neither of these provisions; for, besides associating with those who were forcibly maintaining an adverse possession, hostile to the rights of the United States, they were in a situation in which they might as easily have learned the fact of the passing of the resolve and its provisions, as if they had resided in some other parts of the Territory. There are other reasons for considering Detroit as within the Territory. It is geographically so—so by treaty and right. As such it was considered, claimed, and demanded by the United States; and withheld by the British government, as a means of compelling a compliance with their

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demands. The terms of the act are descriptive of boundaries, not of the actual exercise of civil authority. The words are, "*without the limits of the Territory*," as expressive of local extent, and not of actual limits of political power or extent of legal jurisdiction. Indeed, in critical and legal strictness, the territory actually occupied and possessed by the British at Detroit was within the *outward* limits of the Northwestern Territory, as that Territory was possessed by the United States. The possession of the British having been a wrongful one, it is not to be considered as constructively extended beyond the country they actually covered or occupied; whereas the possession of the United States, under the treaty, is to be considered as including all the lands and waters, from which they were not actually excluded, within their treaty limits, and, of course, as extending to the line northwardly of Detroit, so as to include it.

But, admitting Detroit to have been out of the limits of the Territory, within the meaning of the act, yet, if those persons who removed thither did not return and occupy at Vincennes within the five years from the passing of the act, they cannot be entitled to any benefit under it.

I am, &c., &c.,

LEVI LINCOLN.

To the SECRETARY OF STATE.

GOVERNMENT LIABILITY.

A receiver of captured property, to deliver to the true owners as they should be ascertained by Congress, and who converted the property and had the means of indemnifying himself, has no claim upon the United States for the payment of a judgment obtained against him, unless it expressly appear that such property came into his hands as agent for the United States. (See opinion of January 21, 1803, *ante*.)

WASHINGTON, March 18, 1803.

SIR: I re-enclose Mr. Bingham's letters respecting his action with Cabot and others, as they contain little more than a repetition of former statements. The following observations are similar, it is presumed, to what I had the honor of making in a former letter, of which I preserved no copy.

Mr. Bingham appears to consider his demand against the United States as warranted by law. He certainly ought to have the fair and intended benefit of any resolve which may have passed in his favor; but not of any erroneous construction of such a resolve, even if such a one has ever been made beneficial to him.

Uncontested facts, and the repeated decisions of courts competent to the purpose, show that Bingham, in the transactions which gave rise to the actions he has suffered from, could not have acted as agent, or at least as an authorized agent, of the United States; for if he had so acted, he must have prevailed in his suits.

Bonille's order, on which much dependence has been placed, was that the cargo should be sold, and that its *net proceeds should remain in the hands of B., to be delivered to whomsoever, according to the decision of Congress, these proceeds might belong.* This order is B.'s *first and only* authority for meddling with the property in question; and it also proves for whom and to what purpose he could, in any sense of the word, be considered as an agent concerning it. The object of his agency in *receiving* is by this order expressly pointed out, namely, to *keep and deliver over* the proceeds received, to those to whom, according to the decision of Congress, they might belong. Nothing can be plainer than B.'s duty; and nothing more safe and indemnifying in itself, had it been pursued.

On February 2, 1779, he informs Congress of the capture, and adds that Bonille had insisted that the cargo should be disposed of; and the island being in great want of this necessary article, (flour,) that the sales would be more advantageous to the concerned there than in Europe, and would make the misfortune fall less heavy on the concerned. By this letter it appears that the flour was at a good market, the sales advantageous, and that the net proceeds received by B. would at all times be sufficient to meet the equitable and legal demands of those to whom they might belong, and, being delivered to them, to indemnify and save harmless the agent who received them.

On the 30th of November, 1779, in consequence of a letter from Mr. Bingham, against whom suits were then pending in

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Massachusetts, Congress requested the legislature of that State to consider whether it would not be advisable to stop those suits until the principal question (prize or no prize) should be determined; *after which*, said Congress, *it would be in Bingham's power to discharge himself, by delivering to the true owners the property placed in his hands for their use.*

At this time it is clear that Congress did not mean to change the terms on which B. received the captured property, to become responsible themselves, to indemnify B., or to aid him any further than to find out who those *true owners* were, to whom he could with safety deliver what had been placed in his hands for that purpose. The special principles of his agency, of law, of equity, and the most obvious principles of common justice, would require no more; because, the owners being known, *he* had already been furnished with the means of indemnifying himself; and *then holding them*, could completely do it by *delivering* over the property which had been *placed and continued* in his hands *for that very purpose*, and on the very event of the owners being known.

It is to be repeated that Bonille's order to B. was for *him* to deliver the proceeds of the cargo to whomsoever, according to the *decision of Congress*, it might belong; and that they, in their above-mentioned address to the legislature of Massachusetts, *expressly mention the decision of a prize court* as the *decision* on which B. was to discharge himself by delivering over the property. It is to be remembered that this expression of the consideration of Congress on the subject was *nine months* after B. had informed them by letter that he should place the proceeds of the flour to the credit of their commercial committee, and proves the *refusal* of Congress to *receive the proposed credit*, and to be made accountable to the owners for the proceeds of their cargo. This transaction of Congress, incorrectly stated and erroneously construed, is relied on in support of the demand, as connected with the proposed credits. But a different inference ought to be drawn. Considering B. as receiving the property either from Bonille or from Congress, as their agent, he could not have a right to *elect* the purposes to which *he* would apply it, but *they* from whom he had received it; and from first to the last, on every occasion, have they determined

and elected to consider the property in B.'s hands to be *delivered* over to the *true owners* when they should be known.

The legislature of Massachusetts not thinking it proper to stop the suits, Bingham, on the 6th of June, 1780, petitioned again on the subject; a principal object of which was to exculpate himself and Bonille from blame, and to obtain a release of property attached, in his correspondent's hands; stating that neither the captors nor the captured could eventually suffer by what had been done. Congress thereupon resolved that Bonille, in ordering the cargo of the brig Hope to be sold, and the money to be *deposited in the hands of B.* *TILL the legality of the capture could be proved*, showed the strictest attention to the rights of the claimants, and the highest respect for the opinion of Congress; and that they would *defray* all the *expenses* which B. should be put to by reason of the *suits then pending*, or which might *thereafter* be brought against him, in the *State of Massachusetts*, on account of the brig Hope or her cargo. Bingham being the agent to Congress for other purposes, Bonille the officer of an ally, and the captors our citizens, Congress, as above, absolve from censure and approbate the *conduct* of their agent. But what *conduct*? The *reception of property* to be by *him delivered* over to the *right owners* whenever they should be ascertained "*by a judgment* of the principal question." These are the words. Until this is done, B. could not be safe in delivering the property. He must have delivered it to the right persons at his peril. If he had delivered it to the wrong, that would not have discharged him; he would, notwithstanding, have been responsible to the *judgment owners* the moment they were *ascertained*. B. could with safety, and ought in duty, either as agent or a mere merchant, to have delivered to *them their* property. They *sought* it—they *demand*ed it. The *event had taken place on which* he undertook to do it—on *which Bonille* and Congress expected he would have done it, and had impliedly directed him to do it. *This judgment* would have indemnified him in all places, in all times, against all persons; it was *binding on all the world*.

As B. would not have been safe in delivering the proceeds of the cargo to the claimants until it was ascertained, by judg-

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ment of law, that they were entitled to receive them, it was perfectly reasonable that the investigation should be at the expense of the United States, under the special circumstances of the case, and that their interference should in no way prejudice the *plaintiffs* in the pending actions. They had attached, in the hands of Mr. Russell, as the agent of B., his property, which, in the event of a judgment against B. in the specified actions only, and which it was impossible to obtain previous to a judgment, was liable for its satisfaction. B. complained of having his property embarrassed by an attachment; and as he could not release it by delivering over the property claimed until the justice of the claim was ascertained, Congress, to procure its release, pledged themselves to the *plaintiffs* to pay *all such* sums of money, with costs of suit, as might have been recovered in *either or both of the abovementioned* actions, and *in no other*; for on these alone was B.'s property attached. They therefore directed their navy board to give security *to the plaintiffs, (not to B.,)* for the payment of every judgment which they might recover in these particular actions, and to cause the defendant's attorneys to be instructed in the defence of the same.

These are the resolves and measures on which Mr. B. principally places the legality of his demand. Their only objects were, to discharge B.'s property from a complained-of embarrassment, to direct his attorneys, in reference to the two then depending suits, and to secure the *then plaintiffs* by bonds, as an equivalent for their attachment. By these transactions, no new rights were created—no new obligations, impliedly or expressly, were created against the United States, in favor of Bingham. The words relied on are, *Congress will defray all the expenses that Mr. B. may be put to by reason of the suits now pending, or which may hereafter be brought against him, in the State of Massachusetts, on account of the brig Hope and her cargo.* The intention of Congress, collected either from the words used, from the provisions connected, from the subject-matter, from the effects and consequences, or from the reason and spirit of the provisions and the nature of the transaction, appear to me to be very clear. The terms *expenses by reason of a suit* are not usually applied both to the moneys re-

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covered as *debts* or *damages*, and to the moneys *expended* in carrying on a suit, but only to the latter. A promise to *defray all the expenses* which the *plaintiffs* might be put to by reason of those suits, expressed in the same terms, would have been properly expressed, and yet necessarily confined to the mere *cost* and *expense*. The phrase *expenses of a suit* is, obviously, both in technical and common parlance, expressive of the *costs* of court and the *out-door expenses*, as *distinct* from the *debt* or *damages*. But, if the meaning of the resolve, from the words of it, were uncertain, a positive claim could not be supported from a doubtful construction.

If Congress meant to *defray* (that is, *pay*) the damages or debt, and defray the expenses, why did they *confine* the provision to actions in *Massachusetts*? The reasons for *paying a judgment debt*, measured in its amount by the value of the flour, being the same wherever recovered, would apply equally elsewhere. If Congress intended to have paid the *damages* which might have been recovered in any action, there could have been no reason for expressly limiting the provision to the place of their recovery—to *Massachusetts*. Not so in respect to the *cost* and *expenses*, or the *damages*, in the *two preceding actions*.

The suits could be brought only where one of the parties lived. B. being a stranger in *Massachusetts*, not personally attending; his responsibility not generally known, from his distance; the trouble and expense of defending suits greatly increased; and the little credits and advancements necessary, for the continually accruing expenses in the defence of actions, to be made; and *his property* being held only on the *two depending actions*—the reasons for the legislature's providing for the damages, which might have been recovered, applied only to the pending actions; and for the cost and expenses, to actions only prosecuted in *Massachusetts*; as not any of the stated causes could have operated in actions against B., if prosecuted in Philadelphia.

On these ideas, services performed and moneys expended in and about the suits in *Massachusetts*, were by the resolve secured, and *directly*, on the *credit* of the United States. *These creditors* alone, (not B.,) in virtue of the resolve, could have

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any claims on government. *The expenses were B.'s*; but government *engaged to the creditors*, for their greater security, to pay them. On the same ideas, Congress, in their letter to the legislature of Massachusetts of the 30th November, above referred to, enclosing sundry papers relative to the pending actions, after stating that *Mr. Bingham, on a decision of the principal question, could discharge himself by delivering to the true owners the property placed in his hands for their use*, request that legislature, if they should not think it proper to stop the actions, to furnish B.'s agent with the papers then enclosed. This demonstrates that Congress *considered B.*, and the *property placed in his hands*, as chargeable with the *damages* which might be recovered, after they had subjected themselves, in some degree, to the *expenses* of the suits.

In June, 1797, there was a decision on the principal question in the circuit court, in favor of the owners of the privateers, the plaintiffs in the late action. This sentence, regularly rendered on a libel, (the proper process,) and by a competent court, ascertained the true owners of the property, devolved the obligation on Bingham to deliver it, and completely discharged the United States from any *after care* or *expense* concerning the demand in question. The United States have, however, been at many expenses since.

It appears the recovery finally against B. was on an action for money had and received, tried on the most liberal principles, on the general issue, with a liberty of giving the special matters in evidence; that the disbursements and all expenses were deducted from the amount of the sales; and the net proceeds of the flour, with a calculation of interest, (short of the real interest,) on the amount of these proceeds, were made the measure of damages. Surely B. cannot complain of actual injury, in being held to pay the amount of this judgment, after having had the use of the money for so long a time.

To me it appears, from perusing Mr. B.'s statement of his own case, that he has mistaken both facts and principles, in some very material points; and that, at times, Congress and their officers have also been impressed with mistaken views of the subject; but, nevertheless, they have not rendered the government responsible for any part of the judgment in question:

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that the United States were not held, in virtue of the above-mentioned resolve, to have defrayed even the *expenses* of any proceedings on account of the captured flour, after it was adjudged to be lawful prize to the brig Hope, in the circuit court, as aforesaid: that, as the reason of their interference, so their provision by resolution, stopped here; and to have extended it further, would have been more than justice, policy, or the subject-matter, or even Mr. Bingham himself, in his first communications, seemed to require. What possible cause can be assigned why Congress should have assumed on themselves the payment for property which Mr. Bingham had received, to be delivered over to the right owners, and out of which he had made, and would probably make, until it should be paid over, interest profits, if not mercantile profits? The consequence of such an arrangement would have been; for the United States to have taken the money from B. as *his agents*, and paid it over to *his* creditors' creditors, or as *debtors themselves*, on account of property which *B. had received*, been benefited by, and *chosen to withhold* from the true owners; paid their demands, as the duty of government, without an indemnity; or, like common factors, resorted to B. for their reimbursements. On ideas the reverse of these have been the measures of government. An object, avowed in the said letter of the 30th of November, is, to prevent injustice to *individuals* on the one hand, and embarrassments to an agent on the other, until he could, by a judgment on the *principal question*, *disembarrass himself, by delivering to the true owners the property placed in his hands for their use*. This proves Congress considered the matter, in reference to the *property itself*, as between *individual claimants* and B.; and that they did not mean so to interfere as to render themselves responsible for *that*, but only to secure justice to these *individuals*, by *suffering the law to take its course*, and to *release B. from embarrassments incident to the then pending suits*. On the same principles, the resolve afterwards makes provision *for the release of B.'s property* when attached, and for defraying the expenses occasioned by the actions; and on the same principles, the auditor of accounts refused to receive or have anything to do with the *property* in question, or any part of it, by admitting a credit, in the set-

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element of B.'s account, which he wished to impose on the United States.

As to the price of the flour, in addition to Mr. Lowell's testimony, I understand there was the testimony of another witness. Besides, it is admitted the flour was good, sold at a market where it was in demand, and of course high. If the price in evidence was not the market price at the time of the sale, (which, without evidence of the actual price, would have been the presumed one,) Mr. B., as he had been possessed of that charge and evidence for years before the final trial of his cause, would, as he certainly might have done, have procured evidence of what was the market price. That Mr. B. suffered, in fact, a single cent by a summons in a process of a foreign attachment being served on Mr. Russell, does not appear by any document in the case. This would have in no event rendered the trustee liable, until after a principal judgment could have been obtained against B., and a second and subsequent judgment, on a writ of *scire facias*, rendered against this trustee; which, from the nature of the processes, would, if the actions had been sustained, required years to have accomplished, and have created no necessity of the money's lying dead a single week in the trustee's hands. It does not appear by any paper or evidence in the case that any drafts on Russell were dishonored on account of this attachment, or that B.'s credit or business was thereby in the least degree impaired or deranged; and, considering the characters of the gentlemen, the probability is they were not. This law process had only rendered Russell bail or security for his friend and correspondent, in case of a judgment against him. Surely Mr. Russell would have consented to this, without insisting on an actual deposit or pledge of money, and also the use of this money, without accounting to his friend for its interest. If so, B. could have sustained no injury from the attachments; and if he did, the loss of interest or profits, for the short time he was subject to them, ought in equity to be balanced by a similar loss sustained by the true owners of that property, by whose loss he has been benefited. The loss of interest on the run of the execution, the discount these owners would have made to have received satisfaction of the judgment in money on its being ren-

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dered, with some advantages in the calculation of the interest by the jury in fixing the damages, are perhaps more than equivalent to the injuries complained of by B.

While on this question of damages, it occurs to me that I dwelt on it in my former letter on Bingham's claim; it is therefore unnecessary to trouble you with any farther remarks concerning it. Upon the whole, considering the facts disclosed by Mr. Bingham's written statement, supplemented by his subsequent letters; or the evidence produced on the trial of the cause, the decisions and proceedings of the several courts, the measures of the general government, or the whole combined,—I am constrained to repeat, that I can find neither law, justice, nor equity, in the demand made against the United States.

I have the honor, &c.,

LEVI LINCOLN.

To the SECRETARY OF STATE.

CLAIMS UNDER TREATY WITH FRANCE.

Demands for freight, where individuals have transported articles for the French government, or for its citizens, as they are within no positive provision of the convention, are out of the question; the United States being in no event and on no principles bound to protect them.

WASHINGTON, *November 15, 1803.*

SIR: In despair of being able to form a decided opinion, or one perfectly satisfactory to myself, from the facts or principles of which I am possessed, respecting the submitted question, I can only state the course and result of certain reflections on the subject. The several articles of the convention, obviously designed to designate the same demands as those which the United States are held to satisfy, being indefinite in themselves, expressed in varied terms and not according with the expressed intent of preceding articles and preceding treaties to which they refer, occasion the perplexity. From the evident marks of hurry impressed; in some instances, on the face of our late negotiations with France; it is not to be presumed that the negotiators attached precise ideas to all the principal terms which they made use of. It is clear that the same terms,

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as used in different articles, will not admit of the same construction.

For the purpose of ascertaining their meaning, it seems necessary to consider, as parts of one entire instrument, the treaty of cession and the two conventions; as they refer to, and are dependent on, each other, and were made at the same time, in pursuance of one entire agreement, however independent they may be of each other in their execution.

The 2d article of our treaty with France, of September 30, 1800, (which the late convention refers to as containing some of the objects to be provided for at present,) mentions indemnities, generally, as due or claimed, and which were to be the subject of a future adjustment.

The 5th article of the same treaty provides for the payment of *debts contracted* by the French government with the individual citizens of the United States, saving indemnities claimed on account of captures or confiscations.

The makers of the treaty of 1800 comprised, in the terms "*debts contracted*" and "*indemnities due or claimed*," all the demands which they then meant to provide for, or to reserve for a future adjustment. Had that treaty been ratified in all its articles, and the payments of *debts* been made as provided for in the 5th, and as therein and in the 2d they are distinguished from indemnities, no *after* demands but those comprised under the term *indemnities* could have been made on the French government. Considering these articles connectedly, and in connexion with other parts of this treaty, there can be but little doubt of its having been the intention of their framers to include all just demands, as well for freight as for other causes, within the general description of the *debts mentioned* in the 5th, and the indemnities excepted therefrom and reserved in the 2d article. No reason can be assigned why a *claim* on account of freight should not be considered as within the terms or the meaning of one or the other of these articles:—within the first, when founded on any contract; and within the last, if resulting from capture, or any transaction without an agreement or the consent of the claimant.

The 9th article of the treaty of the 30th of April, 1803, expressly declares it to be the object of the convention of the

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same date "to provide for the payment of debts due to the citizens of the United States by the French government, prior to the 30th of September, 1800." The 1st article of the convention securing a payment to the French government, mentions another convention, also, which shall fix the sum "for the payment of the debts due by France to the citizens of the United States."

To provide for the payment of *these debts*, is the avowed object of the last convention. In the 1st section, it was said that it is "to secure the sum due by France to the citizens of the United States," in compliance with the 2d and 5th articles of the treaty of the 30th of September, 1800, that the respective ministers had been appointed, who had agreed to the following article:

That the debts due by France to citizens of the United States before September 30, 1800, shall be paid according to certain regulations. This last term may possibly refer to the qualifications of the debts, as well as to the mode of payment.

"The sum due" and "the debts due by France," as expressed in the abovementioned article and section, are to be paid in compliance with the 2d and 5th articles of the treaty of 1800; that is, so paid as would be in compliance with them, were this 2d article in force, or in compliance with the principles therein expressed. An execution of this 2d article, or a payment in pursuance of its provisions, would be one in consequence of "negotiation" or an "adjustment" by the two nations respecting indemnities. The convention is such an adjustment by the two nations, by which it is determined on what account there shall be indemnities, and in what instances the United States shall be held to satisfy them and the other demands, under the term *debts*, as described in the said 5th article.

It does not appear that accounts and vouchers for freight were among those mentioned in the 1st article of the convention as presented to the French government, or that debts for freight were among those whose result was comprised in the conjectural note mentioned in the 2d article. If they were not, it is conclusive against the demand in question; but if they

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were, no conclusion results therefrom in support of the claim, if it is within the subsequent exceptions.

The 4th article of the convention confines the demands which the United States are held to pay to such debts as are due *for supplies, for embargoes, or for prizes made at sea, in which the appeal has been properly lodged within the time mentioned in the convention of 1800.* The mistake in there being no such time mentioned, will probably not alter materially the effect of this article.

An execution of that convention being an express object of the late one, this last particularly refers to *the 2d article of the first, respecting indemnities, and to its 5th, respecting debts;* but so confounds and limits these terms as to render their meaning in some instances to a degree doubtful, and in others very circumscribed. The "*debts contracted*" of this 5th article are, by the 4th, as above stated, confined to those for supplies—at least so far as they are to look to the United States for payment. *Debts or demands* for the freight in question cannot be considered, on any principles, as included in this description. The "*indemnities claimed on account of captures or confiscations,*" and "*indemnities due or claimed,*" as mentioned in the above said 5th and 2d articles, are confined, in like manner, to indemnities for *embargoes and prizes made at sea.* A demand on account of *an embargo* detaining both vessel and cargo, or the vessel alone, can, in no sense of the word, be considered as including a demand for the vessel's having transported the cargo, which is the ground of a claim for freight.

Are, then, "*debts,*" or rather "*demands,*" on account of freight, in cases of capture, as distinguished from "*debts due for supplies or for embargoes,*" provided for under the terms "*debts due for prizes made at sea?*" The positive effect of these terms is to include *only* such demands as are in consequence of captures made *at sea*, but not necessarily *all* such. The next article of this convention, therefore, limits the demand on account of captures to such as had been, or should be, ordered to be restored, and in cases of the insufficiency of the captors; and expressly excepts demands on account of prizes whose condemnation had been, or should be, confirmed. These limitations, being inconsistent with the idea of a *payment* of freight

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in *some* instances in which it may be clearly due from the French government or the captors, and not very congenial with such an idea in *others*, conclude, with great strength, in favor of excluding it in *all* cases, as a demand transferred to the United States.

Demands for freight, where individuals may have transported articles for the French government, or for its citizens, if such have existed, as they are within no positive provision of the convention, are out of the question. In such cases there was a voluntary credit, which, if misapplied, as it was the *creditor's* folly, so it will be his loss; the United States in no event, and on no principles, being bound to *protect* or pay such claims—they not being debts for supplies, as before stated, or on account of captures at sea, as above expressed.

A decree or an order for restitution or condemnation is—1. Either of the vessel and cargo; or, 2. A condemnation of the vessel, where the cargo is restored; or, 3. A condemnation of the cargo, where the vessel is restored. In the first two cases, on general principles, there may be a demand for damages; but it is only in the *last* that there can be a demand for freight *against the captors*. As, then, this order of *restitution* is of such a kind as devolves the obligation of making the payment mentioned in the convention, on "*account of captures at sea*," and as it is only an order of condemnation of cargo that can devolve the obligation of the payment of freight, it is to be presumed that the convention meant to provide for the payment or restitution of the vessel or cargo only, which are due from the *captors* on an order of restoration, and not for the payment of freight, which is due only in the event of *condemnation* of the cargo, and this with some exceptions. If the condemned cargo is contraband; if the vessel is coasting from one port of the enemy to another; if she is engaged in a trade between another country and her colonies, not allowed of in a time of peace, or in any other way departs from the principles of a neutral conduct, freight is usually denied. These deviations, although they may not expose the vessel to confiscation, have been considered, by the usages of nations, as sufficient to forfeit the right of freight.

It may be difficult to reconcile the provision in the conven-

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tion for the payment of debts, thus narrowed down and confined to demands for supplies, for embargoes, and for vessels or cargoes ordered to be restored, with its more enlarged professions, and its repeated reference to the two articles of the treaty of 1800. Yet I am inclined to think such ought to be its construction, and that the opinion of the two commissioners is correct. To extend the provision further, would, I think, be unauthorized by the articles themselves, or the rules of construction. The creditors for freight have no cause for complaint against the United States. These demands were against the French government. And if the convention has not transferred them, they still remain good as they were against their original creditors. The commissioners, who are made the judges, are of opinion that the debts for freights are not transferred. But if they were doubtful, the effect ought to be the same. They could never decide that an instrument of a doubtful, or fairly capable of a different construction, had charged the American nation with the debts of the French. The convention supposes, by its expressly referring to the French government, the right of deciding on such claims as shall be so rejected as to exempt the United States from their payment, that there may be some which they may be bound to satisfy. Among those may be the demands for freight. To charge the sum mentioned in the convention with these kinds of debts, if they are not fairly chargeable on it, would be not only injurious to the United States, but an injustice to the indisputable convention debtors, in the event of that sum being insufficient.

The foregoing opinions, although repeatedly reviewed, are submitted to your consideration with real diffidence.

I have the honor, &c., &c.,

LEVI LINCOLN.

To the SECRETARY OF STATE.

RIGHTS AND IMMUNITIES OF PUBLIC MINISTERS.

The entry into a minister's garden by the agent of the owner of a slave, and there seizing and carrying away such slave to the owner, is not such a violation of the domicil of the minister as constitutes a punishable offence, under the act of Congress of April 30, 1790.

WASHINGTON, May 9, 1804.

SIR: I had the honor of receiving yours, enclosing Mr. Merry's, as his Britannic Majesty's minister to the United States.

Its contents lead to a consideration of the immunities of public ministers in relation to exemptions and protections of their dwellings, their domestics, servants, and *laborers*, in some new views of those subjects, and beyond any cases which, from my means of information, I can find to have occurred either in Europe or America. In such a case the discussion must depend, principally, on reasoning from general principles, and the analogy there is between it and cases which have been considered as settled. The circumstance of the person retained by Mr. Merry being a slave, and, with his mistress, a native of the country where the minister resides, forms points in the cause which make it differ materially, both in principle and in fact, from any which appear to have been sanctioned by the consent of nations. It is to be regretted that the officer or agent complained of had not, previously to the recapture of the *run-away slave*, advised Mr. Merry of his condition, and consulted on the means of reclaiming him. Had this requisition of decency and propriety been complied with, and which seems to have been enjoined by a respect for our own government, as well as for his, and for his official station in the country, there can be no doubt but he would have immediately dismissed from his employ the runaway servant of one of our citizens, and thereby have prevented an unpleasant discussion of unsettled principles of the laws of nations, and an apparent violation of privilege, which a religious respect for the usages of nations and the duty due to his situation obliged him to notice. Neither Great Britain nor any other nation can be more interested in "*a religious observance of the laws of nations*" than the United States; nor can the administration of the American government be less anxious for a principled and correct decision in the existing case than Mr. Merry. Both will be happy in the result of an examination which shall evince that no violation of official privilege or national law hath taken place.

The question is, not whether the taking of the negro from the employ of a foreign minister, without previous notice to him or the government in which he resided, was sufficiently respectful towards them; but what are the legal and national rights and obligations, in reference to all the parties concerned, respectively. The immunities of foreign ministers, their retinues,

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domestic servants, dwellings, goods, &c., as stated by the approved writers on the laws of nations, are recognised by the United States in their fullest extent. Present inquiries as to the matter of the things alleged to be privileged, and exempted from the ordinary procedures in our country, as connected with a foreign minister, are: was Scott Mr. Merry's domestic servant? or was he his chattel, in the sense in which the law entitled them to that exemption? or was his garden parcel of his dwelling, to that purpose? The general positions in favor of such exemptions have their exceptions. Some are mentioned in the books; others, equally within their reasons, with no militating decision, should be equally respected. The reclaiming of a slave by his master in a summary manner, is believed to be such a one, as against the mere question of a *privileged service* with a minister of a foreign nation; as against his rights of domicil, it may be more questionable. If a garden is not the privileged parcel of, or appurtenant to, a dwelling-house, those rights could not have been violated in the existing case. This, then, is the first question: Was Scott Mr. Merry's domestic servant in the sense of national law, and in his service, at the time of his capture?

The mere act of doing labor in a minister's house or garden does not, of course, make the laborer such a servant. The laborer may be the domestic servant of the sovereign of the country where the minister resides, or of some minister from another foreign sovereign; in which case, in the event of such laborer's getting into the actual employment of a minister, other than the one to whom he belonged, he would be considered as the servant of his first and rightful master. He could not be the servant of both—have two *such* masters. Nor is the lodging in a minister's house, or even his certificate, incontrovertible evidence of the right of privilege; and without thus lodging and being certified, a person may be a privileged domestic. Although a distinction exists, in some respects, between servants who are natives of the country where the minister resides, and foreign servants brought with him, it does not apply to the present question; nor is it of importance to examine into the reasons of the difference which some authors make between menial servants and such as they call domestic

ones—if, indeed, they are not the same. While the right of exemption or protection may be admitted to extend to every description of ministers' servants, this right must not be confounded with the abuse of it. A person, to be privileged, must be in reality and *bona fide* the servant of the minister; otherwise, no exemption can be claimed by him or for him. The law protects only such. With whatever *good faith* or *fair intention* a minister may receive a person into his service, if it is not also so, and legal on the part of the person received, he cannot be protected.

If Scott was the servant of Mr. Merry, he must have become so by some act or contract between them, sanctioned by some usage or principle of law. It is assumed that Scott, at the time of his engaging in this service, was the runaway slave of a Mrs. Stone, and her property; and that he was retaken by her authority. As such, with what right could a foreign minister, with or without notice, employ him, privilege him, or retain him? Could there be a service by contract—a *bona fide* one? The slave was the property of his mistress, had no *will* of his own; was incapable of disposing of his time for a moment, of creating a right, or binding himself by any contract which he could make. If so, the whole matter of engagement must be considered as void; and the negro was so far from being the *hired servant for a month*, that he was, from his condition in society, incapable of becoming one at will. The service of a slave is secured by the government to his owner. He may be considered as in custody of the law, in the custody of his owner. This master, by law, has the same right to restrain, *reclaim*, and maintain the possession of him, that an officer has in reference to his prisoner; considered as property, as the goods and chattels of the owner, the reasoning is still stronger. The right of recapture, as against a mere actual possession, is universal, and always justifiable, if not attended with a breach of the peace. The law of nations respects the right of the native inhabitants of a country where a foreign minister may reside, as well as his rights and immunities. Hence it is that the act of Congress, passed April 30th, 1790, which expressly recognises the right of public ministers, provides, as does the British statute, in conformity to national law,

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that the benefits of the same shall not be extended to the debts of persons who shall have entered into the service of a public minister, and as shall have been contracted prior to such entry. If a person *capable* of binding himself to service by contract is liable by law to be taken from the service of a foreign minister by his creditor, to whom, previous to engaging in the service, he was indebted, a slave, surely, *incapable* of contracting, may be taken by a master to whom, by previous obligation, the *services* of his life shall have been due, and whose *property* the slave shall have been. So a person in a service of this government, which is incompatible with the service of a foreign minister that he may engage in, will not be protected. On these principles, it is believed, a soldier, a sailor, an apprentice, a child, and a wife, engaging in the service of a public minister, would not be privileged; and, forming exceptions to the general rule, could legally be retaken by their superiors, master, parent, and husband, respectively, under circumstances not endangering the peace.

A *second question* is, admitting Scott was not Mr. Merry's servant, so as to be protected against arrests or recapture, were the rights of the dwelling-house violated in taking him from the garden?

The house of a public minister is exempted from entry by any civil or criminal process, excepting in some very extraordinary cases. How wide this privilege of domicile spreads, has perhaps never been determined with any precision. A *dwell-*ing-house, as to the purposes of protecting it and its occupants against the invasion of burglars, and the owner and his enclosed goods against the arrests of civil processes, is correctly known in law. Its limits, as legally defined in these cases, may be considered by some too narrow to comport with the rank and the respect due to the representatives of sovereigns. They may be so; but, to all necessary purposes, they are sufficiently large. All their out-buildings and enclosures are protected by the laws of the country, in common with those belonging to its most distinguished inhabitants. Indeed, they are better protected; the security of privilege which attaches to a minister's personal chattels, wherever they may be, and of redress in our highest courts and most summary forms of jus-

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tice, render the asylum beyond the mere dwelling-house of no importance, or important only as a sanctuary for strangers. Would a debtor, a culprit, a runaway, a beast or a bird, be privileged and protected in the out-buildings of a minister, appurtenant to his dwelling-house, as they would be in the house itself? Can a garden be considered as parcel of this house, and the man who labors there as having the protection of the house? Certainly such privileges would be inconvenient to the public minister, and might be abused, to the great injury of the people among whom he should reside. It would create the necessity of personal applications whenever it should become necessary for the purposes of civil or criminal justice to enter his possessions; and, in case of his occasional absence, for the want of his consent, a fugitive must escape, or the privilege be violated. Upon the whole, I can find no sufficient reason, either in precedents, principles, or in the official situation of a public minister, for extending the immunities of his domicile to his garden. As well might it be extended to his farm, and shield day-laborers from the common duties and common justice of their country. This applies to Scott, considered merely as a slave taken from the garden by his owner, and not as the servant of the minister. The extent of privilege contended for appears to me noways necessary for the discharge of the official functions of a public minister. It makes him, to an unreasonable degree, independent; nor is it within the necessity or the policy of rendering him so. This *independence* has limits; he cannot do what he pleases; must conform to the laws of the country of his residence; and if, forgetful of duty, he should violate its laws and its customs, to the injury of others, his privilege consists more in the withholding the ordinary remedies from the injured, than in those positive co-operations of government against him which may seem to sanction the wrong after the sufferer has corrected it by doing himself justice.

If the principles which have been stated are correct, they exclude the idea of a resort to any court in the case which has been submitted. Mr. Merry's statement of the seizure having been made by an officer of justice, it is believed, is not correct. In this he must have been misinformed. As I understand it,

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the slave was taken by the agent of his owner, without any process or direction from a magistrate, as has been usual. And of course the case is not provided for, even on the supposition that Scott was the *domestic servant of the minister*, by the act of Congress. Notwithstanding, if *this* was the man's real character, and if the retaking him in the garden was seizing him in the minister's privileged dwelling, in the sense of law, there has been an offence against the rights of nations; and the offenders may be prosecuted by the minister, either in the district or the Supreme Court of the United States, or by an indictment in the district court. But, I repeat it: no court can readily avail itself of a precedent, or a principle, which will punish the owner of a slave—of property—for taking it, in a peaceable manner, from the garden of a foreign minister. I have formed no opinion as to what might be thought expedient, under existing circumstances, if you should have doubts of the propriety of the above-stated positions, or Mr. Merry be dissatisfied with their application. My views have been confined to the effects of what has been considered as strict law. Had the man been seized and taken away by an officer of the general government, who was removable at its pleasure, it might be fit to dismiss him for his neglect of the rules of decency and propriety, in proceeding without first applying to his government, or the minister, for direction or consent. But a private person cannot be thus subjected to these rules, or thus punished for a violation of them.

Many and variant opinions may be, and probably will be, formed on this subject, should it become the topic of popular or legal discussion. The one which I have the honor to submit to your consideration may be adjudged erroneous; but it is embraced with confidence, and is the result of my best reflections.

I have the honor, &c., &c.,

LEVI LINCOLN

To the SECRETARY OF STATE.

 Pay of Seamen discharged in a Foreign Country.

PAY OF SEAMEN DISCHARGED IN A FOREIGN COUNTRY.

The master of a vessel belonging to the United States, sold in a foreign country in consequence of her being stranded, is not, within the meaning of the legislature, liable for three months' unearned pay to the seamen under the act of 1803; for neither justice, policy, nor equity, requires an appropriation of the proceeds of a sale for the return of a crew, when the sale was the result of a disastrous providence.

WASHINGTON, *December 31, 1804.*

SIR: I have the honor to submit to your consideration a summary result of my examination of the 3d section of the law of February 28, 1803, respecting the three months' pay of discharged seamen in a foreign country, which you requested. This section, in substance, requires of the master of a vessel belonging to a citizen of the United States, on a sale of such vessel *and* a discharge of her company in a foreign country, or on the discharge of our citizen seamen there by their own consent, a payment of three months' wages, beyond *what may be due* at the time of such discharge, for each person so discharged—two-thirds of which to be paid to him on his engagement on board of any vessel to return to the United States; *the other third to be applied* for returning *other citizen seamen* from foreign ports to the United States, or *supporting them* there: which third is to be accounted for with the treasury every six months, by the person receiving the same. The words of this provision are general enough, and, in a literal construction, sufficiently broad to embrace the "crew of a vessel sold in consequence of her being stranded." But the question is, whether such a construction conforms to the meaning of the legislature, explained by principles of law and the subject-matter? If there have been any legal decisions in point, I am ignorant of them; and can, therefore, only decide on principles.

The law to which this is supplementary, provided, in its 7th and 8th sections, for the return or support of American seamen in five events: in case of shipwreck, sickness, captivity, and, in case of a discharge without consent, or a contract therefor, on a sale of the vessel. In this last case, if the master refuses to make reasonable provision for the return of such discharged seamen, the vessel might be arrested until there should be a

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compliance. In this act, the legislature considered the sailors who were to be provided for on account of a *wreck*, as distinct from those who, on account of *the sale of their ship*, might become destitute of the means of returning. There being, then, such a legislative construction in this act itself, as to confine its provisions for the return of the crew, in *consequence of a sale of the ship*, to an *ordinary voluntary sale*, and to *exclude a wreck sale*, or a sale of necessity, it is but reasonable to consider the same terms, when copied into the supplementary law, (as they rarely are copied, so far as they respect the description of the case intended to be provided for,) as having or being used in the same sense as they were in the original law, and, of course, as applicable only to *sales in the ordinary course of merchandise*. Neither justice, policy, nor equity, seems to require an appropriation of the *proceeds of a sale* for the support or return of a crew, which *sale* has been a *losing one*—the result of a ruined voyage, and necessitated by a disastrous providence. It is difficult to believe that the legislators meant to charge ship-owners, in addition to the loss of freight and a considerable part of their ship, as the case may be, to a loss of the amount of two months' wages beyond what might be due for the benefit of the crew, and of one month's wages for the benefit of sailors at large; for this would be the effect of considering the act as *embracing all sales—wreck sales*. Such a construction would be taxing property, not in the hands of those who held it, but of those who had lost it; and as it respects one-third of the three months' pay, as a future provision for persons with whom the assessed have had no connexion.

There is another view of the subject. The laws of the United States do not describe the cases when seamen's wages shall be considered as due, and when not, or when payable *pro rata*, or when lost *in toto* from a destruction of the voyage and vessel; but have left these matters to be decided under the special circumstances of the particular cases, according to the marine law, or the common law, as practised on in the several States. By these laws, freight is always considered as the mother of wages; and so close is this legal connexion that whenever it can be claimed, the latter is demandable, and in the same proportion. If, therefore, the goods shall be saved

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and delivered at port, and the vessel lost, both freight and wages would be due; but if the goods should be lost, then both freight and wages would be lost; and this from a policy to stimulate, from a principle of interest, the sailors' utmost exertion to save the ship and cargo when in danger.

The law of 1803 must be so construed as to include *all cases* where there may be a sale of the vessel, or be considered as embracing *those sales* in the common course of merchandise only, where, on the sale, both freight and wages have accrued. On the former construction, if a vessel, on her passage to her port of destination, should, in distress, lose all her cargo, and, of course, her claim to freight, and yet arrive a mere wreck to a port, in which she from necessity should be sold and the crew discharged, they would be entitled to the two months' extraordinary wages, or rather to the benefit of them; but not to one cent of the ordinary wages. This construction would not only be attended with the above unreasonable consequence, but would also change the established principles of the marine and common law, by implication; which is never admissible but from necessity. Considering the law as applying to the last description of sales only, every word of it will have an operation, and be in perfect consistency with equity, policy, and the established provisions of the marine and common law. Besides, there is a verbal argument from the law itself in favor of the last construction. The words are, "three months' pay over *and above the wages* which may then be *due* to such mariner or seaman." There is not, then, by this law, a general provision for *all sailors* who may be discharged in a foreign country on *the sale* of their vessel, but only for such to whom, on such discharge, *wages may be due*. The generality of the first member of the description of the persons to be provided for is circumscribed by this last qualification, "*wages due*." The reasoning stands thus: The law of 1803 does not require the three months' wages to be paid on account of that class of discharged sailors which may include those to whom, on a sale of their vessel, ordinary wages may not be due. Ordinary wages may not be due to the discharged sailors of a stranded vessel, on the sale of her wreck; therefore, the law of 1803 does not require the payment of the three months' wages on account

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of the discharged sailors of a stranded vessel, on the sale of her wreck.

On the whole, from the foregoing view of the subject, with deference to the opinions which may have been formed, or judgments given, I am constrained to believe that the legislators meant to provide *only* in cases of the voluntary sales of their vessels and discharges of their crews, in the ordinary course of trade; and that such *ought* to be the construction of the act.

I have the honor, &c., &c.,

LEVI LINCOLN.

To the SECRETARY OF STATE.

OPINIONS

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HON. JOHN BRECKENRIDGE, OF KENTUCKY:

APPOINTED AUGUST 7, 1805.

EFFECT OF AN AWARD TO SEVERAL COLLECTIVELY.

An award by commissioners under the 7th article of the treaty with Great Britain to several persons collectively, is conclusive upon the matter so far that the right to transfer is vested in all the persons in favor of whom it is made; and if those concerned have neglected to have inserted in it the amount of their respective interests, or if they disagree as to their several proportions, the embarrassments are attributable to themselves. The government cannot undertake to decide among them.

Question for the opinion of the Attorney General.

“IN the award rendered by the commissioners under the 7th article of the treaty with Great Britain, in the case of the Somerset, in favor of John R. Livingston, Wm. Henderson, Messrs. Clarkson & Cross, and Charles Miller, Mr. Livingston claims £54, which, in the report of the assessors, appears to be considered as the property of C. Miller; it being alleged by Mr. Livingston that C. Miller had no right to that sum, and that it was the property of Clarkson & Cross, of whom he is the assignee. The question is, do the award and papers in that case, herewith enclosed, justify the payment of this sum of £54 to Mr. Livingston?”

Answer.

WASHINGTON, December 24, 1805.

The award being rendered in favor of *several persons*, who do not appear to be in partnership, the right to its amount is in *all collectively*, and not in any individually; of consequence the right to transfer must be in all. No transfer from Miller is

Effect of an Award to several collectively.

produced. Evidence to show (as has been attempted in this case) that Miller had never any interest in this sum, (nor, indeed, in the award,) and that it was so understood by the commissioners, is, I conceive, wholly inadmissible. This would be going into a re-examination of the matters referred to and decided on by the commissioners, of which, under the treaty, they had the exclusive and final jurisdiction.

It would be contesting the verity of the award, by setting up a claim contrary to its very letter. If the parties cannot adjust their respective interests in the award, or if either of them shall receive more than his proportion, they must resort to a court of justice for redress. The government has only to see that the moneys are paid to those in whose favor they were awarded, or to those who are legally entitled under them.

The award not ascertaining the separate interest of the parties, and the report of the assessors not being referred to, nor made part of the award, the government has not, I conceive, either the means or the power of examining into such facts. The report of the assessors may furnish evidence for the parties in a contest among themselves, with regard to their respective interests in the award. But, as the commissioners, in making up their awards, were not bound by the reports of the assessors, but might depart from them as they thought fit, the award alone appears to me to be the only portion of their proceedings from which the government can draw that information of which it is bound to take notice. If those concerned have neglected to have inserted in the award the amount of their respective interests, or if they disagree as to their several proportions, the embarrassments are attributable to themselves; the government cannot, without endangering the rights of the parties, as well as the interest of the public, interpose (and that, too, *ex parte*) and undertake to decide among them.

Cases may probably occur where it might be very difficult, perhaps impossible, to procure complete evidence of the transfer of the claims of some of the persons in whose favor awards like the present have been rendered. Such cases must rest on their own circumstances, and may, no doubt, furnish such satisfactory proof of the equitable right of the claimant as to induce the government to direct payment, upon receiving from

Treaty of 1794 with Great Britain—Duties, Tonnage, &c.

him an indemnity against all future demands on the same account.

JOHN BRECKENRIDGE,

Attorney General.

To the SECRETARY OF STATE.

TREATY OF 1794 WITH GREAT BRITAIN—DUTIES, TONNAGE, &c.

Goods and merchandise carried from any place in the territory of his Britannic Majesty on the continent of America by the subjects of Great Britain into any of the northern districts of the United States, are subject to the same duties which would be payable by our citizens on the same goods imported from the same place, in American ships, into the Atlantic ports of the United States. The provision in the treaty relating to the duties on goods and merchandise does not extend to *tonnage duties*.

The subject of trade with the Indians commented upon and explained.

WASHINGTON, *March 22, 1806.*

SIR: I have examined with attention the note of Mr. Merry of the 7th of January, and the accompanying papers, which I had the honor to receive from you.

With respect to the first point—"the mode of calculating the duties collected in the northern districts of the United States, upon goods carried across the boundary line"—I can discover no other admissible construction of the 3d article of the treaty with Great Britain of 1794, than that adopted and practised by the government of this country. Under that construction and practice, goods and merchandise carried from any place in the territory of his Britannic Majesty on the continent of America by the subjects of Great Britain, by land, or by inland navigation, into any of the northern districts of the United States, shall pay the same amount of duties which would be payable by our citizens on the same goods and merchandises imported from the same place in American ships into the Atlantic ports of the United States. The object of that part of the treaty being to exempt the subjects and citizens of each party, in their inland navigation with each other, from the duty imposed on goods imported in *foreign* vessels, that object is certainly effected when no higher duties are collected from British subjects than are collected from American citizens on the same goods,

Treaty of 1794 with Great Britain—Duties, Tonnage, &c.

and imported from the same place in American vessels. This construction is deducible not only from the letter, but also from the spirit of the instrument. A different construction would give to British subjects a privilege not claimed nor permitted to our own citizens, which certainly never could have entered into the mind of those who made the treaty.

2d point: "The imposition of *tonnage* duties on British vessels navigating the lakes."

I am unable to discover, in the 3d article of the treaty with Great Britain, anything which can support the construction insisted on by Mr. Merry. Nothing like it is deducible from the letter of the article. The provision relating to the *duties on goods and merchandise* cannot, by the natural import of the words, or by any rule of sound construction, be extended to *tonnage duties*. They are distinct subjects of municipal regulation—if not in all commercial countries, certainly in those of the contracting parties—and are governed by distinct and separate provisions. To have exempted British ships, therefore, from foreign tonnage duty, it would have been necessary to have declared so in the treaty, in terms as explicit as those which exempted *goods and merchandise* from *foreign import duties*. Duties on both existed by law at the formation of the treaty. To have exempted one and not the other, would, under such circumstances, be conclusive to show that such exemption was not intended. Such, I conceive, would be the fair and legal construction, admitting the treaty was equivocal. If this construction be right as to tonnage, it will be also correct as to *light money*.

3d point: "The compelling of British subjects to take out licenses for the Indian trade, in the same manner as citizens of the United States."

I am not certain that I fully comprehend the extent of Mr. Merry's observations on this head. If they only extend to question the right which he states to be claimed by our agents there, of exacting a fee of six dollars from each British subject for a license to trade with the Indians within our boundaries, I agree with him that the practice is improper, because it is not warranted by any law of the United States, and will doubtless be forbidden. But if his observations are considered as claim-

Municipal Authority to Impose Taxes.

ing for the subjects of his Britannic Majesty any dispensation from the laws of the United States which regulate the trade and intercourse of our citizens with the Indian tribes, I have no difficulty in saying that they are not, in my opinion, founded upon the treaty, nor the explanatory article thereof, nor, so far as I am informed, on any principle or usage applicable to cases of a similar nature. Permission to the citizens and subjects of each nation, and also to the Indians, "freely to pass and repass, by land or inland navigation, into the respective territories and countries of the two parties on the continent of America, and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other," could not possibly by the contracting parties be intended, nor by the treaty can be construed, to give permission to the citizens and subjects of each to carry on a trade within the territories of the other, unchecked and unrestrained by the municipal laws of the respective countries. Had a provision of a kind so novel and extraordinary been contemplated by the contracting parties, an express stipulation would have been necessary; and that, too, couched in terms so irresistibly clear as to have permitted no doubt. But this trade, I conceive, like all internal commerce of the country, is subject to the regulation of Congress; and if the subjects of Great Britain are allowed to participate in it upon the same principles, and under the same regulations, which are prescribed by law for our own citizens, it is granting them everything which could have been contemplated by the parties, and everything which can be extracted from the most liberal construction of the treaty.

I have the honor, &c., &c.,

JOHN BRECKENRIDGE.

To the SECRETARY OF STATE.

MUNICIPAL AUTHORITY TO IMPOSE TAXES.

Neither the city council nor any department of the government of Orleans can legally tax the property of the United States within that territory.

WASHINGTON, April 28, 1806.

I AM of opinion that there rests no power in the city council, nor in any department of the government of Orleans, to tax the

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property of the United States within that territory. I believe the exercise of such power has never been before attempted in any part of the United States, and I think the general government ought not to admit the principle. Laying the tax will be harmless, for I see no means by which the payment of it can be enforced.

JOHN BRECKENRIDGE.

To the SECRETARY OF STATE.

OPINIONS

OF

HON. CÆSAR A. RODNEY, OF DELAWARE:

APPOINTED JANUARY 20, 1807.

LAND PATENTS ISSUED BY MISTAKE.

A land patent issued under a mistake, in consequence of a Virginia military land warrant located on lands which had been previously and regularly located by others, is null and void.

BALTIMORE, *June 10, 1807.*

DEAR SIR: I have read and considered the case stated in your letter of the 28th of April on the subject of a patent issued under a mistake, in consequence of a Virginia military land warrant "located on lands which had been previously and regularly located by others."

The patent thus issued can be of no effect: it is, I conceive, null and void. The identical land, by the same metes and bounds, having been previously granted according to law, by the United States, to other individuals, no subsequent act on the part of the United States could possibly affect the prior title to the premises, derived from their own patent. The use and object of a patent is to complete and render perfect a title to lands, being the formal instrument established by law for this purpose. But if the title of the United States to the same lands has been before parted with by patent, and vested in prior purchasers or warrantees, it must be extremely obvious that the patent cannot operate on lands thus previously granted. It cannot, then, accomplish the object for which it issued, in consequence of the mistake committed in attempting to grant lands before granted; nor can it produce any effect. It is, therefore, a void act, to all intents and purposes. If there were any shadow of interest in the paper, the United States, by whom it was delivered, and the person in whose name it issued, are the only parties concerned. They have, therefore, undoubtedly the right to cancel the patent, and to retrace all the previous steps which led them into the error, provided at

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no stage they affect the interests of third persons. I consider, in all cases where a mistake of this kind happens, it is just and fair on the part of the United States to correct it as soon as it is discovered, with the privity and consent of all parties interested. I would only recommend accuracy and attention to the locations and surveys, in order to be certain of the identity of the lands, with respect to which mistakes may happen in the issuing of patents.

Yours, very respectfully,

C. A. RODNEY.

To the SECRETARY OF STATE.

HOUSE RENT OF COMMANDING OFFICER AT NAVY YARD.

The commanding officer at the navy-yard is entitled to receive the pay and emoluments of a commodore, and therefore is entitled to apartments or house free of rent.

BALTIMORE, June 10, 1807.

MY DEAR SIR: I have reflected much on the case stated for my opinion in your favor of the 12th of March, and feel considerable difficulty in forming a correct judgment on the subject.

The commanding officer at the navy-yard is, by the law to which you refer, entitled to receive the pay and *emoluments* of a captain commanding a squadron on separate service, or, in other language, that of a commodore. The very term *emoluments* imports profit, benefit, or advantage, and is, perhaps, of extensive signification. It must immediately occur to you, that a commodore or captain commanding a squadron on separate service is not only entitled to double rations, but has apartments ready furnished on board his ship. It is very clear that the law of the 27th March, 1804, does not contemplate any residence of this kind for the port admiral (if I may use the expression;) because, for the accommodation of an inferior officer, even a sailingmaster, there is not only no provision, but the regulations under which each vessel previously contained one are repealed. It is not reasonably to be supposed, then, that the commanding officer—holding the rank of a captain, too, in the navy—was to take up his habitation in the cabin of a

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ship not prepared for the reception of a sailingmaster, and without either officers of any kind, or a crew, or any part thereof. A liberal construction of the law would entitle him to a habitation, as comfortable at least, and not more expensive to the United States, than what he would possess if commanding a squadron on separate service; yet, in the strict legal construction of the terms in which the law is couched, independent of other considerations, the question proposed to me is, in my humble opinion, involved in doubt.

There is another and important view to be taken of this subject, and which is worthy of consideration in fixing the just construction to be given to this act of Congress. If I am correctly informed, there exist in the army, navy, and marine departments, precedents applicable to the present case, where, under similar circumstances, the house-rent of an officer has been allowed to him. There is no act of Congress which particularly gives, *eo nomine*, to any officer in the army his house-rent; and yet, I understand, when they are placed on duty where there is a garrison, barracks, or quarters, for their accommodation, this charge has been uniformly admitted. When an officer has been appointed to superintend a ship *whilst* building, as, from the nature of the case, it could afford him no accommodation, a compensation has been allowed for lodging and extra expenses on shore. The same thing, I believe, has taken place where any ship required such repairs as to afford no accommodation for the commanding officer on board. So of the commandant of the marine corps, to whom house-rent was allowed until the present quarters were prepared for him in the marine barracks.

I am sensible that the usage of any particular department does not create or constitute the law, and I am aware of the jealousy manifested by the federal courts on this particular topic. Yet, in ascertaining the just and reasonable construction of a law not unequivocally plain, the course of a department acting under the law from its first existence, or other departments acting under laws precisely similar, is entitled to respect and consideration. In England, the judges have gone great lengths on this subject. Were I to decide in a judicial capacity, unfettered by the decisions which have heretofore

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taken place in our country, I would say that the correct course lies between the two extremes. Viewing the usage referred to as a light to direct my judgment on this occasion, I feel disposed to follow it; and, as the best result of my reflections, to say that the commanding officer of the navy-yard at Washington should be allowed his house-rent.

If any additional reasoning were required, I would observe that the officer, under the existing establishment, next in rank, has a house free of rent. The building, it is true, belongs to the United States; but that does not vary the question. Is not the superior officer equally entitled to as comfortable a mansion, upon common principles of justice, unless there be some provision which precludes him? My impressions might have been different if this were *res integra*; but I will frankly acknowledge my inclination in favor of the claim. The leaning of your mind, I am sensible, must be equally strong with my own.

I am, dear sir, yours, very respectfully,

C. A. RODNEY.

To the SECRETARY OF THE NAVY.

 LIABILITY FOR CAPTURE OF A CHARTERED VESSEL.

The owners of a vessel chartered to the Navy Department, for the purpose of carrying provisions and naval stores to Malta and Syracuse, without stipulations in the charter-party to furnish any particular or special papers, captured by a Spanish privateer on the ground that the vessel was carrying naval stores to the port of an enemy of Spain, the voyage and risk being fixed by the charter-party and freight charged accordingly, are liable for the loss sustained by the capture.

WASHINGTON, July 20, 1807.

SIR: I have read and considered your letter of the 7th instant, and the papers which accompanied it, referred to you by a resolution of the House of Representatives.

From the best consideration I have been able to give the subject, I concur with you in the opinion that the owner of the *Huntress* has no legal claim on the Navy Department for the compensation he demands.

William Hodgson, of Alexandria, as the agent of the owner, chartered this vessel to your department, for the purpose of car-

Liability for Capture of a Chartered Vessel.

rying provisions and naval stores to Malta and Syracuse. No stipulations are contained in the charter-party to furnish any particular or special papers. In general, it is the duty of the captain to procure all the usual documents for the protection of his ship and cargo; nor should he set sail without them.

It is stated by Mr. Abbot, in his Treatise on Shipping. (a work of uncommon merit and established reputation,) "The master must also take on board no false or colorable papers that may subject the ship to capture or detention; and he must *procure and keep on board* all the papers and documents required for the manifestation of the ship and cargo by the laws of the country from and to which the ship is bound, and by the laws of nations in general." Had the United States shipped, in conjunction with others, goods on board this vessel for the accustomed freight, without any charter-party, the rule of law would seem perfectly clear. Whether the charter-party varies the case, and constitutes the person who charters a ship, *pro hac vice*, the owner of the vessel, and makes the captain, of course, his agent, I do not conceive is material to be decided; because it does not appear, in this instance, that any of the usual papers were omitted. In fact, certificates from the President, as well as from the British and French ministers, were obtained to prove that the cargo belonged to the United States, and that it was destined to supply our squadron in the Mediterranean. The reason why a similar certificate was not obtained from the Spanish minister, as correctly stated in your letter, was, because all official communication between him and our government had ceased.

However, I do not consider the certificates of foreign ministers as composing a part of the regular papers with which a ship is usually furnished for the protection of herself and cargo. They are a species of *extra* documents, seldom procured, and which, though sometimes of advantage, are at others injurious. The freight was to compensate for the risk of capture or detention, to which all neutral vessels are subject *flagrante bello*. The freight, however, was not due, (or rather one-third of it,) according to the express contract, until the delivery of the goods at Malta; unless some person, duly authorized by the Navy Department, had released the captain from the further

 Batture in Front of St. Mary's, at New Orleans.

prosecution of the voyage, or had the vessel discharged in England. The consul, you state expressly, had no such authority. The owner, therefore, without performing his part of the contract, has not only received all the freight due by the charter-party, but has actually been paid \$444 44 more than was due to him.

It is true, that from one of the papers it appears that the officer of the Spanish privateer made the want of a certificate from the Spanish minister, similar to those from the French and English ministers, a part of the pretext for capture; but as this is a paper not really required, nor constituting a part of the regular documents to be exhibited by neutrals, it cannot vary the case. The principal and real ground of capture was, that the vessel was carrying naval stores to a port of an enemy of Spain. The voyage, in this case, was settled, and the cargo fixed by the charter-party. The freight must therefore have been in proportion to all risks and hazards on such a voyage with such a cargo. No fault can be attributed to the Navy Department for not procuring a paper which, if there had been a Spanish minister corresponding with the government, must have been asked as a matter of favor, and not of right. Hence, such documents as protections from foreign ministers are not required of neutrals by belligerents, according to the law of nations. The regular papers are those alone which the constituted authorities of the country are competent to give. I think the owner must bear the loss, under existing circumstances.

C. A. RODNEY.

To the SECRETARY OF THE NAVY.

 BATTURE IN FRONT OF ST. MARY'S, AT NEW ORLEANS.

The military force may be employed by the President to remove from these lands any persons who may have taken possession of them since the passage of the law of 3d March, 1807.

WILMINGTON, *October 24, 1807.*

SIR: Previous to my receiving your note of the 22d instant, Mr. Madison had sent me a lengthy statement of facts relative to the *batture* in front of the suburb St. Mary, at New Orleans, or alluvial lands to which you refer. On this statement Messrs. Derbigny and Lislet, French lawyers of reputation, and Mr.

Power of President to nominate a Territorial Brigadier.

Gurley, district attorney of the New Orleans Territory, have, I understand, given decided opinions in favor of the title of the United States to the *batture*. Upon reflection, I concur with them. The statement I must presume to be correct, as it has been officially furnished.

Under the 1st section of the act of the 3d of March, A. D. 1807, I am of opinion that military force may be employed by the President to remove from these lands any persons who may have taken possession of them *since* the passage of the law. This, I think, appears to have been the fact in the present case, from the letter of Mr. Van Praddles, of the 11th ultimo, which I return you. At first I entertained doubts on this point, but further inquiry removed them. These observations contain the requisite answers to the two questions proposed, viz: 1. Have not the United States a claim to these lands? 2. If they have, may not military possession be taken?

Yours, &c., &c.,

C. A. RODNEY.

To the PRESIDENT OF THE UNITED STATES.

POWER OF THE PRESIDENT TO NOMINATE A BRIGADIER FOR
TERRITORIAL MILITIA.

The President has power to nominate to the Senate a suitable person for the office of brigadier general of the militia of the Territorial governments.

WILMINGTON, April 12, 1810.

SIR: In answer to the question proposed by you, "Is the President authorized by law to appoint general officers to the militia of the Territorial governments?" permit me to state: That the ordinance of the old Congress of the 13th July, 1787, "for the government of the Territory of the United States northwest of the river Ohio," declares, "the governor for the time being shall be commander-in-chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by Congress." By an act of Congress under the present constitution of the United States, passed on the 7th August, 1789, entitled "An act to provide for the government of the Territory northwest of the river Ohio," it is provided that "the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint, all officers which,

 Courts Martial.

by the said ordinance, [of 1787,] were to have been appointed by the United States in Congress assembled; and all officers so appointed shall be commissioned by him," &c. The act of April 7, 1798, erects the Mississippi territory (to which the papers transmitted specially apply) into a Territorial government of the first grade, in all respects similar to that of the Territory northwest of the river Ohio, under the ordinance of 1787, with the exception of the last article contained in that ordinance. The act of May 10, 1800, gives to the Mississippi Territory a government of the second grade established by the ordinance of 1787, and provides for the organization of a general assembly therein. The general assembly, by the ordinance of 1787, possesses the "authority to make laws in all cases for the good government of the district," &c. Possessing this authority, the general assembly of the Mississippi Territory have passed an act entitled "An act to organize the militia," which provides that "the whole militia of the Territory shall form one brigade, and be officered as follows: one brigadier general, with one brigade inspector," &c.

From this view of the subject I can see no reason to doubt the power of the President to nominate to the Senate a suitable person for the office of brigadier general, thus created by law. It has been done, I understand, in more instances than one. The principle is clearly established by the plain language of the statutes cited, and is supported by precedent.

C. A. RODNEY.

To the SECRETARY OF WAR.

 COURTS MARTIAL.

When inferior officers or soldiers who think themselves wronged complain to the commanding officer of a regiment, he ought to summon a regimental court-martial to inquire into the truth or falsehood of the complaint, and decide thereon; but, as its authority extends no further than a court of inquiry, the rules and practice of the latter should, in general, govern the proceedings.

WILMINGTON, *March 16, 1811.*

SIR: You have requested my opinion on the construction of the 35th article for the government of the army of the United States.

At first sight there would seem to be an apparent contradic-

Courts Martial.

tion between the provisions contained in this article and some which are subsequent: I allude more particularly to the sixty-seventh and seventy-fifth. On attentive consideration, however, they may be reconciled. This should always be done where it can be accomplished. It is the true rule to be followed in the sound exposition of statutes.

The thirty-fifth article is intended for the benefit of inferior officers and soldiers. It gives them the privilege of complaining to the commanding officer of a regiment when wronged or aggrieved, who is required to summon a regimental court-martial on the case. This latter provision is imperative and compulsory. It is not a matter of favor or discretion, but of right, and is strictly *ex debito justicie*. It constitutes, in fact, a special court of inquiry on the subject, and affords a summary remedy to the party supposed to be injured. The only authority, however, given to this court, is to decide on the justice or injustice of the complaint. By the subsequent articles, they have no authority to punish any officer against whom a complaint may be exhibited or preferred, though they may think it well founded. If further redress be proper, a general court-martial must be called. If the regimental court-martial be of opinion that the complaint is not founded in fact, the complainant may appeal to a general court-martial, but subject to this provision: that, if they consider the complaint groundless, they may punish, at their discretion, the party complaining.

This article, which is literally transcribed from the old articles of war, was originally taken from the British martial code. This code, like our own, does not subject officers to punishment by a regimental court martial. On recurring to their best writers on this subject, I find them laying down the rule agreeably to the opinion I have expressed.

Mr. Tytler, in his accurate essay on military law, speaking of a similar provision in their martial code, says: "It is material, however, to observe, that, as no commissioned officer is properly amenable to the judgment or sentence of a regimental court-martial, the court, on such complaint and inquiry, can only pronounce their opinion whether the complaint is well or ill founded. If they declare the latter, the complainant must either acquiesce in that opinion, or, if he thinks himself ag-

Courts Martial.

grieved, follow the mode of appeal to a general-court martial above prescribed. If the regimental court declare the complaint to be well founded, the complainant may, on that authority, request a general court-martial to take cognizance of the injury, and bring the offender to proper punishment."

Mr. McArthur, in a note on the same point, uses correspondent language: "It is proper to note, that a regimental court-martial cannot adjudge a commissioned officer to any punishment, but only, like a court of inquiry, the members give their opinion whether the charge be well or ill founded. If the charge be adjudged unfounded, the accuser may still, on the grounds of thinking himself aggrieved or wronged, appeal to a general court-martial; and if, on the contrary, the charge be adjudged well founded, the officer accused may appeal to a general court-martial."

The same doctrine is maintained in a valuable treatise, which does credit to an American officer—Major Macomb.

With these lights to direct me, I feel no hesitation in saying, that when inferior officers or soldiers who think themselves wronged complain to the commanding officer of a regiment, he ought to summon a regimental court-martial, to inquire into the truth or falsehood of the complaint, and decide thereon. But, as their authority extends no further than a court of inquiry, the rules and practice of such courts should in general govern their proceedings; for the regimental court-martial in this instance differs only in a few features from the ordinary courts of inquiry. Should the complaint be considered as well founded, and warrant a charge under any of the articles of war, a general court-martial may be ordered, who will have jurisdiction of the whole case, and may punish the offence. The officers may, at the proper season, be arrested; but, in the present stage, I apprehend an arrest would be irregular and premature.

Yours, very respectfully,

C. A. RODNEY.

Hon. P. HAMILTON.

OPINIONS

OF

HON. WILLIAM PINKNEY, OF MARYLAND:

APPOINTED DECEMBER 11, 1811.

ENLISTMENTS FOR NAVAL SERVICE.

Enlistments for the naval service being for "two years from the time when the ship shall last weigh anchor for sea," are regular for that term, although made before, and the persons enlisting serve awhile in fitting the vessel for sea.

ANNAPOLIS, *July 13, 1811.*

1. I CAN perceive no inconsistency whatever between the words of the act of Congress of January, 1809, and the articles of enlistment quoted in the foregoing opinion.

The act requires that the engagement shall be for a period which it defines, and the engagement *is* for that period.

The objection that the enlistment should not have been made to *commence* at the time "when the ship should last weigh anchor for sea," appears to me to have nothing in it. The act of Congress does not prescribe the time when the engagement shall *commence*; it leaves *that* to the discretion of the executive government, to be exercised with a view to the nature and benefit of the service intended for the ship.

It is of no consequence that the men were in fact employed *before the ship set out on her cruise*, and that they have thus already served more than two years. If that consideration be of any account, it cannot go to affect the regularity of the enlistment for two years from the last weighing of the ship's anchor. It can only tend to show that it was unlawful for the Navy Department to employ the same men in the service of the ship *before the term of their regular enlistment, as fixed by the articles, commenced*—a conclusion which might be admitted, without injury to the right of the commander of the "Constitution" to keep the men in question until the expiration of the two years defined in the articles; but I do not think that even that conclusion would be just. The President was authorized to prepare the ship for a cruise or station on our coasts, &c. It can scarcely be doubted that, if the Navy De-

Patents for Inventions.

partment had ordered the *preparatory service* to be performed by one set of persons, it might then have enlisted another set for two years more, for the performance of the principal service, to which the other was preliminary. But if it could do this with two different sets of persons, why not with one—provided that the enlistment for the principal service was limited, as the law prescribed, to two years?

2. If there is no room for doubt upon the letter of the law, there is still less upon the spirit. The enlistments were expressly directed by the act with a view to a specified *actual service* in which the ships were to be employed; and, of course, that commencement of the enlistments, which was also the commencement of the service intended for the ships, was clearly the most natural, and the most consonant to the intention of the statute.

3. I am of opinion that, even if the true construction of the act of Congress be such as the men contend for, their objection cannot be maintained against their own engagement.

The provision in the law concerning the term "enlistment," is merely *directory* to the executive government, and stands upon general grounds of policy. It was not meant for the protection of individuals; and it does not lie with those who have enlisted to say that the directions contained in the provision have not been obeyed, and that the executive government has violated its duty. They are bound by their contract, which is perfectly precise, and in no respect unreasonable or oppressive, and can look no farther. Whether the executive government ought to have authorized such a contract, is for the consideration of those to whom it is constitutionally answerable for the proper execution of the will of the legislature.

WM. PINKNEY.

To the SECRETARY OF THE NAVY.

PATENTS FOR INVENTIONS.

Patents for inventions cannot be withheld on moral grounds, where the allegation and oath, and a suitable specification, have been filed, and a model (if required) deposited.

ATTORNEY GENERAL'S OFFICE,
March 22, 1812.

SIR: I had the honor to receive yesterday your letter, and the accompanying papers, relative to the application of James

Delivering Copies of Specifications of Patents.

McDonald for a patent for a machine for making bricks; and have to state, in answer to the inquiry which it contains, that, however desirable it may be to refuse the patent, and exceptionable as the conduct of the applicant would seem to be upon moral grounds, the Department of State has no discretion to decline to issue the patent as applied for, in case the allegation and oath prescribed by the act of Congress have been made, a suitable specification has been filed, and a model (if required) has been deposited. The efficacy of the patent, when issued, will be for judicial cognizance.

WM. PINKNEY.

To the SECRETARY OF STATE.

DELIVERING COPIES OF SPECIFICATIONS OF PATENTS.

There is no reason for refusing applicants a copy of the specifications, drawings, or model of any patented invention.

ATTORNEY GENERAL'S OFFICE, *May 20, 1812.*

SIR: In answer to your letter of the 14th instant, I have to state that I see no reason for refusing any applicant a copy of any specification of a patent, or drawings of a model, lodged in the office of the Secretary of State.

I do not suppose that the officer who may be intrusted to give such copies has any concern with the purpose for which they are asked. The act of Congress has provided no means by which he could protect himself against a misrepresentation of that purpose, and, of course, did not intend that he should inquire into it. No injury can result from a free and unlimited communication of such specifications and drawings. The policy of the law rather requires than forbids it, and the letter of it looks the same way.

In England, (according to my recollection,) the specifications of all patents are regularly published in a periodical work conducted by private individuals, of which I do not at present remember the title. The security of the patentee is in the protection which the law extends to his invention, not in the secrecy of the description or representation of it.

Indeed, a general knowledge of that description and repre-

Offenders against Naval Laws.

sensation would seem to be necessary to enable those who wish to respect the rights of the patentee to avoid an invasion of them.

WM. PINKNEY.

To the SECRETARY OF STATE.

IN THE MATTER OF JOHN KENT, SUSPECTED TO BE A SPY.

It does not appear that the British pilot, under the circumstances, has committed any offence for which he can be prosecuted; and there is not any evidence of criminal intention.

ATTORNEY GENERAL'S OFFICE,

March 5, 1813.

SIR: I have the honor to inform you, in reply to your letter of the 13th of last month, (which, by reason of its having been sent to Baltimore, I have only very lately received,) that it does not appear to me that John Kent can be prosecuted for any offence.

He appears to be a native American, (born at Boothbay,) settled in the island of Grand Manan, and acting as a British pilot, under British authority. His account of himself and his errand is plausible, and, I should think, true. The fact that he has a brother at Boothbay, where he was arrested, is in his favor; and there is no evidence of any criminal intention or criminal conduct.

If it should be thought advisable to detain him longer in custody, it ought to be for the purpose of fuller inquiry—the result to be transmitted, for further order, to the Department of State. It is scarcely possible that he should be a spy.

WM. PINKNEY.

To the SECRETARY OF STATE.

OFFENDERS AGAINST NAVAL LAWS.

Offenders are regularly kept in the custody of that service, the peculiar laws of which they are accused of having violated, and by which they are to be tried.

OFFICE OF THE ATTORNEY GENERAL OF THE U. S.,

May 12, 1813.

SIR: I suppose that the persons to whom your letter of the 8th instant alludes must remain in custody until such a tribu-

Offenders against Naval Laws.

nal as the law prescribes can be formed for their trial. Such offenders are regularly kept in the exclusive custody of that service, the peculiar laws of which they are accused of having violated, and by which they are to be tried. They have, of course, been delivered up to the commanding officer of the place to which they were brought, who will detain them until a court-martial can be assembled under the orders of the Secretary of the Navy. The expense must devolve on the United States.

It appeared to be intended at the last session of Congress to remove the inconvenience of which you very justly complain, by allowing officers in the land service to be placed on certain naval courts-martial; and I had imagined that this was done. Perhaps it may be well to go even a step further, and to give a power to refer offences committed on board of privateers to the ordinary tribunals, when a court-martial (either of navy officers only or of navy and land officers) cannot be had without prejudice to the public. A general reference of them to the ordinary tribunals would not be judicious, nor would a particular reference be so where it could be avoided; but there may be occasions to justify and require it.

I have the honor to be, very respectfully, your obedient servant,

WM. PINKNEY.

To the SECRETARY OF THE NAVY.

OPINIONS

OF

HON. RICHARD RUSH, OF PENNSYLVANIA:

APPOINTED FEBRUARY 10, 1814.

FUR TRADE AT MICHILIMACKINAC.

It would be unlawful to grant permission to John Jacob Astor to send a vessel in ballast to Michilimackinac to bring away skins and furs.

ATTORNEY GENERAL'S OFFICE,

April 11, 1814.

SIR: I have had the honor to receive your letter of the 9th of this month, enclosing one addressed to you from Mr. John Jacob Astor, in which he asks permission of the government to send a vessel in ballast to Michilimackinac, for the purpose of bringing away a quantity of skins and furs belonging to him, and now at that place, and requesting my opinion whether such permission would be warranted by our laws.

Considering Michilimackinac as a place now in the actual possession and under the dominion of Great Britain, I think the decisions of the last Supreme Court of the United States would make it unlawful to grant the permission in question.

RICHARD RUSH.

To the SECRETARY OF STATE.

SURETIES OF A PURSER.

A former purser reappointed to that office in the navy, under the act of 30th March, 1812, should give a new bond.

OFFICE OF THE ATTORNEY GENERAL OF THE U. S.,

April 14, 1814.

SIR: I have received your letter of the 13th instant, relative to Edwin T. Satterwhite, formerly a purser in the navy, reappointed and confirmed by the Senate under the act of the 30th of March, 1812, in which you state its having become important

Duties on Goods sold under order of Court, &c.

to know whether his sureties under the original bond are, or are not, liable for acts done since the reappointment.

On examining the act in question, I think its correct interpretation imports the necessity of a new bond in all cases of reappointment under its provisions. But, by this opinion, I would not be understood to say that the original sureties of Mr. Satterwhite are wholly discharged of responsibility since the reappointment. This point should be saved on behalf of the United States.

I have the honor to be, with very great respect, sir, your obedient servant,

RICHARD RUSH.

To the SECRETARY OF THE NAVY.

DUTIES ON GOODS SOLD UNDER ORDER OF COURT, &c.

Duties on goods seized with a vessel of a neutral nation and sold, but afterwards adjudged to be unlawful prize, may be lawfully exacted, and cannot be remitted by the Executive.

ATTORNEY GENERAL'S OFFICE,

April 16, 1814.

SIR: In answer to your letter of yesterday's date, I have the honor to state it as my opinion, that the duties in the case of the brig Euplus should be paid.

The cargo having been sold under an interlocutory order of the district court for the district of Georgia, and the goods thus distributed through the country in the hands of consumers while the libel was depending, I do not think it would comport with the meaning and objects of the revenue laws that they should be discharged of duties. The apparent hardship to the neutral claimants, to whom the cargo has been released by the ultimate decision of the court, on the ground that it was not lawful prize, must be taken to be done away in the presumption of the enhanced price at which it sold under the interlocutory order, by reason of the outstanding bonds for the duties which hung over it. Had it remained in bulk, or unsold, so as to be capable of specific restitution under the final decree, a different case, working in favor of the claimants, might have been presented.

Offences on Vessels with Letters-of-Marque.

In answer to the other question, whether, if the duties are to be exacted, the relinquishment of them is within the remitting power confided to the President? I have to reply, that I am not aware of his possessing any such. The act of Congress of the 3d of March, 1797, made perpetual by that of the 11th of February, 1800, invests the Secretary of the Treasury with certain powers to remit in cases of fines, penalties, and forfeitures; but I do not take the case of a debt due to the United States under a bond given for duties to fall under either of these heads, or that of a disability—the other word used in the act.

I have the honor, &c., &c.,

RICHARD RUSH, *Attorney General.*

To the SECRETARY OF STATE.

OFFENCES ON VESSELS WITH LETTERS-OF-MARQUE.

Punishment by court-martial of offences committed on board of letters-of-marque, is contemplated only when such offences are committed without the jurisdiction of the United States.

OFFICE OF THE ATTORNEY GENERAL OF THE U. S.,

May 24, 1814.

SIR: In answer to your letter of yesterday's date, I have the honor to state it as my opinion, that, under the true meaning of the 15th section of the act of Congress of the 26th of June, 1812, the punishment by court martial of offences committed on board of letters-of-marque is contemplated only when such offences happen out of the jurisdiction of the United States. The reason for the distinction may probably have been, that, unless the authority of the court-martial had been recognised for offences committed on board of these vessels when abroad, no punishment could have followed them—it being matter of great doubt how far the common code of the United States extends to the high seas; but for all such offences as may take place on board of them while they are within the jurisdictional limits of the United States, or their territories, the ordinary courts of law of the country are competent to afford redress. The jurisdiction of the military tribunals is not to be stretched by implication.

Marshal's Commissions.

I am further of opinion, in answer to your second question, that a court-martial can take no cognizance of the validity of a contract.

I have the honor to be, very respectfully, sir, your most obedient servant,

RICHARD RUSH.

To the SECRETARY OF THE NAVY.

MARSHAL'S COMMISSIONS.

A marshal is not entitled to the commission of one and a quarter per cent. provided by the act of 28th February, 1799, upon specie captured, as in cases where he sells vessels and other property.

WASHINGTON, *July 26, 1814.*

SIR: In answer to the case you submitted to my consideration, relative to the claim of the marshal of Georgia, I have the honor to state that I continue to entertain the same opinion which I intimated to you verbally; that is, that, upon the specie captured on board the *Epervier*, he is not entitled to the commission of one and a quarter per cent., under the act of Congress of the 28th of February, 1799, as in cases where he sells vessels and other property.

I should have furnished you with this answer at an earlier period, but that I was desirous to inform myself as to the practice upon this point in other districts. I have accordingly done so, as far as I could. The claim, I am given to understand, was made by the marshal of Massachusetts in the case of the money taken in the *Swallow* packet, by Commodore Rodgers, soon after the war. Full argument was had upon it before the court; but it was withdrawn before a decision, on a strong supposition, (as the abandonment itself would seem to indicate,) that it would not be allowed. I do not learn that it has since been renewed in any district north of New York.

In New York it has been allowed to the marshal; but whether under a judicial decision or silent acquiescence, I am not distinctly informed.

The point of practice appearing to be thus different, I incline to the opinion I have expressed as the safer of the two,

Abuse of Letters-of-Marque and Reprisal.

and as a construction of the act best comporting, according to my views, with its equitable intendment, as well as its literal phraseology.

I have the honor to be, with great respect, your most obedient servant,

RICHARD RUSH;
Attorney General.

To the SECRETARY OF THE NAVY.

ABUSE OF LETTERS-OF-MARQUE AND REPRISAL.

Where an American vessel commissioned with a letter-of-marque and reprisal has been sold to foreigners, and the new owners are found cruising with the same commander, with the same letter, and under the American flag, and there is good reason to suppose that the commission of the letter-of-marque has been intentionally transferred, it is such an abuse of it as will warrant a suit upon the bond.

COLLECTOR'S OFFICE,
Norfolk, December 5, 1814.

SIR: In February last, a commission of letter-of-marque and reprisal issued from this office for the "Four Friends," a schooner belonging to Messrs. Butler & Seymour, merchants of this place. The vessel, it appears, was afterwards sold, and, as is stated by one of those gentlemen, the commission retained by the Spanish authority there—the reason he alleges for its not being returned; in proof of which, a certificate, purporting to be from an officer of that government, has been produced, but without any seal or other marks that could be discovered, giving it any official character. Information derived from another source leads me to believe that this vessel has since been employed by her new owners (Carthaginians, it is presumed,) as a cruiser under cover of this commission and of the American flag. What contributes very much to strengthen this opinion is, that it appears the commander named in the commission was acting as such subsequently to the sale. I have deemed it my duty to represent this case to you, in order that I may be instructed what steps, if any, it will be proper to adopt. It is a case which does not seem to be embraced by

Intruders upon Public Lands.

the conditions of the bond required to be given previous to the emanation of the commission, unless that be revoked.

I have the honor to be, most respectfully, your obedient servant,

CHAS. R. MALLORY.

Hon. JAMES MONROE,

Acting Secretary of State.

DECEMBER 26, 1814.

If there is reason to suppose that the commission of the letter-of-marque within named was intentionally transferred, I think it such an abuse of it as would justify the bond being put in suit; but if it was forcibly detained by the Spanish authority, the owners or captain ought not to be visited by such responsibility. If a Spanish vessel should cruise under a commission so assigned, it would be at her peril.

R. RUSH.

To the SECRETARY OF STATE.

INTRUDERS UPON PUBLIC LANDS.

Intruders, without title subsequent to March 3, 1807, may be removed under the provisions of the act of that date, without three months' notice. If the marshal fail to effect such removal, upon trial, the President may employ adequate military force to accomplish it.

WASHINGTON, April 4, 1815.

Assuming it as fact, under the letter from the register of Shawneetown, dated March 11, 1815, that the intruders in question are utterly without title; that their unlawful possession was subsequent to the 3d of March, 1807, and previous to any sale made by the United States of the lands entered upon, I am of opinion:

That such intruders should be dispossessed by the authority of the government, in the manner pointed out in the 1st and 4th sections of the act of Congress of the 3d of March, 1807. The three months' notice mentioned in the 4th section will not be necessary, as it applies to another class of intruders.

If the instructions which are issued in the first instance to

Pensions to Officers, &c., in the Peace Establishment.

the marshal, or officer acting as such, are not found available to oust them from the land, and the marshal, upon trial, fails to effect that end, it is clear that the President may direct the employment of such military force as he may deem adequate and necessary to its accomplishment.

RICHARD RUSH,
Attorney General.

PENSIONS TO OFFICERS, &c., IN THE PEACE ESTABLISHMENT.

Officers, musicians, and privates, composing the peace-establishment, who, although not "wounded," have lost their health whilst in the line of their duty to such an extent as to be disabled from performing duty any more, are within the meaning of the term "*or otherwise*," and are *prima facie* entitled to the charitable relief of the legislature.

Every officer, &c., in full commission, and not on furlough, must be considered in the line of his duty, although at the moment no particular duty is devolved upon him.

WASHINGTON, April 6, 1815.

THE Secretary of War having, in a letter of the 4th instant, desired my opinion on the true meaning of the first clause of the 14th section of the act of Congress passed on the 16th of March, 1802, for fixing the military peace-establishment, I have the honor to submit the following:

The words of the clause are: "That, if any officer, non-commissioned officer, musician, or private, in the corps composing the peace-establishment, shall be disabled by wounds or otherwise while in the line of his duty in public service, he shall be placed on the list of invalids of the United States, at such rate of pay, and under such regulations, as may be directed by the President of the United States for the time being."

The question made is, in what other way than by wounds must the disability have been incurred, to entitle the party to the pay provided?

The words of the section are not quite so distinct as to remove all grounds for diversity of opinion; yet, unless some liberality in their interpretation be allowed, it is to be feared that the benignant intentions of the law might be in danger of being curtailed or frustrated. The expression "*or other-*

Pensions to Officers &c., in the Peace Establishment.

wise¹³ is placed in contradistinction to wounds. In its primary signification, it may be taken to import a disability brought on by the direct and apparent agency of accidents or inflictions from the hand of God or men, happening to the party while in the immediate and obvious discharge of his duty, but which could not, with technical propriety, be denominated *wounds*. Instances of the kind may readily be conceived;—as if an officer, exercising his men on a hot day, should receive a stroke of the sun; a musician, while obeying an order to sound his bugle, should rupture a blood-vessel; or a soldier, while working upon fortifications, should dislocate a limb: in such, and similar cases that may be imagined, it cannot be doubted but that the disability would be brought on in a mode to meet the alternative stated in the act. It will be to enlarge it but a little more, and, as is conceived, to uphold its genuine and humane spirit, as well as its legal sense, to say that the connexion between the inflicting agent and consequent disability need not always be so direct and instantaneous. It will be enough if it be derivative, and the disability be plainly, though remotely, the incident and result of the military profession. Such are the changes and uncertainties of the military life—such oftentimes its trials, as well as its hazards—that the seeds of disease, which finally prostrate the constitution, may have been hidden as they were sown, and thus be in danger of not being recognised as first causes of disability in a meritorious claim put forth for the bounty of the act. It would not, I think, be going too far to say, that in every case where an officer or private loses his health while in the service, to such a degree as to be disabled from performing his duty any more, he is contemplated, *prima facie*, as an object of this charitable relief from the legislature. I feel more doubtful in fixing, by any undeviating standard, what is meant by being in the line of his duty. Upon this point, I should presume, however, that every officer in full commission, and not on furlough, must be considered in the line of his duty, although, at the moment, no particular or active employment is devolved upon him. The same of a soldier who is kept in pay, for it is presupposed of both the one and the other that they are at all times prepared for duty; and it is surely of indispensable obligation upon them to keep

Pensions to Officers, &c., in the Peace Establishment.

themselves detached from other pursuits, so as to be ready at a moment to answer any call emanating from those who may be authorized to command them. Perhaps a voluntary absence, too long continued, on the part of an officer, from his station, might form an exception, so as to exclude the idea of his being in the line of his duty during any accident or sickness palpably proceeding from causes while he was away. But the officer who, by reason of marches in damp or cold weather, or who, from being in a garrison exposed to marshy exhalations, finds, even at some interval, his constitution broken down by rheumatism, or enfeebled by the constant recurrence of fevers, is surely as just an object of this humane stipend at the hands of the government, as he who may have had his arm shattered by a bullet. Such cases are again put only as examples. Others may also be supposed, in which the performance of military duty in some of the various shapes it may be made to assume, has proved the original, though it may not be admitted as the proximate, cause of the disability superinduced.

In the discretion which is vested in the President, a sufficient guard is established that an interpretation of the act, such as is indicated by the foregoing remarks, will not open the way to abuse. If the loss of health should have proceeded from careless or irregular habits in the party—much more if from vicious ones; or if he brought to the service or ranks of his country a constitution already impaired, or rankling with the germ of maladies that afterwards do nothing more than ripen into activity;—these will form occasions for caution, or for an entire exclusion from the bounty, when the executive duty comes to be performed in the way Congress have pointed out. A claimant who was suspected not to stand in lights altogether meritorious or innocent, must expect that his application would meet a severe scrutiny, and certain rejection at the discovery of anything that could taint it with unfairness or imposition. But if the sound construction be not at least as broad as I have supposed, we shall be at some loss to know what meaning the words “inferior disabilities,” used in the concluding sentence of the 14th section, were intended to convey.

It may, perhaps, be said, that to earn the bounty, the disability should have been incurred by accidents or sickness pecu-

Warrants for Bounty Lands.

liar to the employments of military men; and such as it may reasonably be supposed would have been avoided in other occupations. But it is conceived that this would prove a vague or deceptive rule of interpretation. With what safety, or with what certainty, could it be applied? The soldier asleep in garrison may suddenly, when he wakes, find his eyesight gone, without being sensible himself, or without its being imagined by others, that the predisposing and leading cause of his affliction was imbibed in ascending the Mississippi months before, whilst a hot and vertical sun was flashing its fires around him. Another may linger in a consumption; the consequence, perhaps, of a slight cold in the beginning, but of which the labors and hardships of his life may never have allowed him opportunity to get rid. And a third may lie bedridden under a palsy, which the change of habits and aliment after his enlistment may have been the chief though occult causes in producing. It would be easy to multiply indefinitely such illustrations, applicable alike to the condition of officers and men.

I would remark, as giving strength to the principles which I suppose the legislature to have had in mind in framing this section, that we find it recorded in the Digest of Justinian, that "he who has hired his services is to receive his reward for the whole time, if it has not been his fault that the service has not been performed." So, too, by the maritime law, it is well understood, that if sickness or disability overtake a seaman, which was not brought on by vicious or unjustifiable conduct, he is entitled to his full wages for the voyage. Nor does it make any difference whether it come on during the time he was on actual duty, or was merely accidental while he continued in the service. These principles have been sanctioned by time; and it is hoped that it will not have been deemed out of place to advert to the analogies they hold up.

RICHARD RUSH,
Attorney General.

To the SECRETARY OF WAR.

WARRANTS FOR BOUNTY LANDS.

Non-commissioned officers and soldiers enlisted after 10th December, 1814, as well as before, on the proper certificates, are entitled to a bounty of three

Prosecutions for Piracy.

hundred and twenty acres of land; and minors, bringing themselves within the requirements, are entitled in like manner as those of full age.

WASHINGTON, *August 1, 1815.*

SIR: 1. I think that every non-commissioned officer and soldier enlisted since the 10th of December, 1814, is entitled to a bounty of 320 acres of land, provided that he obtain, on his discharge from service, a certificate from the commanding officer of his company, battalion, or regiment, that he had faithfully performed his duty whilst in service.

2. I do not think that the fact of minority creates any incapacity to take the land-bounty, any more than the bounty in money or pay. The contract of the legislature must be fulfilled in this, as in all other respects. The minor who brings himself within all the other requisites is, I think, entitled to his land-warrant in like manner with persons of full age.

RICHARD RUSH,

Attorney General.

To the SECRETARY OF WAR.

PROSECUTIONS FOR PIRACY.

Prosecutions for alleged acts of piracy committed on the high seas, or in any place out of the jurisdiction of any particular State, should take place in the district where the offender is apprehended, or into which he may be first brought.

AUGUST 29, 1815.

SIR: In answer to the question growing out of the letter from Commodore Patterson to the Secretary of the Navy, dated New Orleans, July 21, 1815, and submitted for my opinion by the Secretary of the Treasury on the 29th instant, I have the honor to state: That if the prosecutions alluded to have reference to persons for alleged acts of piracy committed on the high seas, or in any place out of the jurisdiction of any particular State, they should take place in the district where the offender is apprehended, or into which he may first be brought. In this case, (that is, where the crime is committed on the high seas, or out of the jurisdiction of any particular State,) I apprehend it would be at the option of the capturing vessel to carry the

Rights of Captors in Prizes of War.

offender or offenders to such port or district of the United States, for trial, as was thought proper.

But where the capture or seizure takes place for any alleged breach of the revenue laws, the trial should be had in the district within which the seizure was made, or penalty incurred.

RICHARD RUSH,

Attorney General United States.

To the SECRETARY OF THE NAVY..

RIGHTS OF CAPTORS IN PRIZES OF WAR.

Where a brig captured off Tripoli, as prize of war, by a part of a squadron, and condemned, was afterwards taken by the commodore at a valuation, and placed in the service of the United States, *decided* that the captors were entitled to their prize interest of the government, and that the other moiety should be applied to the navy pension fund.

WASHINGTON, *March 27, 1816.*

SIR: I have examined the papers transmitted to me with your letter of the 12th of last month, and have now the honor to submit, according to your request, the following opinions upon the cases which they present:

1. It appears that the brig *Transfer* was captured off Tripoli, for a breach of blockade, on the 17th of March, 1804, by a part of the squadron under the command of Commodore Preble; that she was regularly condemned as prize of war; and that she was taken by the commodore at a valuation of five thousand dollars, and placed in the service of the United States, where she co-operated as a cruiser with the squadron aforesaid, in the course of its subsequent belligerent operations.

Under such a state of facts, I do not think that the captors are divested of their prize interest. They are entitled to it at the hands of the government, which thus became the purchaser of the prize. Considering this interest as a vested one on their part, I can see no objection to a payment of the amount by the Navy Department, provided there be any existing appropriation of money to cover such payment. I also think that the portion of the prize to which the United States are entitled should, as in other cases, be applied to the use of the navy pen-

Courts-Martial.

sion fund, as directed by the ninth section of the act of Congress of the 23d of April, 1800.

2. In regard to the ship *Madonna Catapoliana*, captured by a part of the same squadron off Tripoli on the 22d of March, 1804, and restored to the former owners, by the authority of the commodore, before any condemnation or judicial proceedings had, it would seem alike equitable that the captors should be reimbursed. I forbear, at this time, the expression of any more direct opinion upon this case, the power of Congress being fully competent to act upon it, as in the case now before that body of the Algerine vessels lately surrendered, from which the present is not in principle distinguishable.

I pray you, sir, to receive as an apology for this late answer to your letter, that, when it was received, and for some weeks afterwards, my constant public engagements at the Supreme Court of the United States prevented an attention to other subjects.

With great respect, I have the honor to be your obedient servant,

RICHARD RUSH.

To the SECRETARY OF THE NAVY.

COURTS-MARTIAL.

Courts-martial of marine officers stationed on shore, and convened under the articles of war, may try and sentence to suffer corporeal punishment marines who have deserted from the public ships.

WASHINGTON, *March 28, 1816.*

SIR: "Is it competent for a general court-martial of marine officers stationed on shore, and convened under the articles of war, to try and sentence to suffer corporeal punishment marines who have deserted from the public ships, where they were liable to such punishment under the regulations of the navy, but which has been forbidden by the act of Congress of May 16, 1812, in regard to the army?"

Answer.—I can see no objections to such a course. It would be otherwise, had the offence been committed while the marines were employed in any service upon the land, under the

Allowances to Navy Agents.

act of July 11, 1798. In such case, the subsequent abolition of corporeal punishment, by the 7th section of the act of May 16, 1812, in reference to the army, would, under the 4th section of the act of July 11 aforesaid, be applicable, and exclude also its infliction upon the marines.

RICHARD RUSH, *Attorney General*.

To the SECRETARY OF THE NAVY.

ENDORSEMENT OF BILLS OF EXCHANGE.

Bills of exchange may be endorsed by an attorney in fact, having competent authority derived from a power.

WASHINGTON, *April 27, 1816.*

SIR: In answer to the question submitted by the Secretary of the Navy, in his letter of the 12th of this month, the Attorney General has the honor to state—

That he sees no objection, in point of law, to the endorsement of a bill of exchange under an authority derived from a power of attorney. The Attorney General begs leave to refer to his absence from the city, as a reason for not having transmitted an earlier answer.

RICHARD RUSH, *Attorney General*.

To the SECRETARY OF THE NAVY.

ALLOWANCES TO NAVY AGENTS.

Under the act of 3d March, 1809, navy agents may be allowed two thousand dollars per year over and above office rent, clerk hire, fuel, stationery, &c.

WASHINGTON, *June 20, 1816.*

THE accounts of the navy agent at Boston being presented for settlement at the office of the accountant of the Navy Department, they are found to contain certain charges for contingent expenses, which have been disallowed by the accountant as not warranted by law.

It does not appear that the charges are, in themselves, deemed to be unjust; but the accountant supposes that the sum of two thousand dollars, allowed by law as the annual compensation

Allowances to Navy Agents.

of the agent, was intended to cover all his expenses, and that no sum beyond this can be admitted to his credit upon any ground.

The agent still claiming to be allowed the items in question, which are for such charges as office rent, clerk hire, fuel, and stationery, the Secretary of the Navy requests that the Attorney General will be pleased to state his opinion upon the meaning of the law in this respect.

Answer.—The law fixing the compensation of navy agents will be found at the close of the 3d section of the act of the 3d of March, 1809, entitled “An act to amend the several acts for the establishment and regulation of the Treasury, War, and Navy Departments.” It runs as follows: “*Provided, That the compensation allowed to either [alluding to navy agents and certain other officers mentioned in the foregoing part of the section] shall not exceed one per centum on the public moneys disbursed by him, nor in any instance the compensation allowed by law to the purveyor of public supplies.*”

The law creating the office of purveyor of public supplies is that of the 23d February, 1795, and is in the words following: “That there shall be in the Department of the Treasury an officer to be denominated ‘purveyor of public supplies,’ whose duty it shall be, under the direction and supervision of the Secretary of the Treasury, to conduct the procuring and providing of all arms, military and naval stores, provisions, clothing, Indian goods, and, generally, all articles of supplies requisite for the service of the United States, *and whose salary shall be a compensation of two thousand dollars per annum.*” This is all that is said about the compensation of this officer.

It is agreed that, before the passage of the act of 3d of March, 1809, above recited, the purveyor of public supplies had been allowed, in the settlement of his accounts, credit for contingent disbursements, such as office rent, clerk hire, fuel, and other like expenses necessarily incurred in the performance of his official duty. This fact I take to be conclusive in favor of such a construction of the act of the 3d of March, 1809, as will allow to the navy agents, in the settlement of their accounts, credits for the same necessary and reasonable disbursements. The act of the 3d March, 1809, in adopting the rule

Neutrality.

of compensation from the act of the 23d February, 1795, must, I think, have intended to place navy agents (in case of their compensation reaching its maximum) upon a footing of equal advantage, in all respects, with the purveyor. No sufficient reason is perceived why any difference should be made.

I am, therefore, of opinion that the act of the 3d March, 1809, intended that the compensation of the navy agents should be two thousand dollars a year, clear of all deductions; in like manner as was the case, before its passage, with the purveyor of public supplies.

RICHARD RUSH,
Attorney General.

To the SECRETARY OF THE NAVY.

NEUTRALITY.

There is no law that can prevent a merchant or ship-owner selling his vessel and cargo to a citizen or inhabitant of Buenos Ayres; but if a vessel be fitted out, furnished, &c., with intent to employ them in the service of any foreign state, to cruise or commit hostilities, &c., it would be unlawful.

WASHINGTON, *July 27, 1816.*

SIR: Upon the letter of the collector of Baltimore, dated the 24th of this month, submitted to me yesterday, I have to state:

That I am aware of no law of the United States that can prevent a merchant or ship-owner selling his vessel and cargo (should the latter even consist of warlike stores) to a citizen or inhabitant of Buenos Ayres, or of any part of South America. Nor will it, do I think, make any difference whether such sale be made directly in a port of the United States, with immediate transfer and possession thereupon; or under a contract entered into here, with delivery to take place in a port of South America.

If vessels be fitted out, furnished, or armed, within the waters of the United States, and there be sufficient grounds for believing that it is done with intent to employ them in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects or property of another foreign prince or state with whom the United States are at peace, it would be unlawful under the act of Congress.

Patents to Purchasers at Sheriffs' Sales.

If the English vessel alluded to in the collector's letter be seeking an armament with the latter purpose, it will consequently be unlawful. But I know of no law to prohibit her taking in arms or military stores in the way of trade, or for necessary self-defence.

RICHARD RUSH,

Attorney General.

To the PRESIDENT.

LAND CERTIFICATES.

When the register at Kaskaskia had issued two certificates for the same land to two different persons, *held* that the first had preference.

WASHINGTON, *August 8, 1816.*

SIR: I have examined the case which the enclosed papers present, relative to the conflicting claims between the heirs of James Pigot, assignee of James Ware, and N. Jarrot, to the militia claim of James Ware of one hundred acres, No. 489, in the county of St. Clair, Indiana, and am of opinion that the heirs of Pigot, or those claiming under them, are entitled to the patent.

RICHARD RUSH,

Attorney General.

To the SECRETARY OF WAR.

PATENTS TO PURCHASERS AT SHERIFFS' SALES.

Where the local law authorizes a transfer of the right to patents at sheriffs' sales, the purchasers may demand patents:

WASHINGTON, *August 15, 1816.*

SIR: The enclosed papers present cases arising in different Territories. As regards the one from Indiana, the extract from the proper law is given, together with the proceedings of the court, and I think that a patent may well issue to Jacob War-
rick, who purchased at sheriff's sale. In the case of the claim of John Beard, or his representatives, neither the law of the Territory of Illinois authorizing a sale of the land, nor any

 JUDICIAL PRIVILEGES OF FOREIGNERS.

exemplifications of the proceedings of the court of common pleas of Randolph county, being set out, but merely the indenture of the commissioners given, I cannot form an opinion equally explicit. That given in the case of Warrick may, however, in the end, serve to govern this also.

RICHARD RUSH,
Attorney General.

To the SECRETARY OF WAR.

PAY OF OFFICERS OF THE NAVY.

The act of April 18, 1814, does not limit the right of the President to increase the pay of the officers and men belonging to the navy, to the close of the war with Great Britain.

WASHINGTON, August 16, 1816.

I do not think that there is anything in the act of April 18, 1814, limiting the right of the President to increase the pay of the officers and men belonging to the navy to the close of the war with Great Britain, which then existed; but undoubtedly it is in his discretion to do so. I think, however, that no increase ought to take place in their pay since the war, without a new and particular authority from the President.

RICHARD RUSH,
Attorney General.

To the SECRETARY OF THE NAVY.

JUDICIAL PRIVILEGES OF FOREIGNERS.

The courts of the United States in every State are at all times open to the subjects of a foreign power in friendly relations with them. The more especially will such remedies be extended in a case of fraud.

WASHINGTON, October 1, 1816.

THE Attorney General, having seen the representation addressed to the Minister of France by Mr. Dufort, president of the royal court at Bordeaux, respecting the conduct of a person by the name of Antoine, charged with having shipped certain effects of value to the United States, with a view to defraud

Judicial Privileges of Foreigners.

his creditors in France, as well as the letter from the Minister of France to the Secretary of State, dated the 13th of last month, (both of which the Secretary of State has done him the honor to refer to him,) has great pleasure in stating, for the information of those in whose behalf the minister is so naturally desirous to obtain justice, that the laws will happily afford every facility to that end.

The courts of the United States in every State are at all times open to the subjects of a foreign power in friendly relations with them; and, on this occasion, the Attorney General is happy to add, that those of his Most Christian Majesty will be entitled to claim the benefit of every legal remedy in as ample a manner as could be enforced by any citizen of the United States. The more especially will such remedies be extended in a case of fraud, which the law is ever sedulous to defeat.

In whatever town or place of the United States the effects thus sent off by Antoine can be found, they will be liable to process—either of attachment, or some other—rendering them or their amount ultimately liable to the just claims of his creditors. The latter, whether residing at Bordeaux or elsewhere in France, should transmit to the United States evidence of the nature and amount of their debts, under the best forms of authentication prescribed by the laws of France. It would, perhaps, be convenient if, on their arrival in this country, they were lodged in the hands of some agent or attorney, who might immediately act whenever the effects themselves, or those to whose hands they have been fraudulently shipped, are discovered.

The Attorney General forbears, for the present, to add anything further, without being apprized of more particulars of the case itself, or knowing in which of the States it may become necessary to apply for process: each State having its own judicial usages, which govern in some degree the courts of the United States. All, however, concur in abhorring fraud; and the Attorney General indulges the conviction that every relief it is practicable to obtain through the instrumentality of courts of justice, will be promptly and effectually accorded to

Cutting Timber from the Public Lands

the French claimants in the present instance, as soon as proofs of their debts are exhibited.

I have the honor to be, &c.,

RICHARD RUSH,
Attorney General.

To the SECRETARY OF STATE.

CUTTING TIMBER FROM THE PUBLIC LANDS.

Neither the statute nor criminal code will authorize prosecution for cutting timber from the public lands as for a robbery.

NOVEMBER 27, 1816.

SIR: There is no statute of Congress, that I am aware of, that reaches the case of cutting timber from the public lands as a specific offence. Nor will the nature of the criminal code authorize a prosecution as for a robbery.

Yet, if the facts be as stated in the within letter, it is such an outrage upon the United States in their rights of property as will lay the foundation of an action of trespass, in which it can scarcely be doubted that just damages would be enforced against the delinquents. The trespass, however, being local, the attorney of the government in that quarter who would conduct the suit should also, perhaps, be asked to furnish his advice upon the occasion. If the hint of this officer's backwardness be true, it would seem to raise a necessity for an immediate substitute, as the prompt instrumentality of an attorney for the public will be indispensable towards upholding the authority of the laws. The facts are important; the communication anonymous. Names are mentioned. Are any of them known? What is stated may well awaken attention, coming, as it does, from an intelligent hand, and dealing so in particulars. But can the government venture upon any positive step, without intermediate inquiry and further corroboration?

As to the Indians alleged to have been killed by Fisher and his party, the laws of the United States which protect them in these cases (if within their own territory) would seem to render nothing further necessary than the proper testimony to warrant

Petty Navy Officers.

an indictment for murder. Might the letter, or an extract from it, be transmitted to the Attorney of the United States?

RICHARD RUSH,

Attorney General.

To the SECRETARY OF WAR.

COMMUTATION BY GUARDIANS.

A child must have been under sixteen years of age at the death of the non-commissioned officer, musician, or private, in order to invest the guardian with the right to commute the bounty land for half-pay.

WASHINGTON, *December 24, 1816.*

SIR: Under the second section of the act of Congress of the 16th of April, 1816, entitled "An act making further provision for military services during the late war, and for other purposes," I am of opinion that the epoch of the death of the non-commissioned officer, musician, or private of the regular army, marks the point of time at which the child or children must have been under sixteen years of age in order to invest the guardian with the right of commuting the bounty land for the half-pay proposed as its substitute. It may be scarcely necessary to add, that, at the period of the relinquishment, the legal rights of the guardian over the estate of the minor must be in full existence.

RICHARD RUSH.

To the SECRETARY OF WAR.

PETTY NAVY OFFICERS.

Boatswains, gunners, carpenters, and sailmakers were intended to be included in the resolutions of Congress of the 6th of January, 1814.

WASHINGTON, *August 27, 1817.*

SIR: I am of opinion that, under the fourth clause of the resolutions of Congress of the 6th of January, 1814, the boatswain, gunner, carpenter, and sailmaker were meant to be included, and that they are entitled to the benefit which it holds out. But for this construction they would receive nothing, as

American Prisoners at Algiers.

the term "warrant officer" does not occur in any part of the resolutions. It is impossible to conceive any good reason why they should be left out altogether, seeing that even the seamen are provided for. If they do not technically come under the term "petty officers," we are bound to suppose, in order to a just interpretation of the clause, that Congress nevertheless intended by it to include them.

RICHARD RUSH,

Attorney General.

To the SECRETARY OF THE NAVY.

AMERICAN PRISONERS AT ALGIERS.

A consul of the United States for Tunis, with instructions from the Department of State, authorizing him, if he could find a suitable channel through which to negotiate the immediate release of the American prisoners at Algiers, to go as far as three thousand dollars per man, who employed an agent at hire and promise of reward to effect the object; and then drew bills on the State Department for such compensation, and for money paid, &c., in favor of a merchant at Gibraltar—HELD that the employment of an agent was justified under the power, but that the true meaning of the instructions was lost sight of by the manner of the employment of the agent for a compensation.

The proceedings throughout commented upon and reprehended; and other transactions blended with them, complicating the affair, render an application to Congress necessary.

WASHINGTON, *December 30, 1816.*

SIR: On the case of Mr. Noah, stated to me by the Secretary of State in his letter of the 22d of this month, the following questions arise, and are submitted for consideration:

1. Whether the power given to Mr. Noah for the ransom of our prisoners at Algiers, under his instructions from the Department of State of the 13th of April, 1813, justified the employment of an agent under him; or, if any, such an agent as he employed, and in the manner stated?

2. If such a power were given, could it be considered as justifying Mr. Noah in the payment of the full limit of three thousand dollars for each man, without any experiment being made to obtain their release for a less sum?

3. Whether the sum charged for the two men belonging to the crew of the brig Edwin can be considered a fair charge?

American Prisoners at Algiers.

and, if it be, whether that for the four men not of the Edwin's crew can be so considered?

4. Whether the pledge to Mr. Butler, for the payment of certain bills of exchange, can inure to Mr. Lewis, under the whole circumstances of the case?

For the better understanding of the above questions, it will be proper to bring into view the material facts of the case, whether presented to me in the letter of the Secretary of State, or collected from the papers and exhibits, written and printed, transmitted in further explanation of that letter.

When Mr. Noah was about to leave the United States as consul for Tunis, he received, among other instructions, the following from the Department of State:

"On your way to Tunis, (perhaps at Malaga or Marseilles,) you may probably devise means for the liberation of our unfortunate captives at Algiers, whose situation has justly excited much sympathy in the people of this country. Should you find a suitable channel, therefore, through which you can negotiate their immediate release, you are authorized to go as far as three thousand dollars a man; but a less sum may probably effect the object. Whatever may be the result of the attempt, you will, for obvious reasons, not let it be understood as proceeding from this government, but rather from the friends of the parties themselves. As yet, we have information only of eleven persons (the crew of the brig Edwin, of Salem) being confined at Algiers; and it is to be hoped that no addition has since been made to the number. If success should attend your efforts, you will draw upon this department for the necessary funds for paying their ransom, and providing for their comfortable return to their country and friends."

On the arrival of Mr. Noah at Cadiz, in the autumn of 1813, he thought proper to select Richard R. Keene, a native of Maryland, but claiming at that time to be a Spanish subject, as an agent to negotiate the liberation of the captives in question. Before any final agreement, however, with him, Mr. Noah addressed a note to Mr. Hackley, consul of the United States at Cadiz, dated October 2, 1813. In this note he states that he is authorized by the United States to negotiate for the release of these prisoners. After touching upon other matters connected

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with the chief subject, he expresses a wish for Mr. Hackley's advice in the designation of a suitable agent, and on the compensation proper to be allowed him. Mr. Hackley states, that, having learned that Mr. Keene had proposed to undertake a voyage to Algiers to effect the contemplated release, he does not hesitate, after a tribute to his character and abilities, to recommend him as a person every way qualified for the attempt. In regard to compensation, Mr. Hackley also states the amount to which he thinks Mr. Keene would be entitled. On the receipt of this letter, Mr. Noah determines upon the employment of Mr. Keene, and, on the 13th of November, 1813, enters into a contract with him. It is stated in this contract that Mr. Noah is vested by his government with competent authority for the step he is taking. The compensation to be paid Mr. Keene is one thousand dollars in advance, and nothing further if the enterprise failed; if it succeeded, he was to be allowed an additional sum of three thousand dollars, and a contingent remuneration to arise out of "any surplus that there might be above the prices to be paid for said captives, out of an allowance at the rate of three thousand dollars for each man."

On the 5th of November preceding the date of the contract, Mr. Keene had furnished himself, in furtherance of the objects of the mission, with a despatch from the Spanish government, addressed to the Spanish consul-general at Algiers. This instrument, after reciting that the government of Spain was desirous of giving new proofs to the United States of the protection dispensed to their commerce, as well as to the individuals employed in it, enjoins it upon the consul-general to make all possible exertions, without compromising their responsibility, to obtain the liberation of twelve American citizens who were captives at Algiers; and in case any present of unusual gratification was found necessary, he was directed to give advice of the same, for the ultimate determination of the regency, by whose order the despatch was stated to be communicated.

On the 12th of November he obtained, also, from the British ambassador in Spain, (Sir Henry Wellesley,) a letter addressed to the British vice-consul at Algiers. In this letter, Mr. Keene's object is represented to be humane in its character, and grow-

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ing out of the instigation of American merchants residing at Cadiz. As such, he is recommended to the assistance and protection of the British vice-consul.

So prepared, and receiving a letter of instructions from Mr. Noah, dated Gibraltar, January 20, 1814, Mr. Keene proceeded for Algiers. It is not necessary to state all that took place there, as described in his letter to Mr. Noah, written from Algiers May the 22d, 1814. On his first arrival, he was reported as the bearer of despatches from the Spanish regency to their consul. He then opened his negotiation on the asserted instigation of the American merchants at Cadiz. In the end, he obtained the release of two of the crew of the *Edwin*, viz: William Turner and John Clark; for each of whom he claimed an allowance of three thousand dollars. He effected, also, the liberation of four other individuals, not of the crew of the *Edwin*, but who all swore that they were born in New Orleans. These men were not, in fact, in actual slavery. They had been landed at Algiers in April, 1814, from on board the British frigate *Franchise*. The account which they gave of themselves was, that they sailed from New Orleans in 1806, bound to Bordeaux; that, on their arrival at the latter place, they were, by orders from the government, sent on board the French frigate *Dromedary*; that this frigate was captured near Malta by the British frigate *Euryalus*; that they were sent as prisoners to Malta, and afterwards placed on board the *Franchise*, from which they were landed at Algiers as aforesaid. For these four men Mr. Keene paid six thousand dollars.

To meet the expenses thus incurred, and others growing out of the operation, (such as the compensation of Mr. Keene, losses on exchange, and other incidental charges,) Mr. Noah drew bills on the Department of State for 18,743 dollars, in favor of Mr. Butler, a merchant at Gibraltar. These bills were protested, upon the ground that Mr. Noah had not acted in conformity with his instructions. It afterwards appearing, from the representations of our consul at Gibraltar, that, at the time of drawing, Mr. Noah had shown his instructions to Mr. Butler, who had negotiated his bills upon the faith of them, and likewise that it was important to our naval operations in the Mediterranean that the credit of the agents of the United States

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should be sustained in that quarter, it was thought proper to accept the bills. After acceptance, but before payment, information was received that part of a sum of money which had fallen into Mr. Noah's hands at Tunis had been pledged by him to Mr. Butler for payment of the bills, in case they were not paid here. On receiving this information, the department declined making the payment at first intended. The bills were then returned to Mr. Noah, who paid them at Tunis, out of the money stated as above to be in his hands. This money was placed in his hands by Commodore Decatur. It had been wrested by the latter from the Bey of Tunis in payment of certain English prizes belonging to Winslow Lewis, of Boston, and sent into Tunis by the privateer Abelino, Captain Weyer. Captain Weyer being at Tunis, constituted Mr. Noah, by letter of January 16th, 1815, agent for such prizes as he should send into that port. It was in the capacity of agent for the privateer that Commodore Decatur paid over the money to Mr. Noah.

On learning the above facts, Mr. Lewis addressed a claim to the Department of State, alleging that he ought to be paid the amount of the bills, to satisfy which his funds in the hands of Mr. Noah had been thus appropriated, and which had once actually been accepted by the government. At first, it was intimated to Mr. Lewis that there seemed to be much reason in his claim; but doubts on the propriety of satisfying it afterwards arose, on becoming acquainted with the private capacity in which Mr. Noah had received the funds, and the whole concomitant circumstances.

On mature consideration of the foregoing facts, I proceed to offer such opinions as I have formed on the questions stated in the beginning.

1. In order to a just comprehension of the first question, the general nature of Mr. Noah's instructions must be adverted to. It is conceived that they are to be viewed as merely subordinate to the principal objects of his appointment. A distinct, independent mission for the release of the captives, does not appear (at that time, at least, and in the person of Mr. Noah) to have been in contemplation. About to depart as a consul for Tunis, this duty was devolved upon him as incidental to his primary and permanent movement. The execu-

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tion of it is made to depend, by every just implication, upon fit concurring circumstances. There is nothing positive in the character of the obligation created in him to fulfil it; a limited door merely being opened for discretion to do its sound office. As little did it fall within their scope to impart any costliness to the attempt, and least of all to invest it with any circumstances of publicity. Still I think that, taken as an abstract question, the employment of an agent may have been justified under his power. On a favorable aspect of events, inviting him to go forward in the object, the instrumentality of some third person at Algiers, selected under the expressed cautions and implied restraints held out, may have become indispensable to its accomplishment.

I am quite as clear in the opinion that the true meaning of the instructions was lost sight of by the employment of Mr. Keene, and in the manner stated.

I perceive, in the first place, no authority for the amount stipulated and paid as his compensation. Three thousand dollars was the maximum to be allowed for each man. This sum, with the expenses incident to the comfortable return of the captives, if released, are the only disbursements for which I am able to discover any warrant in the instructions. If it be objected that, on the hypothesis of an agent rightfully employed, some compensation would reasonably be due for his services, I would reply, that Mr. Noah's contract with Mr. Keene has, in one part of it, furnished the answer. A contingent reward is held out to him out of moneys to be saved from the three thousand dollars allotted as the highest price for each redeemed captive. I can see no authority to have placed the reward upon any other than this footing. The department, in fixing three thousand dollars as the utmost sum, must have designed that it should comprehend every expense necessary to cover the release. I am driven to this conclusion in the absence of any express authority to incur the cost of a separate agency; and am the less disposed to infer such an authority constructively, since the instructions terminate with an engagement to defray the charges of a passage home, leaving out of view every other object. The words, "necessary funds for paying their ransom," in the last sentence, must be restricted to the three thousand

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dollars. A good reason may be imagined for placing the reward upon this contingent ground. The self-interest of the agent would thereby have coupled itself with his efforts to effect the redemption at low rates. If, through any extraordinary exertion and hazards, resulting in benefits of proportionate magnitude, a claim had been founded to other and better compensation, this, indeed, might well, in the end, have been addressed to the liberal and kind justice of the American government. But, for Mr. Noah to pay Mr. Keene an independent sum, and in the first instance, appears to me an act in which he was not justified.

If, however, any doubts should be felt upon this point, there can scarce be any room for any under other views of the employment of this agent. It presents features obviously thwarting the spirit and scope of the instructions in points vitally interwoven with their execution. The steps taken would seem to indicate, on the minds of both principal and agent, the impression of an independent and prominent mission. Instead of any attempts entered upon at Malaga or Marseilles, (which, in the first instance, it might have been natural to expect,) both these places are passed by. Nor does it appear that any effort was made to use the intervention of any individual resident at Algiers, especially some person in a capacity wholly private—a measure also to have been looked for, both as it might have reduced the expense of the enterprise, and interposed additional shields against the discovery of the government as a party to it. But, grant that the force of such suggestions may be overruled, and that Cadiz was the fit place whence to give the operation its first impulse: yet how shall we reconcile the conduct that followed, with the rule marked down in the instructions? To say no more of them, it must be admitted that to exclude the suspicion of the governmental agency is stamped as a leading and positive characteristic. Thus warned, Mr. Noah, in his letter to Mr. Hackley, sets out with distinctly affirming that the United States had invested him with authority. This, although the latter was a consul, does not appear to have been necessary. The same fact is again proclaimed upon the face of a formal contract with Mr. Keene. But yielding to all that might be urged in defence of these disclosures,

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there seems nothing left to excuse the nature of the voyage to Algiers. It is clothed with something of the livery of an embassy itself. Instead of secrecy and silence, *eclat* rather marks its movements. A despatch was obtained from the Spanish government, bearing indications (too plain to be misunderstood) that it was possessed of the real ground upon which Mr. Noah stood. Another official paper is sought at the hands of the British ambassador, as a further passport to Mr. Keene; and all this known to Mr. Noah. What will every well judging mind say to such facts? Undoubtedly that they tended to make known the very authority that ought to have been hidden. The despatch from the Spanish regency might also be construed as indicative of a favor supposed to be accorded to the United States. Now, taking this to be one of the meanings of which it is susceptible, it is possible that it might not have been within the intentions of our own government, in relation to such an enterprise, to invite a favor. Moreover, the letter of Sir Henry Wellesley is asked and accepted, when America and England stood in the attitude of belligerents. Passing over animadversions that hence occur, such measures were just such as were adapted to strip off the veil which Mr. Noah should sedulously have worn. It is against all sound anticipations to suppose that they did not at once lay his genuine case bare. Secrets are prone to escape through much smaller openings. It is true, that in his note to Mr. Hackley, and in his letter of instructions to Mr. Keene, he adverts to the necessity of keeping his government out of sight. In the Spanish despatch, there is also an outward allusion to the same necessity. But these (their concealments) need not be the subject of remark, when opposed by the more intelligible and positive indications which pointed to another conclusion, by the open machinery which foreign governments and functionaries were made to interpose in advancement of the undertaking. Considering that Mr. Keene was provided with both the Spanish despatch and the letter from the English ambassador before the middle of November, and that he did not embark until February, there is no violence done to credulity in supposing that the knowledge of his true objects and authority preceded his own arrival at Algiers. This—and it is no very strained presumption—might

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serve in part to account for the extravagance which, in the first instance, characterized the Dey's demands. When we look to the actual state of our relations with Spain, as well as England, at that epoch, it can scarcely be going too far to conjecture that neither their policy nor their friendship could have been deeply offended at such demands.

Should such reasoning be thought in anywise defective, in relation to making known the United States as at the bottom of the proceeding, another fact presents itself, of force not to be resisted. It is not to be denied that the affair was ushered in at Algiers as one to which some government had lent its instrumentality. Mr. Keene, in his letter of the 22d of May, 1814, states that, on his arrival, the public barge came alongside of their vessel, and that he was reported as charged with despatches from the Spanish government. He states, further, that he conducted the negotiation in the name of the regency. Now this appears to me to stand in like hostility to the instructions. The participation, even in a formal or mere exterior way, of any government whatever, could never have been contemplated by the Department of State. The course of reasoning that would ascribe advantages to such a plan is not easily to be sustained. It is supposed, on the contrary, that it must have been productive of obstacles; and, at all events, it is taken to be against the clearly-expressed intention of the instructions, which was to place the whole interference upon a footing private and unostentatious.

In answer, then, specifically, to the first question, I am of opinion that the power given to Mr. Noah might have justified the employment of an agent; but that it does not justify such an agent as he employed, and in the manner stated.

2. If such an authority was given, could it be considered as justifying Mr. Noah in the payment of the full limit of three thousand dollars, without an experiment being made to obtain the release for a less sum?

This question I am disposed to answer in the affirmative. If an agent be authorized to pay a fixed sum, I do not see that he absolutely violates his authority by paying the whole at once, although a hope may have been entertained, and an intimation thrown out, that the end might probably have been accom-

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plished for less. It may well be an objection against the discreet exercise of the authority. A mind prudent and skilful would be slow thus to act. But I do not feel prepared to say that it would be a positive breach. Circumstances may be conceived, leading to a rational belief beforehand that the smaller sum would not be accepted, which may the more serve to excuse the ceremony of the offer. I do not say that precisely such circumstances existed in the present instance. None are perceived, unless Mr. Noah rested upon the letter of Mr. Hackley. If he yielded his own judgment to that of another, still Mr. Hackley's letter to him does not import an unequivocal opinion upon this point. If it did, he fell into an error. It is a fact too strong to escape attention under this head, that each of the six men brought off was actually obtained for a less sum than three thousand dollars. Upon the whole, however, my opinion is, that looking liberally at the peculiar words of Mr. Noah's power, it was not violated by going to the full limit, without the trial of previous experiments.

3. The third question divides itself into two branches: 1st. As respects the two men belonging to the crew of the Edwin; 2dly. As respects the four landed from the English frigate.

In regard to the two former, I think that the charge must be considered fair. Whilst the employment of Mr. Keene may not have been justified, there are acts in which Mr. Noah may nevertheless be warranted by the intrinsic virtue of his instructions. This I take to be such an act. These two men were, indeed, released through the mediation of the British vice-consul, and delivered up as British subjects. This fact appears from the letter of Mr. Keene. Other evidence is also before me from the Department of State, superinducing strong suspicions that they were not Americans. It is at least of weight to impair the effect of their own affidavits. This will be agreed, when it is stated to be a letter from the captain of the Edwin himself, in which he explicitly disclaims them as Americans. Still, they were of the crew of the Edwin. Those who composed this crew are mentioned in the instructions as captives to be released. Mr. Noah may not have thought himself at liberty to make discriminations between them, or to institute

or permit inquiries as to their citizenship. For him, the language of the instructions was sufficient to close the door against other investigations. Mr. Keene here uses a similar shield in the emphatic words of his Spanish despatch.

But different is the case of the four men alleged to be Louisianians. I can discover no authority for allowing the charge on their account. There is not a trace of evidence, beyond their oaths, that they were citizens of the United States. To swear in this way, they had the strongest temptations of personal safety, if we take Mr. Keene's representation (and there is no other) upon the subject; for, although he states that they were not held in slavery, he adds, that there was every reason to suppose they would be. Aside from this powerful objection on the score of interest, all rational presumptions contradict their assertions. It is, to the last degree, probable that they were Frenchmen. They had, by their own accounts, not been in the United States for eight years. They were put on board of a French frigate in 1806, by orders from the French government. The smattering which they had of the English tongue may well enough have grown up during their subsequent imprisonment on board of English vessels. In their own affidavits, they do not go the length of saying that they were put on shore from the British frigate as Americans. If, according to their own oaths, they were even all born in New Orleans, it must have been before that place became one of the cities of the United States. They may then, nevertheless, from choice or accident, have remained French subjects. But, to waive such a suggestion, the fact of their being genuine American citizens was alike unsupported by plausibility and by proof. How it should have gained credit in the mind of a person about to perform an important trust upon the faith of it, seems strange. Mr. Noah, in his own letter to the Secretary of State, of May 31, 1814, seems to give in to the captain of the British frigate, having been induced to land them, from finding them "unwilling to work," and being in other respects useless. In the light of troublesome and expensive incumbrances, it is also as probable that the British vice-consul handed them over so promptly to Mr. Keene. It is difficult to banish the suspicion of a design at imposition, when men un-

der such circumstances were received and ransomed as citizens of the United States; and though Mr. Noah may not be implicated, it can never, I think, meet the sanction of government. I am very clearly of opinion that no part of the charge for them should be allowed. It is enough that the public money has been expended upon the doubtful citizenship of Turner and Clark.

4. Upon the fourth and last question, although coupling itself with the general case, I have felt more hesitation than upon any of the points preceding.

The conclusion to which I have come is, that the pledge to Mr. Butler to pay the bills cannot, under all the circumstances, operate to the benefit of Mr. Lewis. The refusal by the department to accept them, in the first instance, was, as I suppose, completely justified. The subsequent acceptance was not from seeing the instructions, or the conduct under them, in any different or more advantageous lights, but for reasons extrinsic and new. It was from the provident and paramount motive of keeping the credit of the nation in the Mediterranean firm. Before payment, this object was met, by Mr. Noah, who had agreed to appropriate, in discharge of the bills, certain funds lodged in his hands. This removed the only ground which had impelled the United States to make the assumption. The motive being at an end, the assumption becomes so too. It was not made to Mr. Lewis, but to Mr. Butler. Between the United States and Mr. Lewis there was no privity. That the assumption passed to him, on the mere footing of his money having been unwarrantably used, I do not feel prepared to say. It had been deposited with Mr. Noah, as the prize agent of Mr. Lewis. This appears from the official letter of Commodore Decatur to the Secretary of the Navy, dated July 31, 1815, from the bay of Tunis. It is true that, by an act of Congress, our consuls on the Barbary coast are not to engage in trade with those States. But I do not say that the restriction operated to prevent Mr. Noah's acceptance of the prize agency. He did accept it, being at the same time consul; and, in the former capacity, received Mr. Lewis's funds. He paid them away without authority and of his responsibility; I presume that there

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can be no doubt. This, then, is the true legal remedy open to Mr. Lewis.

But Mr. Lewis stands in the attitude of an individual to whom an injury has been done. If, therefore, his recourse to Mr. Noah should not prove efficacious, and the United States, in consideration of his money having been applied to meet a public object, which they themselves were about to meet, should think fit to recognise a creditor so meritorious, it may be done through the medium of Congress. I feel unwilling to give an opinion under which his reimbursement might take place by any power short of this.

RICHARD RUSH,
Attorney General.

To the SECRETARY OF STATE.

OPINIONS

OF

HON. WILLIAM WIRT, OF VIRGINIA:

APPOINTED DECEMBER 16, 1817.

THE ATTORNEY GENERAL.

The Attorney General is bound to give his opinion to the President and heads of departments on a case stated in writing; but he will not act as *arbitrator*, nor render an *award*.

ATTORNEY GENERAL'S OFFICE,

January 23, 1818.

SIR: The Attorney General can never act as an *arbitrator* between the government and an individual, and therefore can render no *award* in the sense in which this phrase is generally understood. The Attorney General is officially bound to give his opinion on any question of law which may be propounded to him by either of the departments; but his opinion is made up on the case as it comes from the department, stated in writing. Whatever you may wish, therefore, to present to my consideration, must be sent *through the department from which the inquiry comes, and must be in writing*, as it reaches me through that channel.

I am, sir, &c.,

WM. WIRT.

To Mr. JACOB BARKER.

FRAUDS UPON THE GOVERNMENT.

There is no law of the United States which makes a fraud, by forgery, perjury, subornation of perjury, and the corruption of a justice of the peace, punishable by criminal prosecution.

No act can be made an offence against the United States, except by a law of Congress.

Forgery, as an offence against the laws of the United States, is confined to certain specific subjects, such as certificates, indents, public securities, bank notes, and checks, &c. Perjury is limited to depositions taken pursuant to some law of Congress; and bribery and corruption of a justice is not punishable by the laws of the United States.

Frauds upon the Government.

If money has been fraudulently obtained from the United States, an action in the name of the United States will lie to recover it back.

ATTORNEY GENERAL'S OFFICE,
March 8, 1818.

SIR: I have availed myself of the first moment I could command, to examine the documents developing certain fraudulent transactions in the State of New York, which you have done me the honor to submit for my opinion on the following questions:

1. "Whether, according to the existing laws, any prosecution can be sustained in the courts against the persons implicated?" and

2. "Whether the moneys fraudulently obtained from government can be recovered from the persons who have obtained them?"

1. I understand the *prosecution* mentioned in the first question to mean a *criminal prosecution*; and the *existing laws* to mean the laws of the United States. There is no law of the United States which makes this kind of fraud a crime punishable by criminal prosecution. By the common and statute law of England, as well as by the statutes of several of the United States, this kind of cheat is indictable. But neither the common law nor statutes of England, nor the statutes of the States, can confer any jurisdiction on the courts of the United States, nor can they create an offence against the United States. No act can be made an offence *against the United States*, except by act of Congress; and there is no such act in regard to this offence.

The whole offence (the fraud) seems to have been composed of several distinct offences—forgery, perjury, subornation of perjury, the corruption of one justice of the peace at least, and, finally, the imposition on the officers of the government here, by means of these fabricated materials.

The offence of forgery, under the laws of the United States, is confined to certain specific subjects; such as certificates, indents or other public securities, bank notes and checks on the Bank of the United States, treasury notes, and gold and silver coin; and does not extend to the forgery of such papers as are here in question.

Office of Attorney General.

The offences of wilful and corrupt perjury, and subornation of perjury, extend, by the laws of the United States, to "any deposition taken pursuant to the laws of the United States." The several acts of Congress under which these claims were presented and paid, allow of depositions in support of the claims, and prescribe the mode in which they shall be taken. I am therefore of the opinion that all perjuries and subornations of perjury committed in depositions taken under these acts are punishable by the laws of the United States.

The offence of bribery and corruption of a State magistrate is not punishable by the laws of the United States; and I have already said that no provision has been made by the laws of the United States for the punishment of the imposition on the officers of government by means of these false papers.

2. This question is one entirely new to me, and, so far as I am informed, has never been tried; yet I think an action in the name of the United States, to recover back the money, may be sustained in the courts of the United States.

I have the honor to be, &c.,

WM. WIRT.

To the CHAIRMAN of the Committee of Claims,
House of Representatives U. S.

OFFICE OF ATTORNEY GENERAL.

The Attorney General is not authorized to give an official opinion in any case except on the call of the President or some one of the heads of departments. Subordinate officers of the government, who desire an official opinion, must seek it through the head of the department to which such subordinate is accountable.

ATTORNEY GENERAL'S OFFICE,

June 12, 1818.

SIR: I beg you to be assured that the failure to give an earlier answer to your letter of the 7th ultimo has proceeded from no want of respect, personal or official, for you; but has been forced on me by a current of duties which I could not turn aside. I am sorry now to be obliged to decline an answer to your question, which I do simply on the ground that I have no legal authority to answer it officially.

The commission of Attorney General authorizes and em-

Duty of President as to a Register of Wills.

powers him to execute the duties of that office *according to law*; and the law which creates this office prescribes its duties in the following terms: "*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 opinions 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.*" Under this law, which is the only one upon the subject, I do not think myself authorized to give an *official opinion* in any case, except on the call of the President, or some one of the heads of departments; and I should consider myself as transcending the limits of my commission in a very unjustifiable manner, in attempting to attach the weight of *my office* to any opinion not authorized by the law which prescribes my duties. You will, I trust, excuse me, therefore, in declining to give the *official* opinion which you request; and which I assure you I do, not from any want of respect to you, but purely from a sense of official duty, and my respect for the law which prescribes that duty.

If you think the matter of sufficient consequence to make an *official* opinion from me desirable, you will, perhaps, have it in your power to give your application such a direction, through the Navy Department, or that of War, as to justify me in expressing the opinion *officially*, which I have every *personal* disposition to give.

I am, sir, &c.,

WM. WIRT.

To Major SAMUEL MILLER,
Headquarters of Marines, Washington.

DUTY OF PRESIDENT AS TO A REGISTER OF WILLS.

Where an act of Congress gives the President power to appoint an officer, without defining the tenure by which the office is to be held, a commission may legally issue to the officer to hold the office *during the pleasure of the President*.

ATTORNEY GENERAL'S OFFICE,

June 15, 1818.

SIR: I have considered the subject which you have submitted to me, by the desire of the President of the United States, for my official opinion, which I have now the honor to give you.

Power of the President concerning Bail.

The gentleman who now fills the office of register of wills for the county of Washington, holds that office, you state, by a commission from the President, which authorizes him to hold the office *during the pleasure of the President*. If the President had no right to issue such a commission, the commission is void, the office vacant, and the President has now a right to commission another person anew: if, on the contrary, the President had the right to issue such a commission, he has, on the face of that commission, the power of removal and the authority to reappoint.

But as the act of Congress gives the President the power to appoint this officer, without defining the tenure by which it shall be held, I perceive nothing irregular in the commission which has been issued. Whenever Congress intend a more permanent tenure, (during good behavior, for example,) they take care to express that intention clearly and explicitly; and in every instance, I believe, in which they give a naked power to appoint, (saying nothing of the tenure,) the practice has been to fill up the commissions in the manner in which you represent this to have been done: and this without complaint, so far as I have heard; and without any just ground to complain, that I can discern.

I have the honor to be, sir, &c.,

WM. WIRT.

To ROBERT BRENT, Esq.,

For the President of the United States.

POWER OF THE PRESIDENT CONCERNING BAIL.

The President does not possess the power to direct a person indicted for cheating the accounting officers by means of forged papers, supporting fictitious losses, to be let to bail or discharged on his own recognizance.

OFFICE OF THE ATTORNEY GENERAL,

June 23, 1818.

SIR: I have, according to your request, examined the petition and memorial of Samuel Pease, together with the certificates which accompany it. This man is under prosecution for a cheat effected on the accounting officers of the United States

The Saline Bank of Virginia.

by the means of forged papers, supporting fictitious claims for losses alleged to have happened during the late war. His prayer is, that the President will direct him to be bailed, or discharged without bail, on his own bond, to take his trial at the next term. The power which the President is thus called upon to exercise does not, in my opinion, belong to him by the constitution and laws of the United States. The question of bail is a judicial, not an executive one. Under this view of the subject, it has become unnecessary to examine the merits of the case on which the petitioner insists; but if it had been necessary, instead of relying on *his* statement, it would have been necessary to have called upon the United States attorney for the district, together with the documentary and parol proof on which it is understood a bill has been found by the grand jury. But let the merits of the petitioner's case be what they may, they would be unavailing, because the President does not possess the power which he is called upon to exercise.

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

THE SALINE BANK OF VIRGINIA.

The stockholders are not individually liable for the notes of the Saline Bank, for the reason that both the notes issued by the bank and the discount notes given to it are contracts founded in a breach of the law, and which a court will not lend its aid to enforce.

Neither can the Saline Bank, as a bank, sustain suits, being unchartered, and all their transactions, contracts, and promises being founded in a breach of the law.

OFFICE OF THE ATTORNEY GENERAL,

June 29, 1818.

SIR: I have considered, very deliberately, the question submitted a few days since for my opinion, and have now the honor to give you the result.

The question is, whether the stockholders of the Saline Bank of Virginia be not individually liable for the notes issued by that bank, the bank not having been an incorporated one?

As a general question, and in the absence of any municipal prohibition against the operations of such a company, I should

The Saline Bank of Virginia.

have no doubt of their competency to bind the stockholders, individually, by their notes; for I should consider them as a mercantile association, trading under the firm of "the president, directors, and company," &c., and the stockholders as the partners constituting that firm. In the few remarks I exchanged with you on Friday evening on this subject, I looked to the question merely as a general one, unaffected by any legislative prohibition; for at that time I had read only your question, in which the particular bank is not named; and, therefore, expressed the opinion which I should again express were the case such a one as I supposed it to be. On reading the letter, however, covered by your envelope, I find it to be the case of the *Saline Bank*, which I had occasion to consider very elaborately previous to my appointment to this office; and on examining now the opinion which I then expressed, I see no reason to alter it. A copy of this opinion is now enclosed; and that you may understand it the more readily, I send you, also, the statement of the case, and the interrogatories, by which that opinion was drawn from me. This may be useful in another point of view; for I discover, by the letter from your correspondent, that you are asking information, generally, as to the affairs of the *Saline Bank*; and the letter of Mr. Duncan (who, I understand, is a very honorable member of the profession of law) may shed some light on the subject, in addition to that furnished by General Jackson. You will discover that the embarrassments of the bank have split the stockholders and directors into two very acrimonious parties; both composed of men heretofore respectable, but on this occasion charging each other, reciprocally, with the most sordid views and the most ruinous policy.

The case, you will observe, was once before the chancellor of the Winchester district, on an injunction obtained by General Jackson's clients; but I have understood that the chancellor has since thrown the subject wholly out of court, on the ground taken in my opinion—that the association was when created, at first, in opposition to the laws of the land, and all their operations, therefore, illegal and void; to enforce which, or even to adjust their controversies among themselves, a court would not lend its aid.

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As to the correctness or incorrectness of the opinion which accompanies this letter, you will be yourself immediately able to judge; because I have given fully and explicitly both the reasons and authorities on which it is founded. I will merely observe, that the case was one of the first impression in Virginia, and it is, therefore, quite uncertain how the court of last resort in that State would settle it; the principles of law seeming to point to one conclusion of a very startling character, while every consideration of convenience in the particular case required another. I incline to think, however, that that court would consider the *general* convenience arising from an adherence to the settled principles of law, as an object of greater consequence than the particular inconveniences brought upon the parties by themselves, by an open violation of a public law of the land.

The second opinion, of which General Jackson speaks with his usual courtesy, was this: Judgments were represented as having been entered in the name of Webster as plaintiff, but for the benefit of the stockholders; thus it appeared upon the record that Webster was merely the *nominal* plaintiff, and that the *real* plaintiffs in interest were the stockholders. On this short statement of the case, I was asked who had the right to direct and control the issuing of the executions? and I answered, the real plaintiffs in interest. In the courts in which I have practised in Virginia, it is no unusual thing to see a man the holder and real owner of a bond or promissory note, which had been originally made payable to another, and which had been passed to him by simple transfer, without assignment. In such cases, the suits are necessarily brought in the name of the obligee or payee, for the use and benefit of the real owner of the debt: so that the nominal plaintiff is one person, and the *real plaintiff in interest* is another. In such cases, it was never doubted that the real plaintiff in interest, and not the nominal plaintiff, had the whole and sole control and authority over the executions; and I consider the case of Webster and the stockholders of the Saline Bank to be essentially the same in principle.

As it may throw additional light on the affairs of this bank, I enclose you, also, a copy of the bill for injunction, and the

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answer, which were before the chancellor, and request that they, together with Mr. Duncan's letter, may be returned when you shall have satisfied yourself of their contents.

WM. WIRT.

To the SECRETARY OF THE TREASURY.

"RICHMOND, *August 25, 1817.*

"DEAR SIR: My reply to yours of the 17th ultimo was suspended until the answer in chancery to the bill filed by Adams should arrive. The answer came to hand only a mail or two ago; since which time I have been so incessantly engaged, that it has not been till now that I could take up the case of the Saline Bank.

"The case is a new one, and surrounded with considerable difficulty, which necessarily diminishes the confidence I feel in my own opinions. Such as they are, however, you shall have them without reserve.

"Before I proceed to answer your questions specifically, it may clear the way to take a view of the several acts of Assembly, and the principles of law on which those answers must rest.

"The operation of the act of the 24th of February, 1816, 'more effectually to prevent the circulation of notes emitted by unchartered banks,' having been suspended as to the Saline Bank by the act of the last session, I shall first consider the case as standing clear of these acts, and depending on pre-existing laws.

"On the 25th January, 1805, was passed 'An act to amend the act "to prevent the circulation of private bank notes;"' (2d vol. of the Rev. Code, page 79.) By this it is enacted that it 'shall not be lawful for any person to offer in payment any note or bill, whether payable to bearer or not, which shall be emitted by any banking company *not having a charter*;' and by the 2d section, it is enacted 'that offenders against the true intent and meaning of this act shall incur all the pains and penalties of the act entitled "An act to prevent the circulation of private bank notes."' The penalties prescribed by the law thus referred to are, the forfeiture of ten times the value of the sum mentioned in the note; the liability to be bound to their good behavior; and the forfeiture of the recognizance by a

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second offence. (See 1st Rev. Code, page 16.) It is true, these acts contain no positive prohibition of unchartered banking companies; but their enactment is equivalent to a positive prohibition. For we are told by Lord Holt (Carthew, 252) 'that *every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibiting words in a statute.*' So, also, it is a settled principle of law, that all contracts, the consideration whereof, although not against the letter, is against the policy of the statute, are illegal; and that courts will not lend their aid to enforce such contracts. It is on this principle that all the cases of stock-jobbing contracts against the 7th Geo. II, chap. 8, turn. (See particularly the cases of *Steers vs. Lashley*, 6 T. R., 61; and *Brown vs. Turner*, 7 T. R., 630; and 1 Esp. N. P., 91, where the principle is expressly advanced and supported by authority.) By the statute 6 Geo. I, c. 18, § 12, it is enacted 'that all policies of insurance on ships at sea, made by any corporation, (other than the two corporations therein mentioned,) or *by persons acting in partnership*, shall be void.' Two men form a partnership to insure, contrary to this act: one of them receives all the premiums, and the other sues for his share. He cannot recover; and the reason given is, 'because the plaintiff's claim arose out "of a transaction which was illegal," and therefore the court would not give it effect.' (*Booth vs. Hodgson*, 6 T. R., 405.) So, if one of such partners pay the whole of such losses, he cannot recover from his partner his share of the losses so paid. (*Mitchell vs. Cockburne*, 2 H. B., 379; and *Aubert vs. Maze*, 2 Bos. and Pul., 371.) So, where one of such partners had been compelled to pay the whole of such loss, and the other partner had paid his share into the hands of a broker, it was holden that that moiety could not be recovered from the broker by the partner who had paid the whole loss. (*Sullivan vs. Greaves*, Park. Ins., 8.)

"The principles thus established are these:

"1. That a court will never lend its aid to enforce a con-

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tract founded in a breach of the law, or founded in a breach even of the policy of a law.

"2. That an act of assembly annexing a penalty to any transaction whatever is equivalent to a positive prohibition of that transaction, renders it illegal, and invalidates every contract growing out of it, or, in the language of Lord Holt, '*for or about it.*'

"On these principles, I consider the Saline Company as an illegal association, under the act of 1805; and their banking transactions as so many illegal contracts, which a court cannot properly lend its aid to enforce.

"In Pennsylvania this has been expressly decided as to the bank-notes of unchartered banks: that is, that no action can be maintained to recover the amount of such notes. The cases were those of Anthony's executors *vs.* Coulon, and Mitchell *vs.* Smith, cited by Chief Justice Tilghman in the case of Spangler *vs.* the Commonwealth. (3 Binney's Reports, 536.) I now proceed to answer your questions specifically, under the act of 1805; and I shall state them in your own words.

"1. 'Can the Saline Bank (being unchartered) sustain suits?'

"*Answer.* I think not: certainly *not as the Saline Bank*; for that is a name unknown to the law. And, for the reasons above stated, I do not think that the individuals who compose the company could maintain a suit on their banking contracts, or on any *assumpsit*, express or implied, growing out of any banking transaction; all such contracts, promises, and undertakings, whether verbal or written, being (to use Lord Kenyon's language) 'founded in a breach of the law.'

"2. 'Can a stockholder be sued for a debt due to the bank before a dissolution of the partnership?'

"*Answer.* For the reason just given, I think not; nor after the dissolution, either.

"3. 'is it not usurious to take \$10 50 as interest for the forbearance of \$1,000 for sixty days?'

"*Answer.* Certainly it is, in all individuals and companies not expressly authorized so to do by law; which is clearly the case of all unchartered banks.

"4. 'The notes given to the bank by its debtors are mere

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single bills, payable to John Webster sixty days after date, not stating that the debt is to the use of the bank or his agency. Can the interest of the bank, the purposes for which it was given, or the relation between the debtor, (he being a stockholder,) be pleaded to an action brought on that note?"

"*Answer.* All these circumstances may be pleaded. Illegality of consideration may be pleaded *even to a bond* which is fair upon its face. (1 Esp. N. P., 223.)

"5. 'The notes emitted by the Saline Bank are made payable to A, accepted by the cashier, and endorsed by A, or the person to whom they are made payable. If the Saline Bank should become insolvent, or refuse to redeem its notes, will not the person so endorsing its notes become liable for the note so endorsed?'

"*Answer.* I think not; for the whole transaction is illegal, *notoriously* so; because the notes were *notoriously* the notes of an unchartered bank; and every one being presumed to know the law, the person who receives such a note is legally apprized of the guilt and invalidity of the paper, and so takes it *with notice*.

"6. 'Are the stockholders individually liable for the notes issued?'

"*Answer.* I think that they are not liable, either individually or collectively, for the reason so often repeated: that both the notes issued by the bank, and the discount notes given to it, are contracts founded in a breach of the law, and which, therefore, a court will not lend its aid to enforce.

"This is my opinion of the operation of the act of 1805. Do the late acts (those of the 24th February and 15th November, 1816) produce any change in the operation of the pre-existing laws? I think not; for the latter act merely suspends the operation of that of February; the suspension is *expressly limited to that of February*; so that it does not touch, by way either of suspension or repeal, any former law. Between the 15th November, 1816, and the 31st August, 1817, (the period of suspension,) the act of February is a dead letter as to the Saline Bank; but during this period the pre-existing laws remain in full operation, and six days hence the act of February also will be in full operation.

“If it should be said that the act of November is an implied agreement on the part of the legislature that the operations of the bank should go on to the 31st of this month, I answer: 1. That, if the argument be correct, it gives legitimacy to the operations of the bank *only between the 16th November, 1816, and the 31st August, 1817*; for the previous contracts (I mean those previous to the 16th November) being illegal by virtue of the laws *then in force*, could not be rendered legal even by the *subsequent actual repeal of all the former laws*. (1 Comyn on Contracts, pp. 38, 39, on the authority of 1 H. Blackstone’s Reports, p. 65.)

“7. You ask the best and most speedy mode of divesting John Webster of his agency over the affairs of the bank.

“*Answer.* Before this answer reaches you, neither John Webster nor the stockholders can have any further legal agency with the affairs of the bank, for, six days hence, the act of February, 1816, will resume its operation; and any act performed by any member, officer, or agent of the association, after the 31st instant, will be a misdemeanor punishable by fine, and produce a forfeiture of the bank capital.

“Blended with this inquiry as to Mr. Webster, I perceive there is another question by you.

“8. ‘No dividends have been declared for the last twelve or eighteen months; yet the business is thought to be productive. Where a judgment has been obtained by the bank against a stockholder, for a debt due by such stockholder, can he not enjoin such judgment until an account is rendered, and apply the amount of his dividends and stock, or both, as credits to the extinguishment of the said debt?’

“*Answer.* If the principle which reigns throughout this opinion be correct, the case put can never occur; because no judgment can ever be obtained against a stockholder, the contract on which he is sued being founded in a breach of the law. If there has been such a judgment, and the true nature of this case appears upon the record, I think the judgment may be reversed by appeal; if not, I think the injunction will be until the whole affairs of the bank are wound up.

“9. ‘How are the affairs of the bank to be concluded?’—

that is, as I understand you, on what principles are they to be settled?

Answer. We have seen, that after the 31st day of this month the operations of the bank cannot be continued without misdemeanor and forfeiture: there will then remain for adjustment its floating paper, the notes due to it, and the capital of the bank. I will consider them separately:

“1. As to the floating paper, it will fall dead in the hands which may chance to hold it on the 31st of August, without the legal right either to circulate or to recover it. An exception may, perhaps, be made in favor of the notes emitted since the 16th November last, under countenance of the law of that date.

“2. The notes due to the bank will share the same fate, perhaps with the same exception.

“3. As to the banking capital, I believe, on the authority of the cases cited on the first page, that it could not before the court of King's Bench be recovered out of the hands of John Webster; but, from the side-wind authority given to this bank by the act of November last, and from the interference of the chancellor with the directorship of the bank, I presume that a court of equity would interfere so far as to distribute the capital among the subscribers; but, in taking the account, it surely could not, without the most palpable violation of the principle last above cited from Comyn and H. Blackstone, look to any engagements anterior to the 16th November last: if it should, the controversy would become a scramble beyond the pale of the law, as to the issue of which any other man is just as well qualified to guess as a lawyer. A debtor to the bank, for example, whose own *illegal* note was about to be enforced against him, would probably (in violation of the acts of 1805 and February, 1816) collect as much of the dead and illegal paper of the bank as he could, and claim the right of setting it off against his own *illegal* note; and certainly one would be just as legal as the other. There is only one hypothesis on which it is possible to conceive that this course can be tolerated; and that is, by considering the act of the 16th November, 1816, as operating retrospectively, and giving an implied sanction to *all the past transactions of the bank*. I do not believe

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that the legislature intended this; it was an awkward plaster, awkwardly applied to a desperate case, without taking time to weigh very nicely the legal consequences of the act. I have already assigned my reasons for the opinion that this retrospective effect cannot be given to the act of November; but if it can, then all the answers which I have given to your inquiries are wrong: the bank becomes a legal bank from its first inception, and all its acts perfectly legitimate and obligatory down to the 31st of this month; at which time it must stop, and wind up its affairs, like any other bank at the expiration of its charter. It is even possible that our courts, in their lenity, and to avoid the very serious and extensive inconveniences of my opinion, (however correct it may be in point of law,) may be disposed to give this retroactive operation to the act of last November. Indeed, there are but two courses which can clear the case of inextricable confusion: either to regard the bank as an illegal association, and all its acts void; or as a legal association, and all its acts valid. The former, however unpalatable it may be, is my opinion; and that, for the reasons which have been already so fully assigned.

“ WM. WIRT.

“ To EDWARD S. DUNCAN, Esq.,
Clarksburg, Virginia.”

WATER-LOTS ON THE POTOMAC.

So long as the law of Maryland, and the order of the commissioners under it, remain unrepealed and unmodified, the wharves proposed to be built by the owners of water-lots on the Potomac and Eastern Branch must follow the direction of the present streets of the city, and cannot be projected at right-angles from Water street to the channel.

The order of the commissioners, allowing the proprietors to erect buildings beyond the line of Water street, is invalid; they having no power to make such an order.

ATTORNEY GENERAL'S OFFICE, *July 8, 1818.*

SIR: I have examined the two questions propounded by the Commissioner of Public Buildings, which you submitted to me, and have now the honor to furnish the answers.

These questions are—1st. Whether the wharves proposed to

Water-Lots on the Potomac.

be built by the owners of water-lots on the Potomac and Eastern Branch shall follow the direction of the present streets of the city, or start at right-angles from Water street; and, 2d. Whether the proprietors of those water-lots have a right to erect *buildings* beyond the line of Water street.

1. According to the documents submitted for my information, there was nothing in the terms of their purchases which authorized the owners of those lots to build wharves at all. They bought "with a water privilege" merely, which privilege was not defined. And if there was no general law then in force, which authorized the purchasers of water-lots to build wharves, the mere purchase of a *water privilege* does not necessarily include the right of wharving. It gives the free use and enjoyment of the water, as it lies on its natural bed; but it gives no right to vary that bed, by the erection of wharves, or any other obstruction whatever.

The only legislative act on this subject which has been brought to my notice, is the act of cession from the State of Maryland to the United States, which passed on the 19th December, 1791. By the 12th section of which, it is provided "that the commissioners for the time being, or any two of them, shall, from time to time, until Congress shall exercise the jurisdiction and government within the said territory, have power to license the building of wharves in the waters of the Potomac and the Eastern Branch, adjoining the said city, of the materials, in the manner, and of the extent they may judge durable, convenient, and agreeing with general order; but no license shall be granted to one to build a wharf before the land of another, nor shall any wharf be built in the waters without license as aforesaid." Since Congress assumed jurisdiction and government within the territory so ceded, this act has been repeatedly recognised, and the powers conferred by it on the commissioners several times transferred to others. Thus, on the 1st of May, 1802, an act was passed "to abolish the board of commissioners in the city of Washington, and for other purposes;" by the 2d section of which act, it was provided that the affairs of the city, which had theretofore been under the care and superintendence of the said commissioners, should thereafter be under the direction of a superintendent, to be ap-

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pointed by, and to be under the control of, the President. And the superintendent was thereby expressly vested with all the powers with which the said commissioners had been vested by any act of Congress, or any act of the General Assembly of Maryland. Again: by an act of Congress of April 29, 1816, entitled "An act making an appropriation for enclosing and improving the public square near the Capitol, and to abolish," &c., &c., the office of superintendent was abolished, and all his powers devolved on a single commissioner, to be appointed by the President, by and with the consent of the Senate.

Thus the commissioner in office under the last mentioned act is now vested with all the powers which belonged to the superintendent, and, before him, to the three commissioners at first in office.

What these powers are in relation to wharves, we have seen from the quotation before made from the law of Maryland. Before the abolition of the three commissioners, (to wit, on the 20th July, 1795,) they issued a general order, purporting to be founded on that law, by which a general permission was given to the proprietors of water-lots to wharf *and build* as far out into the river Potomac and the Eastern Branch as they think convenient and proper, not injuring or interrupting the channels or navigation of the said waters; leaving a space, wherever the general plan or the streets in the city require it, of equal breadth with those streets, which, (streets,) if made by an individual holding the adjacent property, shall be subject to his separate occupation and use until the public shall reimburse the expense of making such street; and where no street or streets intersect said wharf, to leave a space of sixty feet for a street at the termination of every three hundred feet of made ground. The buildings on said wharves, or made ground, to be subject to the general regulations for buildings in the city of Washington, as declared by the President. Wharves to be built of such materials as the proprietors may elect.

I doubt the regularity of this order, on the ground of its being a general one. The law of Maryland clearly contemplated specific and single licenses to each individual *separately*, as applications might be made. In support of which construction it will be observed, that, in the same section of the law, the lan-

guage is changed to "regulation" wherever a *general order* is contemplated;—for example, in relation to the discharge of ballast, the landing of cargoes, &c. The policy of the law in relation to wharves was probably to enable the commissioners to avoid, in subsequent licenses, any inconvenience which might have been observed to arise from former ones, and thus to profit by their own experience as they went along. But admitting that the advantage of a general system in the construction of wharves is an object of paramount importance, and that the general order or license which has been quoted was a correct exercise of power on the part of the commissioners, the order itself (which has never been revoked or altered, so far as I can learn, and which, therefore, gives the law in this case) answers both questions; for, first, the order clearly contemplates the continuance of the present streets in their present direction over the made ground of the wharves—an effect which cannot be produced in any other way than by following the present direction of the streets in giving form to the wharves. In looking at the plan of the city, or at the diagram accompanying the commissioners' statement, it will be seen that a wharf, standing at right angles from Water street to the channel of the river, will inevitably cross the present direction of the streets, and therefore violate that provision in the order of the commissioners which requires the builders of the wharves "to leave spaces, *wherever the general plan of the streets in the city requires it*, of equal breadth of those streets;" language which I can understand in no other way than as contemplating the projection of the present streets in the same direction, and of the same width, over the artificial ground constituting the wharves.

Again: the law of Maryland itself, from which the commissioners derived their power, imposed one specific restriction on its exercise; which was, that no license should be granted to one to build a wharf before the lands of another. But, in casting the eye on the commissioners' diagram, it will be seen that a wharf, projected at right-angles from Water street to the channel, will not only cross the course of the streets, but pass over so as to lie "before the lands of another," in direct violation of the act.

My answer to the first question, therefore, is: that, so long as the law of Maryland, and the order of the commissioners under

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it, remain unrepealed and unmodified, the wharves must follow the present direction of the streets, and cannot be projected at right-angles from Water street to the channel.

2. The second question is answered with equal explicitness by the order of the commissioners just referred to; for the permission is "to wharf *and build*" to the channel; and it is further directed, thereby, that "*the buildings* on such wharves or made ground shall be subject to the general regulations for buildings in the city of Washington, as declared by the President." As these must, of necessity, be all beyond the line of Water street, the buildings on them must be so of course; and, therefore, the proprietors of water-lots have a right to erect buildings beyond the line of Water street, if *the commissioners had any authority to give them such right*.

There lies an objection to this part of the order, which, from any legislative acts or documents submitted to me, is perfectly insuperable. It is this: that the commissioners had no power to make the order. Their whole authority over this subject is derived from the law of Maryland; and by that law they are restricted to the *licensing of wharves*; but no authority is superadded to license *buildings on those wharves*. I am, therefore, of opinion, as at present advised, that this part of the order exceeded their authority, and is therefore void.

The whole subject of *licensing wharves*, I take it, is now under the control of the commissioner, who, in the exercise of this power, is himself under the control of the President; and the authority to build on those wharves is under the sole control of the President; the orders of both being subject to repeal or modification, at their pleasure, so as to produce no retrospective effect.

The owners of water-lots have no right to complain of this decision as to buildings; because it appears, by the report of the surveyor, (Mr. King,) that the plans of the city exhibited at the time of the sales of those lots all presented a Water street as the boundary of the building-lots, and that on one or more of them *wharves* only were exhibited beyond the line of Water street; indicating that the privilege of wharves only was promised beyond that line.

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

Death-Warrants.

DEATH-WARRANTS.

The President will issue death-warrants in order to give effect to the laws in cases where they are necessary by the practice of the State in which the sentence is passed.

ATTORNEY GENERAL'S OFFICE,
August 19, 1818.

SIR: I have received a letter from Judge Duval, touching the mail-robbers sentenced to death at the spring circuit court at Baltimore. He says he has heard that the President neither intends to pardon them, nor to issue a warrant for their execution; and that this last determination is founded on the opinion that it was the duty of the court which passed the sentence to fix the day for the execution. But he says there is no law which gives the court such authority; and that the practice of the State of Maryland has been uniformly, and from time immemorial, otherwise. I believe he is right in saying that there is no law—that is, no positive act of Congress—which gives to the courts of the United States the express power of fixing the day. I find, on inquiry, that the courts of the United States have adopted, in this particular, the practice of the State courts in which they hold their sessions, and these are various: death-warrants from the governor being required in several of the States; and in others the courts fixing the day. It is certainly desirable that there should be a uniform rule to guide the conduct of the President in this respect. Such a rule, however, can be prescribed by Congress only; and there being none such yet prescribed, it seems to me that the President must, of necessity, to give effect to our laws, follow that which the courts have adopted: that is, issue warrants for execution in all cases where they are made necessary by the practice of the State in which the sentence is passed. Such is the case in the present instance, and the case has become one of great emergency; for the convicts, finding that they are not to be pardoned, have become desperate, and have once actually broken the prison and made their escape: but they have been retaken. They will, however, unquestionably attempt it again, and probably with more success, unless they should be guarded at an enormous expense to the United States. I submit to

The Power to Cause an Arrest.

you, therefore, sir, the necessity of drawing the President's immediate attention to this subject;

And have the honor to be, &c.,

WM. WIRT.

To the SECRETARY OF STATE.

THE POWER TO CAUSE AN ARREST.

Arrest for trial is a proceeding belonging to the judiciary, not to the executive branch of the government; and the warrant of arrest must be founded on an information on oath.

The President has no power to cause an arrest to be made except upon probable cause supported by oath or affirmation. (Vide article VI of Amendments to the Constitution.)

The President may issue his proclamation against an offender who has once been regularly arrested and made his escape; for, in such case, the regularity of the arrest implies that the probable cause has been furnished on oath according to the constitution.

ATTORNEY GENERAL'S OFFICE,

September 8, 1818.

SIR: Mr. Calhoun has called on me, at the desire of the Secretary of State, (now absent,) for the purpose of inquiring whether I would advise a proclamation against Obed Wright, of Georgia, or private instructions to the marshals of the several districts and Territories, for the apprehension of the fugitive. On inquiry at the Department of State, no precedent is to be found for either course, as you will find from Mr. Brent's answer to some questions put by me, which I enclose. The case to which he alludes by memory is that, he says, of Bradford, who was implicated in the Pennsylvania insurrection. But we know not what degree of evidence General Washington might have had against Bradford to warrant his proclamation; or whether he relied upon the openness and notoriety of the fact of the insurrection, which was very little, if anything, short of *bellum flagrans*. The result of the inquiry is, that there is no certain precedent to guide us as to either course; and I have very strong doubts (in which Mr. Calhoun concurs) whether either of the courses proposed is warranted by the constitution. Arrest for trial is a proceeding which belongs to the judicial, not to the executive branch of the government; and the war-

The Power to Cause an Arrest.

rant of arrest is always preceded by evidence—*ex parte* to be sure, but still evidence—to wit: information on oath. Can the President of the United States order an arrest either by proclamation or by instructions to marshals? Would not such proclamation or instructions be, in effect, a warrant to arrest? It is very clear to me that they would; and that either of them would be a violation of the sixth article of the amendments of the constitution of the United States, which provides that “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 warrant 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. It was one of the strong grounds of objection to the celebrated alien law, that it gave the President power to arrest; “a power,” says Judge Tucker, “which it was presumed did not exist either in the executive of the State or of the federal government.” (4th Tucker’s Black., 290.)

Would not a better course be, to have an indictment submitted to the next grand jury for the circuit court of Georgia; and, if found by them, to cause authenticated copies of it to be furnished to the several marshals and collectors of the United States, with instructions, if Wright should make his appearance anywhere within the United States, to cause him to be arrested according to law, with special reference, if necessary, to the sixth amendment to the constitution of the United States and the thirty-third section of the judiciary act, which points out the mode of arrest?

There is nothing in this suggestion which denies to the President the power of issuing his proclamation against an offender who has once been regularly arrested and has made his escape; for the regularity of the arrest implies that the probable cause has been furnished on oath or affirmation according to the amendment of the constitution, and that the warrant of arrest has been duly issued and has had its effect.

I shall await your instructions on this subject; and have the honor to be, &c.,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

Neutrality.

EXECUTIVE POWER TO DISCHARGE PUBLIC DEBTORS.

The President has no power to discharge public debtors imprisoned on *mesne* process, but only debtors imprisoned on execution; at the same time requiring the judgment to remain good, to be satisfied out of any estate then, or afterwards, belonging to the debtor.

OFFICE OF THE ATTORNEY GENERAL,

September 8, 1818.

SIR: I have examined the case of John Gates, jr., represented by his brother, Mr. Gerritt Gates, whose letter I return. It is unnecessary to say anything of the merits of the case, because I am satisfied that you have not the power to discharge the prisoner, admitting the case, upon its merits, to be a proper one for the exercise of such a power. The act of Congress which gives the President his only power to discharge public debtors, is the act of the 3d March, 1817, entitled "An act supplementary to 'An act for the relief of persons imprisoned for debts due the United States.' " This act expressly limits the power of the President to cases in which the person is imprisoned upon execution, and requires that *the judgment* which shall have been obtained shall remain good and sufficient in law, and may be satisfied out of any estate which may then, or at any time afterwards, belong to the debtor. Lest you should not have the act with you, I enclose a copy of it; by which you will see that it is not applicable to the case of John Gates, against whom there has been yet *no judgment*, and who is imprisoned, not *upon execution*, but upon *mesne process*.

[WM. WIRT.]

To the PRESIDENT OF THE UNITED STATES.

NEUTRALITY.

A vessel fitted out at Savannah with armament, munitions, and sea stores, and afterwards found with a commission from the republic of Venezuela to cruise against the subjects of the King of Spain, and having sailed on such a cruise, but under another name, seized at Savannah on the charge of having been

Neutrality.

fitted out in a port of the United States to cruise against the King of Spain, is a fit case for adjudication, and not one calling for the interference of the government.

OFFICE OF THE ATTORNEY GENERAL,

September 10, 1818.

SIR : The case of the *Corony*, Captain Saunders, seized at Savannah on a charge of having been fitted out in a port of the United States to cruise against the King of Spain, with whom we are at peace, has been submitted by the Secretary of State for my opinion; and, in his absence, I take the liberty of communicating the opinion directly to you.

Captain Saunders applies for an order to discharge his vessel from further prosecution, on the ground that she is a legitimate armed vessel, lawfully sailing under the flag of the republic of Venezuela, and regularly commissioned by Admiral Brion. Although both the statements and the documents furnished by Captain Saunders are entirely *ex parte*, yet, from his own showing, I consider it a fair case for adjudication; for, in his letter to the Secretary of State, he admits that the *Corony* is the same vessel which, on the 1st day of April last, cleared out from the custom-house at Savannah, with the munitions of war then on board with which she was apprehended; and by reference to the manifest which he encloses in his letter, (in support, it is presumed, of this assertion,) it will be found that she *then* cleared out under the name of the *Felix*, having on board three cases of muskets, two four-pounder cannon with carriages, sixteen kegs of powder, and no other cargo, except sea-stores. And he admits that, thus armed, she took a commission to cruise against the subjects of the King of Spain, and did sail upon such cruise. At this time the act "to prevent citizens of the United States from privateering against nations in amity with, or against the citizens of, the United States," and the act passed the 3d March, 1817, "more effectually to preserve the neutral relations of the United States," were both in force, the provisions of which are familiar to you; and I therefore think it unnecessary to say more than that, in my opinion, the case of the *Corony* is a fit case for adjudication, and by no means one which calls for the extraordinary interference of the government.

New Trials before Courts-Martial.

To enable you the more readily to test the accuracy of this opinion by the facts communicated by Captain Saunders, I enclose his letter to the Secretary of State, with the documents which that letter covered.

[WM. WIRT.]

To the PRESIDENT OF THE UNITED STATES.

NEW TRIALS BEFORE COURTS-MARTIAL.

The President of the United States has the power to order a new trial before a court-martial where, in his opinion, the court erred on the first trial in excluding proper testimony.

The provision in the Articles of War that "no officer, &c., shall be tried a second time for the same offence," is borrowed from the common law, and is not held, in either civil or military tribunals, to preclude the accused from having a second trial on his own motion.

The plea of *autrefois acquit*, or *convict*, is the *privilege* of the accused, which he may use or waive at pleasure; if he does not choose to use it, courts will not take notice of it so as to bar a trial.

It is error for a court-martial to refuse a second trial to the accused when the same has been ordered by the President.

OFFICE OF THE ATTORNEY GENERAL,

September 14, 1818.

SIR: The Secretary of War has submitted to me, by your desire, the proceedings of a court-martial, held at Plattsburg, in the State of New York, on the 5th day of June last, in the case of Captain Nathaniel N. Hall, of the corps of artillery; in which case the court, under the opinion of the judge advocate, refused to arraign Captain Hall, on the ground that he had been previously tried by a court-martial on the same charge, and that a new trial was forbidden by the 87th article of war. The general order prefixed to this report shows that the sentence of the first court, which cashiered this officer, was disapproved by the President; and it appears by the proceedings that the new trial ordered, by a court composed of different members, was an act of mercy to the party accused, in consonance with his wishes, and at his own desire. The grounds on which the new trial was ordered are also distinctly stated in the general order prefixed to the proceedings which have been handed to me. They were—1st, that the first court erred

New Trials before Courts-Martial.

in refusing to admit testimony to prove the general character of Captain Hall; and, 2dly, in refusing to admit evidence to prove that a quarrel had taken place between the prisoner and the principal witness against him, on the night on which the offence is charged to have been committed. The question presented for my opinion is, whether a President of the United States has the right, under these circumstances, to order a new trial?

It is a clear principle that the President has no powers except those which he derives from the constitution and laws of the United States; if the power in question, therefore, cannot be fairly deduced from these sources, it does not exist at all.

By the constitution, the President is made commander-in-chief of the army and navy of the United States. But, in a government limited like ours, it would not be safe to draw from this provision inferential powers, by a forced analogy to other governments differently constituted. Let us draw from it, therefore, no other inference than that, under the constitution, the President is the national and proper depository of the final appellate power, in all judicial matters touching the police of the army; but let us not claim this power for him, unless it has been communicated to him by some specific grant from Congress, the fountain of all law under the constitution. By the 14th section of the act of the 16th March, 1802, fixing the military peace establishment of the United States, it is provided that "the officers, non-commissioned officers, musicians, and privates of the said corps shall be governed by the rules and articles of war which have been established by the United States in Congress assembled, or by such rules and articles as may be hereafter established: provided, nevertheless, that the sentence of general courts-martial, extending to the loss of life, *the dismissal of a commissioned officer*, or which shall respect a general officer, shall, with the whole proceedings of such cases, respectively, be laid before the President of the United States, who is hereby authorized to direct the same to be carried into execution, *or otherwise, as he shall judge proper.*" The court, in this case, *was a general court-martial*; and its sentence one which extended *to the dismissal of a commissioned officer*: it could not, therefore, according to this law, be carried into

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effect until the sentence, with the whole proceedings which led to it, should be laid before the President; who was authorized by the law either to direct it to be carried into execution, *or otherwise, as he should judge proper.* To show the value of this appellate power, according to the spirit of this nation from the period of its earliest struggles for liberty, it is not unworthy of remark, that, by the 18th section of the rules and articles of war, established by the continental Congress, it was provided "that the continental general commanding in either of the American States for the time being shall have full power of appointing general courts-martial to be held, and of pardoning and mitigating any of the punishments ordered to be inflicted for any of the offences mentioned in the aforementioned rules and articles for the better government of the troops, except the punishment of offenders under the sentence of death by a general court-martial, which he may order to be suspended until the pleasure of Congress can be known; which suspension, with the proceedings of the court-martial, he shall immediately transmit to Congress for their determination. (1 Graydon's Digest, app. 156-'7.) On the 27th May, 1777, the whole appellate power was given to the general or commander-in-chief, *id. ib.*, confirmed by an order of 18th June, 1777. Some years after the close of the revolutionary war, (to wit, on the 31st May, 1786,) it was resolved by Congress, among other things, that "no sentence of a general court-martial, in time of peace, extending to the loss of life, the dismissal of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, shall be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before Congress for their confirmation or disapproval, *and their orders in the same.*" (1 Graydon, app. 158-'9.) The question may as well be asked here as elsewhere, whether the appellate power of the continental Congress, in the resolution last quoted, was limited to the *confirmation or disapproval* of the sentence of the court-martial on which they were called to act? Had *they* not the power, not merely of disapproving that sentence, *but of ordering a new trial*? If they were so limited, why did not the resolution stop at giving them the power *to confirm or disapprove*? Why

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the additional words, after the disapproval, "*and their orders in the same?*" These words obviously mean something: and what they *do* mean, we shall discover by turning our attention for a moment to the prototype from which we have chiefly drawn all our laws, both civil and military, and from which our then recent connexion with Great Britain rendered it most natural that we should draw them.

The mutiny act of England, which annually passed, and which is the sole foundation and rule of courts-martial in that country, establishes a connexion between the *martial* and *civil* courts of the kingdom, and authorizes an appeal from the former to the latter. The 79th section of the mutiny act authorizes an appeal from the sentence of a court-martial to the Courts of King's Bench and Common Pleas in England and Ireland, and the Court of Sessions in Scotland. (Tytler's Essay on Military Law, &c., p. 167-'8: Edinburgh edition, 1800.) The *causes* for which the sentence of a court-martial may be brought under review of a superior judicature, are the same which in the civil courts in England authorize *either the granting of a new trial*, or an arrest of judgment; that is to say, if the sentence or verdict shall have been manifestly *without* or contrary to evidence, &c., &c. But in all such cases, as the presumption is strongly in favor of the judgment, the superior court will not entertain the appeal, *or authorize any review of the proceedings*, unless on the most pregnant or positive grounds for supposing *that the merits have not been fairly discussed, and that the decision is not agreeable to the justice and truth of the case.*" (Tytler, 171-'2.)

It appears, therefore, that in England the power to award a new trial *does* exist, by an appeal from the courts-martial to the *civil courts* of the kingdom. But there is something still more strong in this view of the subject: which is, that this appeal lies to the civil courts of the kingdom; and this power of awarding a new trial exists *after the king shall have approved the sentence of the court-martial*; for, never until then is the sentence complete and *final*, and never, therefore, until *then*, can there be an appeal; since an appeal lies from a *final* sentence only.

It cannot be doubted that our Congress were in full posses-

New Trials before Courts-Martial.

sion, by painful experience, of the mutiny act, and of the whole laws of the British army, at the period of our Revolution; that they understood thoroughly, not merely the legal limits of the power of a standing army in its operation upon our citizens, but the laws which controlled the internal government of the army itself. To say nothing of the painful lessons of experience, which would drive them to consider and to understand the provisions of the mutiny act, those distinguished men were organizing a new government—a *new nation*; and were projecting their system of rules on more liberal and bolder principles in favor of the citizen. Can it be believed that, acting in this spirit, and with these enlarged views of human liberty, they would have narrowed the rights and privileges of the American citizen, and surrendered him to a military despotism more severe than that which they were throwing off? And yet this must be supposed, if the peace resolution of the Congress of 1786, above quoted, is to be construed as limited to a cold rejection of the sentence of a court-martial, without the milder and more conciliating remedy of a new trial, which they knew to exist under the British law; because the rejection would still leave the party under an ignominy of the sentence of his brother officer, without a hope of wiping out the reproach, and reduce the power of Congress to a power (most humiliating to the prisoner) of pardoning a condemned culprit. Looking on the subject in this light, I cannot doubt that, by the words of the resolution of 1786, above quoted, “for their confirmation or disapproval, *and their orders in the same*,” it was the intention of Congress to lodge in that body all the conciliating powers, over sentences of courts-martial, which they must have known to exist in the different branches of the government of England. For if Congress did not intend by this resolution to reserve to themselves this power, among others, of awarding a new trial, no other tribunal of this country could then have possessed it. We had then no national courts, corresponding with the King’s Bench, &c., to whom the power of awarding new trials is given in England; much less any connexion established by law between such courts and the courts-martial of the country. If Congress, therefore, did not mean by this resolution to re-

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serve this power, it did not exist at all; and the armies of our republic were under a despotism infinitely more severe than that from which they fought to extricate themselves. Can this be supposed of such a body as that of the continental Congress, who, seeing the whole ground, and well aware of the existing provisions of the martial code of Great Britain, have used terms broad enough to cover the benignant power in question? Congress were forced by the emergency of the crisis to assume, in some instances, legislative, executive, and judicial power; or, in other words, *to take care of the republic*—in relation to the army particularly. Having no national court, they were forced to divide the government of *that* between the republican generals and themselves; and, in relation to an army composed of their fellow-citizens struggling for the common liberty, and alive, in every nerve, to all that concerned their honor, it cannot be doubted that every power, whose exercise was essential to that honor, was intended to be preserved by the broad expressions which have been quoted. That they could have done all, therefore, which the court of King's Bench, &c., could have done for the relief of the injured honor of the army, I have no doubt.

The power which Congress possessed before the formation of the present government was, obviously, intended to be transferred to the President after its formation. This will be evident by comparing the congressional resolution of 1786 with the language of the act of Congress first quoted. By the resolution of Congress, the sentence is to be laid before Congress "for their confirmation or disapproval, and their orders on the case;" by the act of Congress of the 16th March, 1802, it is to be laid before the President, "who is authorized to direct the same to be carried into effect, *or otherwise, as he shall judge proper.*" If these words, "*or otherwise, as he shall judge proper,*" shall be insisted on as nothing more than a power of disapproving the sentence, it might well be answered that it is a very encumbered mode of expressing a very simple idea: that with reference even to itself, and much more with reference to the pre-existing state of the law, it carries a bolder meaning; and that when considered, still more especially, in connexion with the reference made in this act of 1802 to the

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articles of war formerly adopted by Congress, (of which the resolution of 1786, before cited, is one,) the clear design was to carry to the President all the powers of the continental Congress over the cases specified. But if this could for a moment be doubted under the act of 1802, what shall we say to the act of 10th April, 1806, entitled "An act for establishing rules and articles for the government of the armies of the United States?" by the 65th article of which, it is expressly provided (in the very words of the congressional resolution of 1786, *mutatis mutandis*) that no sentence of a general court-martial "in time of peace, extending to the loss of life, or the *dismissal of a commissioned officer*, &c., shall be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval, *and orders in the case.*" What is the meaning of these words, "*and orders in the case,*" but the meaning which obviously attaches to the same words in the continental resolution of 1786? What answer can be given, but that the design was to comprehend, under this clause, all the power which had been long known to exist in England, over sentences of courts-martial pronounced in that country? and, among these, (as shown under the English mutiny act by Tytler,) the power of reviewing them and giving a new trial. And where is the injury, in any quarter, by the existence of such a power? The benefit of an appellate tribunal is obvious, while human nature shall remain as imperfect as it is: not so, I think, the final power of the tribunal first convened. On the contrary, the dangers of this latter principle are incalculable; it surrenders the victim, bound hand and foot, to the malice, revenge, and corruption of his enemies.

The argument presented by the judge advocate and the court-martial at Plattsburg, against the new trial, strikes me as being founded rather on the *letter* than on the *spirit* of the 87th article of the rules and articles of war. That article is in the following words: "No person shall be sentenced to suffer death, but by the concurrence of two-thirds of the members of a general court-martial, nor except in the cases herein expressly mentioned; nor shall more than fifty lashes be inflicted on

any offender, at the discretion of a court-martial; and no officer, non-commissioned officer, soldier, or follower of the army, shall be tried a second time for the same offence." It is very apparent that the whole of this article is designed for the benefit of the party accused, not for his prejudice; and yet the constructive operation given to it, in this case, is for his prejudice only, and not for his benefit. There is no principle in law better settled than that a party has the right to waive a rule designed merely for his own benefit. The writers on martial law have labored, very laudably, to reconcile the principles of proceeding in this law with those of the common law of England; and there is not a lawyer who can read this article without seeing in it the common-law rule in criminal trials, from which it has flowed. "The plea of *autres fois acquit*, (says Black., 4th vol., p. 336,) or a former acquittal, is grounded on this universal maxim of the common law of England—that no man is to be brought into jeopardy of his life more than once for the same offence." Again: "the plea of *autres fois convict*, or a former conviction, for the same identical crime, though on judgment was ever given, or perhaps will be, (being suspended by the benefit of clergy or other causes,) is a good plea in bar to an indictment;" (*id. ib.*) You perceive, sir, that this is the very principle and origin of the article of war which has just been quoted. But do these maxims, which form the rule of the common law, (and consequently of the martial law, which is borrowed from it,) bar a new trial, on the motion, and in behalf, of the accused? Blackstone shall answer: "Yet, in many instances, where, contrary to evidence, the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the court of King's Bench, &c. But there hath been, yet, no instance of granting a new trial, where the prisoner was acquitted on the first." (4th Black., 361.) It is almost needless to remark, that the crown, itself, is now, and has been for the last two or three years, contending in England for the right of a new trial against the prisoner, where the verdict in his favor is contrary to evidence. It is enough for our purpose that the prisoner has long had this right, and that the rule which forbids a second trial, devised purely for his benefit, has never been considered as being in-

fringed by granting such new trial *on his motion*; that he has invariably had this new trial, whenever, in the estimation of those constituted to judge, the reason and equity of the case have required it. Now, why should a rule of martial law, borrowed obviously from the common law, and therefore aimed at the same common object in both, produce a different effect in the derivative, from that which it produces in the primitive law? Both the rule and the reason being the same, I cannot comprehend the necessity or propriety of a different result! It will be observed that the rule is altogether *benignant* to the party accused. It does not follow that, *if acquitted*, he can be arraigned anew; it is not (according to Blackstone) that the new trial can be ordered *against him*—it is only *for him*. What just ground of alarm, therefore, can there be to the officers of the army, that a principle, exclusively beneficent in its operation, should exist?—one which *can* operate in their favor; and *never, by any possibility, can* operate against them? Is it not expedient that an appellate tribunal, clothed with the power of awarding a new trial, should exist? Can we hope for such perfection in an original tribunal, composed of human beings, that *final* power should be given to it? And would not the power be almost equivalent to a final one, which should leave to the appellate tribunals no power to order a new trial before a different court; which should leave to the appellate tribunal *the power merely of pardoning a convicted culprit*? Would this save the honor of an officer, condemned by the prejudice of the moment, or by those sinister impulses which have been seen occasionally, in other states, to warp the noblest minds? Is there any mode by which his honor can be rescued from the imputation thrown upon it by an improper sentence of a first court, except that of ordering a second? It may be observed, farther, that under the laws of the United States, the sentence of a court-martial, in case of death or dismissal, is not perfected until it shall have received the approbation of the President. Without his sanction, it is no more a perfect sentence than a bill which has passed both houses of the national legislature, but which has not yet received the approbation of the President, is an act of Congress. In both cases, his approbation is necessary to consummate the meas-

New Trials before Courts-Martial.

ure; and in the case of the martial sentence, his disapproval *annihilates it*; the case stands as if there had been no trial, and is just as open to an order for a court-martial as it was in the first instance.

Again: Does the crown in England, or do the King's courts, take notice *ex officio* of a previous trial? Do they ever *force upon the prisoner* the plea of *autres foits acquit*, or *convict*? I apprehend not. The plea is *his privilege*, which he may either use or waive, at his pleasure; and if he does not use it, however the fact may be, neither the crown nor the court will take notice of it, so as to bar the trial. In the present instance, the prisoner, so far from urging the plea, expressly waived it, and insisted upon the trial. The previous trial, therefore, was not in issue before the court. It could have been put in issue only by a plea from the prisoner. The judgment of the court could in no other way be judicially directed to it. Their decision, therefore, was upon a point not before them. It was utterly extrajudicial, and, for this reason among others, erroneous.

Would it not be extraordinary that our laws should have provided so sedulously appellate tribunals, clothed with the power of awarding new trials *in questions of mere property*, and that there should exist no such tribunal—no such power—in the more important cases of *life, liberty, and honor*? That if a court, in a case where the whole question relates to a few dollars, improperly exclude evidence which ought to have been admitted on the trial, a superior tribunal should have the power, *for this reason alone*, to award a new trial, and to direct that the evidence should be let in; while in a case involving that which is infinitely dearer to a soldier than all the possessions on earth, a similar mistake in judgment is irrevocable, irreversible, and is to fix upon his reputation a stigma for life;—that this *ought not* to be the state of things must, I think, be very evident; and that it *is not*, is to my judgment sufficiently clear from the considerations which have been already urged.

Upon the whole, I am of the opinion that the President of the United States is vested by the laws with the power of ordering a new trial for the benefit of the prisoner; that the

power, so far from being dangerous to the army, is a salutary power; that it is indispensably necessary to the well-being of the army; and that the only danger which can be rationally conceived in the case would arise, not from the existence, but from the non-existence of such a power.

One other topic of inquiry only remains: If the President possesses the power in question, has it been properly exercised in the present instance?

We have seen, by the authority of Tytler, (page 171,) that, in England, (where, by their mutiny act, an appeal is given from the sentence of the court-martial to the supreme civil courts of the kingdom,) these courts, in reviewing the sentence appealed from, are governed by the same considerations in reversing that sentence and ordering a new trial, which govern them in appeals from the inferior civil courts. He instances, among other causes, "where the sentence shall have been manifestly without or contrary to evidence;" and we know that nothing is more familiar in practice in civil appeals, than reversing the judgment of the inferior courts on the ground that evidence was improperly excluded.

This is precisely the ground taken by the President in the case before us. The evidence which he decides to have been improperly excluded on the first trial is—1st, evidence of the general character of Captain Hall; and, 2dly, evidence of an existing quarrel between the prisoner and the principal witness against him.

1. In the first position the President is clearly supported by authority. McArthur on Naval and Military Courts-martial, (2d vol., pages 90, 91,) expressly declares that the prisoner has the right to examine the character, not only in capital cases, but in all cases of misdemeanor; and he supports himself by the authority of McNally and of Lord Kenyon, both as to the admissibility and the force of such evidence in criminal trials. Major Macomb, in his compilation from Tytler, advances the same principle.

2. As little doubt can there be that the court erred in refusing to admit proof of an existing quarrel between the principal witness and the prisoner. The existence of a hostile spirit on the part of the witness towards the accused is certainly not an

Surrender of a Midshipman to a State Authority.

objection which goes to his competency, but it does as unquestionably affect his credit; for while human nature remains what it is, such a spirit will almost unavoidably dispose a witness to give a coloring to his statements, for which a proper allowance ought always to be made by those who are to adjudge a case upon his evidence; and this more especially in a doubtful case.

I am therefore of the opinion, not only that the power which has been exercised by the President exists, but that it has been rightfully exercised in the present instance.

I have the honor to be, &c.,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

SURRENDER OF A MIDSHIPMAN TO A STATE AUTHORITY.

Although there is no act of Congress authorizing a call by a governor for the surrender of a midshipman charged with having broken the peace of a State, nor any law authorizing an arrest by the Executive with a view to a forcible surrender of him for the purposes of trial, it is important that the accused should surrender himself, and that an order from the Navy Department be given.

OFFICE OF THE ATTORNEY GENERAL,

October 20, 1818.

SIR: I have considered the case of Midshipman Childs; the papers relative to which were handed me a few days back by Mr. Homans, of the Navy Department, by your desire.

I have not been able to find any act of Congress which authorizes the call now made by the governor of Georgia for the surrender of Mr. Childs for the purpose of taking his trial in Georgia for an alleged breach of the peace of that State; nor any law which authorizes an arrest of the person of Mr. Childs by order of the Navy Department, or of the President, with a view to the forcible surrender of him to the State authorities for the purpose aforesaid. Nevertheless, the respect due to the civil authorities and laws of the States, and the great importance of inculcating on the officers of the navy the principle that the public service in which they are engaged gives them no authority to violate the civil laws of the States, and will afford them no protection against the consequences of such vio-

Case of the Peacock—Liability of the United States.

lation, make it desirable that Mr. Childs should *surrender himself* to the State authority of Georgia for the purpose of taking his trial; to which end I would advise that an order from the Navy Department be given him. If he should judge it important to his defence *against the alleged breach of the peace*, that any persons belonging to the ship should accompany him as witnesses, it would be but an act of justice to him that they also should be ordered on.

But before an order should be issued either to him or them, the convenience of the public service requires that we should know at what time his trial will come on. An indictment for a breach of the peace may be found against him in his absence. If this has been done, (as we may presume it has,) the governor of Georgia will be able to inform the Navy Department at what time Mr. Childs must go on to meet his trial; and the order should direct the attendance of himself, and any of the ship's crew whom he may allege to be material witnesses in his defence, in full time not only to meet the trial, but, if he thinks it necessary, in time also to summon any witnesses in Georgia whom he may deem necessary.

The papers handed me by Mr. Homans are herewith returned.

[WM. WIRT.]

To the PRESIDENT OF THE UNITED STATES.

CASE OF THE PEACOCK—LIABILITY OF THE UNITED STATES.

Where the Quartermaster General had entered into an agreement with an individual to pay him \$8,000 for a vessel upon condition that the latter should deliver her in good order at the mouth of the Apalachicola by a specified time, and the latter agreed to do so, "dangers of the sea, or being prevented by an enemy, excepted," yet failed to deliver her in time; but under a division order from General Jackson, directing the Quartermaster General to purchase the vessel "if to be had at cost here," he took possession of her without any consultation with the owner or agent, and sent her up the river with supplies for the army—*decided*, that, by virtue of the conversion, the United States ought to pay for her, not the stipulated price, but *quantum valebat*.

OFFICE OF THE ATTORNEY GENERAL,

October 20, 1818.

SIR: I have, in conformity with your request, considered the claim of Mr. John Rogers for the stipulated price of the barge

Case of the Peacock—Liability of the United States.

Peacock, under articles of agreement between that gentleman and Colonel Gibson, Quartermaster General of the army, under the command of General Jackson.

The first question is: Whether, by these articles, the sale of the Peacock for \$8,000 was an absolute sale at New Orleans, on the day of the date of the articles, (to wit, the 14th February, 1818,) with a covenant annexed, on the part of Mr. Rogers, that he would deliver the barge, complete and in good order, at the mouth of the Apalachicola, on or before the 28th day of the same month, "the dangers of the sea, or being prevented by an enemy, excepted?" Because, if this be the nature of the contract, I should consider it as resting on the principle so often decided in regard to bills of lading. The master of a ship stipulates, by his bill of lading, to deliver a quantity of goods at a given port, "in like good order and condition" as he received them, "the perils of the sea excepted." It has been repeatedly decided, that, if the goods be delivered not in like good order and condition, but *damaged by the perils of the sea*, without any default on the part of the master, the master is not liable to an action for damages on this stipulation, because the damage was done *by the perils of the sea*, as to which the shipper, by the terms of the stipulation, undertook to become the insurer, and had expressly absolved the master from any kind of responsibility for a damage proceeding from that cause. In such a case, therefore, although the owner is liable for the stipulated freight, he has no offset or claim on the master for the damage done to the goods.

So here, if the undertaking on the part of Mr. Rogers to deliver the barge at the time and place appointed was an undertaking separate from the contract of sale, (the sale being absolute at New Orleans on the date of the agreement,) I should consider the failure to deliver the barge as not affecting the sale in any manner whatever; nor as subjecting Mr. Rogers to any claim of damages for the failure to deliver; because I understand it to be admitted that this failure proceeded from the dangers of the seas, which form an express exception to the stipulation of delivery at the appointed time and place. On this hypothesis, therefore, I should consider Mr. Rogers as entitled to the \$8,000, without any liability for such failure to deliver.

Case of the Peacock—Liability of the United States.

If, on the contrary, the sale was not an absolute sale at New Orleans, on the date of the contract, but was a conditional sale, made expressly to depend on the precedent condition of the delivery of the barge at the time and place appointed: then, unless such delivery took place according to the stipulations, the contract was void; and Mr. Rogers can claim nothing under it, by virtue of any subsequent readiness or offer to deliver.

This makes it necessary to examine the articles of agreement themselves, and to ascertain the true character of the contract. The articles begin (without saying anything about a sale) with an engagement on the part of Mr. Rogers to deliver the barge "on or before the 28th February, at the mouth of the Apalachicola river; *the dangers of the sea, or being prevented by an enemy, excepted.*" But for the words *underscored*, Mr. Rogers would have been liable to an action of damages if he had failed to make the delivery, by whatever cause prevented; so that the only effect of the *underscored* words is to exempt him from this action, if the failure proceeded from either of the causes specified and excepted from his undertaking. Then, after another stipulation on the part of Mr. Rogers as to the order and condition in which the vessel should be delivered, her anchors, cables, and other equipments, the articles of agreement proceed to state the only stipulation which exists on the part of the Quartermaster General; that stipulation is in the following words: "The said Colonel George Gibson, Quartermaster General, for and on behalf of the United States, doth stipulate and agree, *on condition of the delivery of the said barge at the time and place*, and in the condition aforesaid, to pay to the said John Rogers, his heirs, &c., the sum of eight thousand dollars." Nothing can be clearer than that the delivery at the time and place is an express condition precedent to the obligation to pay the \$8,000; and that, if the United States were suable, Mr. Rogers could not have maintained an action for the price on the contract, without *averring in his declaration and proving his performance of this precedent condition.*

But there were subsequent proceedings in this case, which present it in a new aspect, and demand a further opinion. Although the United States were not bound, according to the foregoing opinion, to have received the barge, because she was

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not delivered according to the agreement; yet it seems that, on the 6th of May following, General Jackson issued a division order, whereby Col. Gibson was directed to purchase the barge for the United States, *if to be had at cost here*. Col. Gibson states, that, as Mr. Rogers had no authorized agent present, he could not make the purchase as directed; but that, nevertheless, under this order, he took possession of the barge, loaded her, and sent her up the river with supplies for the army. This act was not authorized by *the terms* of the order under which Col. Gibson acted; and is to find its justification, I presume, in the emergency of the case and the pressing necessities of the army. The contract, however, being at an end by the failure on the part of Mr. Rogers to deliver the barge according to his stipulation, the property in the barge was his, and not the property of the United States. Gen. Jackson, in his order, contemplates the property as Mr. Rogers's, and, therefore, as being the subject of a new contract; such new contract, however, could not be made without the assent of both parties. I do not think that the possession thus taken was a waiver of the failure to deliver, and therefore restored the original contract; but it was the seizure of the property of another for public purposes, and this act entitled the owner *to the value of the property thus seized*; not to its first cost, but *to its value*; and not to its value at New Orleans, but its cost and value *to the owner*, and its value to the United States, *at the place* at which it was seized. Its cost and value to the owner was the price which it would have brought at New Orleans, with the expense and hazard superadded of bringing it from New Orleans to the mouth of the Apalachicola; and its value to the United States was the price which they would have had to pay for such a barge so equipped, delivered at the mouth of the Apalachicola. This, I think, would be taken by a jury as the fair criterion of the value in an action between individuals, founded on a *quantum valebat*; and they would directly look to the stipulation between the parties as fixing the measure of the damages. The certificate of Lieut. Col. Trimble, annexed to the contract, proves that *that* contract was made on the best terms on which such a barge could be procured to be sent from New Orleans to Apalachicola; and Col. Gibson,

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the contracting agent of the United States, declares that the price was \$1,000 cheaper than he could have procured such a barge to be delivered at the same point.

I am, therefore, of the opinion, that, if the United States were suable, the verdict of a jury would rightfully be for \$8,000; and such, in my opinion, is the sentence of the law.

WM. WIRT.

To the SECRETARY OF WAR.

THE CASE OF THE FOURTH-OF-JULY PRIVATEER.

Instructions to the district attorney for the United States, at Baltimore, concerning the Fourth-of-July privateer from La Plata, whose separate existence has not been acknowledged by the executive branch of the government, advising indictments against the captain and crew as pirates; also under the act of 1794; and also under the act of 1817.

ATTORNEY GENERAL'S OFFICE,

November 6, 1818.

DEAR SIR: I have been deliberating, as well as I could, on the course of prosecution which should be adopted against the owners, captain, and crew of the Fourth-of-July privateer; and, according to the request contained in your first letter, will now give you my opinion on that course.

First: I would indict the captain and crew as pirates, under the original act of Congress, which defines piracy. The prisoners will defend themselves under the commission of Artigas. I would object to that commission going before the jury as evidence, on the ground that it is not the commission of a sovereign recognised by our government. In the case of the *Romp*, in Richmond, the chief justice decided that a maritime commission, signed by the sovereign authority of the province of La Plata, furnished no justification to the crew of that vessel, because the court could not take notice of La Plata as a sovereignty until recognised by our government, and, consequently, could not take notice of a commission purporting to be issued under the separate authority of that province; that, in the view of the court, La Plata must be considered as a dependence of the Spanish crown, until its separate existence as

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a nation had been acknowledged by the executive branch of the government. In reply to this, they will quote the decision of the Supreme Court in the case of Palmer, (2 Wheaton, 634; 635;) and they will insist upon the correspondence of Mr. Monroe, when Secretary of State, with Don Onís, as well as the President's message at the opening of the last session of Congress, to prove the admission of the government that the South American colonies are to be considered as in a state of civil war. On this limited recognition they will claim for Artigas the rights laid down in Palmer's case *quâ supra*—that is, *all the rights which war authorizes*; and they will insist, under that opinion, "that persons and vessels employed in the service of the self-created government must be permitted to prove the fact of their being actually employed in such service by the same testimony which would be sufficient to prove that such vessel or person was employed in the service of *an acknowledged state*;" that although, under that opinion, "the seal of such unacknowledged government cannot be admitted to prove itself," yet that "it may be proved by such testimony as the nature of the case admits;" and that "the fact that such vessel or person is so employed may be proved without producing the seal." To this there are two answers:

1. That the correspondence with De Onís, and the message, are not pointed at Artigas. They are to be considered in reference to the subject-matter, which alluded to a complaint of the Spanish minister touching the admission of Buenos Ayrean privateers into our ports. The section of country which Artigas holds is claimed by Portugal. This war is with the King of Portugal. The system of colonial government adopted by the two monarchies is alleged to be very different: that of Spain, oppressive to the colonists in an extreme degree; that of Portugal, comparatively liberal. According to the writers on the laws of nations, the course which a neutral holds in such wars is often directed by its sense of the justice of one side of the cause or the other; and, according to this sense, it relaxes at pleasure the rigor of its neutrality—still, however, keeping within the neutral pale. According to those writers, a recognition of the independence of a revolted colony by a neutral is no cause of war to the parent nation, provided the revolted

colony be in actual and exclusive possession of its territory and government. According to these principles, our government might recognise the government of Buenos Ayres, without giving just cause of war to Spain; but if the Banda Orientale, as Portugal contends, is a separate territory, belonging to a distinct sovereign, such recognition of Buenos Ayres would not extend *to that*; because the American government may perceive a justice in the one conflict which it does not in the other.

On the same principle, the recognition of a civil war in Buenos Ayres, a Spanish colony, would not by any means carry along with it, as a consequence, the recognition of a civil war even in a Portuguese colony. You will not understand me as speaking in the name of the government of the United States, as to its seeing any difference in fact between the cases of Peurrydon and Artigas. I have no authority for making any such declaration. I speak only of the inference of fact which may or not be fairly deduced from the correspondence and message in question. Those who rely on them as establishing the admission that a civil war exists between Artigas and Portugal must show that admission on the face of those documents; and cannot, for the reasons I have given, infer argumentatively, by reasoning from the one case to the other. If the prisoners fail in showing that our government had admitted the existence of a civil war between Artigas and Portugal, then the principles laid down in Palmer's case, *quâ supra*, can have no application to the case at bar; and this case will revert to the principles established by the chief justice in the case of the *Romp*.

2. But suppose it to be taken as admitted by the government that a civil war does exist between Artigas and Portugal; does it follow that the citizens of the United States may participate in that war? The Supreme Court have not said that Palmer was not expressly indicted as a citizen of the United States, nor is the vessel charged as being United States property; and the principles laid down by the court are to be taken *secundum rem judicatam*, and not to be extended to another case. If the Banda Orientale is to be considered as part of the province of La Plata, and, consequently, as belonging to Spain, the fourteenth article of our treaty with Spain makes the case

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at bar a case of piracy, (see that article;) and whatever rights of war Artigas may have, on the ground of his being engaged in a civil war, the citizens of the United States cannot mingle in that war, on this hypothesis, without being guilty of piracy. (See what Vattel says, book 3, chapter 2, section 15, as to enlisting troops in a foreign nation.)

As a branch of this opinion, the owners, &c., ought to be indicted as accessories to the piracy, under the ninth and tenth sections of the act of 1790—"An act for the punishment of certain crimes against the United States."

Secondly: I would indict them under the act of 1794—"An act in addition to the act for the punishment of certain crimes against the United States," laying a separate count under every section where the facts will warrant it. The defence here will be, that Artigas is neither a *foreign prince*, nor his province a *state*, according to the decision in *Gelston vs. Hoyt*. But as the previous prosecution for piracy can fail only on the ground that *he is a prince*, and *his government that of a state*, (under the decision in Palmer's case, and by our government's recognition of a civil war,) the prisoners will have taken this ground from under themselves. Artigas and his province *are either a foreign prince and state*, or they are not: *if they are*, the indictment will lie under the act of 1794; *if they are not*, the indictment for piracy will lie under the act of 1790.

There seems to me no possibility of escaping this dilemma but by splitting the hair, and saying they are *so far* a foreign prince and state as to excuse the prisoners from piracy, but yet not so far as to subject them under the act of 1794. In the case of *Gelston* and *Hoyt*, the alleged princes and states were *Petion* and *Christophe*, and *St. Domingo*. Our government had never acknowledged these sovereignties, not even by the recognition of a civil war either between themselves or their parent countries; so that inference can be drawn from that case to this, if the court shall have previously excused the piracy on the ground of our recognition of a civil war. This simple recognition in Palmer's case was considered and decided as placing the belligerents on the same footing, for the purposes of war, as if they had been both regularly recognised

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sovereigns—an effect which would certainly bring the act of 1794 to bear directly on the case.

Thirdly: I would indict them under the act of 1817. As to the facts under this act, you have, I understand, only a single witness; but that there is in expectation a further proof. The grand jury, I presume, would not hesitate to find a bill on the testimony of this single witness; and if you think it unsafe to go into his trial on the evidence of this single witness, the court would, I presume, indulge you in a continuance until the next term.

WM. WIRT.

ELIAS GLENN, Esq.,

District Attorney for the United States, Baltimore.

DUTIES OF ATTORNEY GENERAL—FRAUDS ON THE TREASURY.

It is the duty of the Attorney General to give his advice on questions of law only when required by the President and heads of departments; not to investigate the truth of any allegation of a fraudulent collusion to obtain money from the treasury.

The United States may recover back money fraudulently obtained from the treasury, upon making out a case to the satisfaction of a jury.

ATTORNEY GENERAL'S OFFICE,

December 22, 1818.

SIR: About the close of the last session of Congress, a large mass of documents was lodged in this office, accompanied by the following order of the House of Representatives:

“*Ordered*, That all the accounts and papers in the possession of the Clerk of this House, in relation to the accounts of James Thomas, a quartermaster general in the army during the late war, be referred to the Attorney General of the United States.”

The purpose for which this reference was made not being specified by the order itself, it was natural to suppose that it pointed to the performance of some known duty attached to the office of Attorney General, which would be readily discovered by adverting to the laws that designate the duties of that office. But among those duties there is no one that bears any relation to this order of the House of Representatives, or can help me

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to an understanding of the service which is expected at my hands. The act of 1789, which creates the office of Attorney General, enumerates the duties of that officer in the following terms: "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 one of the departments*." A subsequent act makes the Attorney General *ex officio* a commissioner of the sinking fund; and these two acts comprise the whole catalogue of his duties as they are designated by law. Neither the order nor the laws, therefore, afford any explanation of the object with which this reference has been made; and my predecessors having left no trace of any official practice in aid of the law which could furnish a clew to that object, I hope I shall be excused if I err in considering the reference as having been made to me *as the law officer of the government*, and, consequently, that nothing more is expected of me than the expression of my opinion as to the law arising on the case.

It is to be collected from the documents in this case, that James Thomas, a quartermaster general in the service of the United States, is charged with having drawn from the public treasury divers large sums of money, by a fraudulent collusion between himself and a certain Michael T. Simpson, by means of which collusion he was enabled to impose on the accounting officers of the government, and to obtain a false balance to be struck in his favor. To decide upon the truth of this allegation is out of my province; it belongs to a different department; but, assuming it to be true, it is, in my opinion, very clear that the United States may maintain an action against James Thomas before the courts of the United States, for the purpose of recovering back the money thus fraudulently obtained; and that, if they make out the fact to the satisfaction of a jury, they will unquestionably recover it back.

There is no act of Congress which subjects the quartermaster to a criminal prosecution for such a fraud as this is alleged to have been. The act of the 28th March, 1812, "to establish a quartermaster's department, and for other purposes,"

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by its sixth section, subjected the quartermaster to fine and imprisonment on conviction of taking, or applying to his own use, any emolument or gain, for negotiating or transacting any business in his department, other than such as should be allowed by law; but this section is expressly repealed by the act amendatory of the former, passed on the 22d May, 1812. (See the 4th vol. Laws United States, new edition, pages 397 and 347.)

This remedy, therefore, if the facts be made out, is by an action at law against Thomas, and his sureties on his bond, as quartermaster, so far as the penalty of that bond will extend; and against Thomas singly, by an action on the case for the residue.

The documents accompanying the order of the House of Representatives will be returned herewith to the Clerk of that House.

I have the honor to be, &c.,

WM. WIRT.

To the SPEAKER of the House of Representatives.

CLAIM FOR DAMAGE BY FIRE.

When the British invaded Castine, the commander of the United States ship Adams, then lying in that port, burnt her, to prevent her from falling into the hands of the enemy; the fire communicated with a neighboring warehouse, in which there was valuable property destroyed, for which a claim is made against the government: DECIDED, that the destruction was one of those casualties of war resulting from exposure.—(See Raymond's Reports, 422, 467; 1 Salk., 12; Mod. Rep., 151.)

ATTORNEY GENERAL'S OFFICE,

January 8, 1819.

SIR: I regret that my official duties have not permitted me to attend sooner to the claim of Messrs. Caze & Richaud, on which you have asked my opinion. The case I understand to be this: When the British invaded Castine in the autumn of 1814, Captain Morris, commander of the United States ship Adams, then lying in that port, burnt her, in order to prevent her from falling into the hands of the enemy; the fire was communicated from the ship to a neighboring warehouse, in which

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the petitioners had valuable property stored, which was thus destroyed; and for the value of this property the present claim is advanced. The question you ask is this: "Suppose the burning to have been necessary to effect a legitimate national object; can the liability for consequential damages to an individual be avoided at law?"

It is extremely difficult to bring a question like this to any known legal standard. All the cases of consequential damages furnished by the books, have been cases involving none but individual interests on the one hand or the other, and never complicated with any great considerations of public war or national defence. Were it possible to regard this as a question purely individual, there would be no difficulty in deciding it; for among individuals it has long since been settled—

1. That though a man do a lawful thing, yet, if any damage thereby befall another, he shall answer, *if he could have avoided it*; and that this principle holds in all civil cases. (See Sir Thomas Raymond's Reports, 422-'3, and 467-'8.)

2. That to bring a man within the protection of inability to avoid the damage, it must appear that the lawful act which produced it was not of a nature to have threatened the consequential damage so imminently, but that it might have been avoided by proper care on the part of the defendant. Thus, it is a necessary part of husbandry, in some countries, to have fire in the grounds; and it is perfectly lawful to have it. But the husbandman must at his peril take care that the fire so made shall not, through his neglect, injure his neighbor; for if it do, he shall answer. If, however, a violent and sudden tempest arise after the fire shall have been kindled, and, in spite of the husbandman's resistance, carry the fire into his neighbor's lands, this shall excuse him. (1 Lord Raymond, 264; 1 Salk. 13 and 12; Mod. Rep. 151.)

3. If a man cannot use his property in any given way without inevitable injury to that of his neighbor, it is not lawful in him to make that use of it; and if he do, he shall answer the damage; because, *being the inevitable consequence* of his act, he will be considered as having intended it, and therefore as being responsible for it. This proceeds on the well-known maxim of the law, *sic utere tuo ut alienum non laedas*. The

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obstruction of ancient lights, the diversion of ancient water-courses, &c., are illustrations of this maxim.

Whether these principles would, if suffered to apply, decide an action brought by the petitioners against Captain Morris, would depend on the particular circumstances of the case, which are not detailed by the petition. For example: 1. Could Captain Morris have avoided this damage by proper care on his part? 2d. Was the ship Adams fired when she was at a safe distance from the warehouse? and was she carried thither by a sudden and unexpected storm or wind, which could not have been resisted? 3. Or was the ship so near the warehouse, when fired, that the communication of the fire to the warehouse was an inevitable consequence of that measure? If the facts of the case would answer the first and last of these questions affirmatively, Captain Morris would be condemned to answer the damages, by the principles which have been stated. If, on the other hand, the facts would answer those questions negatively, or the second question affirmatively, he would be discharged.

These principles, however, are made for peace; in war, there is another maxim, which silences every other—*salus populi suprema lex*. If, therefore, the measure was one which the interests of the whole community called for, the officer who performed it could not, I think, be condemned to answer the individual damage, unless his neglect in performing it was *gross indeed*.

How far the people, for whose benefit the ship was fired, ought to feel themselves bound to answer for this consequential damage, is a question which our law books do not enable us to answer. It is, indeed, a fundamental principle of the social compact, that individual property shall not be taken for the public good, without compensation from the individual from whom it is taken; but this proceeds upon the consideration that the public have derived an advantage from the use of the property, which it ought to requite; or, in other words, that all the members of the community are bound only to contribute equally to the public good; and that he who has been compelled to contribute more than his fair proportion shall be restored to the footing of equality by reimbursement. This is the

 United States vs. The Bank of Somerset.

basis of the writ of *ad quod damnum*, where, in time of peace, individual property is condemned for the public good: it is the basis, too, of those laws which, at the close of the late war, provided a compensation to individuals for property lost, captured, or destroyed by the enemy, *while in the military service of the United States*. The claim of Messrs. Caze & Richaud seems to go a step beyond these principles. Their property was not taken for the public service; the public derived no benefit from the use of it; they had no use of it. Its destruction seems to me to have been one of those casualties of war, which place them on no higher ground than the hundreds (perhaps thousands) of individuals along the shores of our bays and rivers, who (like the warehouse and sails in the present case) were ruined by the mere circumstance of their greater exposure to the calamities of war.

I am, &c.,

WM. WIRT.

To the CHAIRMAN OF THE COMMITTEE OF CLAIMS.

UNITED STATES vs. THE BANK OF SOMERSET.

A judgment may be obtained against an individual debtor by default, and against receivers of public moneys on return of process under an act of Congress; but as against corporate bodies the practice is regulated by the practice of the several States in such cases.

OFFICE OF THE ATTORNEY GENERAL,
January 15, 1819.

SIR: I have examined the two questions which have been submitted to me by you, on Mr. Glenn's letter touching the suit of the United States against the Bank of Somerset; and have now the honor of presenting the answers.

Your first question is—whether, according to the laws of the United States, judgment cannot be obtained against a debtor who refuses to appear, and cannot be made to appear?

Against an individual debtor, such judgment can never be defeated by the refusal of the party to appear in reality. In relation to receivers of public moneys, there is an express act of Congress which authorizes judgment on the return of the process, with certain modifications.

 Right of a Collector to a Moiety of Double Duties.

Your next question is—whether, if the debtor ordinarily can be proceeded against by default, corporations are special exceptions to the general rule?

To which I answer, that the provisions in the act of Congress in relation to public debtors do not reach the case of corporate bodies; as will be obvious from their phraseology, which applies peculiarly to individuals. There being, therefore, no act of Congress which directs the course of proceedings against corporate bodies, that course is left under the 24th section of the judiciary act, and the 2d section of the act for regulating processes, &c., to be regulated by the practice of the several States. In Maryland, where this question arises, the English practice prevails; according to which, there can be no final judgment against a corporation without appearance; and, in a common law court, there is no mode of enforcing an appearance but by *distringas* on their lands and goods; for a corporation, having only an ideal existence, cannot be arrested, nor outlawed. There can be no personal coercion on it, therefore, and no means of coercion but by the seizure of its lands and goods. Nor is this, in reality, so much a grievance as at first it may appear; for if there be neither lands nor goods of a corporation on which a *distringas* can act, of what avail would be a judgment by default?

The execution on such judgment could be only against the lands or goods of the corporation; and the inefficacy of the *distringas* presupposes that there are none such.

WM. WIRT.

To the SECRETARY OF THE TREASURY.

RIGHT OF A COLLECTOR TO A MOIETY OF DOUBLE DUTIES.

Where double duties are the fruits of a compromise, in a case of forfeiture, the collector prosecuting is as much entitled to his moiety of them as he would have been to his moiety of the forfeiture which they represent.

OFFICE OF THE ATTORNEY GENERAL,

March 6, 1819.

SIR: I have, according to your desire of this morning, examined the claim of Colonel Allen McLane, as stated by Mr.

Duties of Government under Contracts for Supplies.

Ingersoll, and am very clear in the opinion, that the *double duties* being the fruits of a compromise in the case of forfeiture, the collector from whose prosecution those fruits arose is as much entitled to his moiety of them as he would have been to his moiety of the forfeiture which they represent.

WM. WIRT.

THE PRESIDENT OF THE UNITED STATES.

DUTIES OF GOVERNMENT UNDER CONTRACTS FOR SUPPLIES.

Where contracts for supplies for the army contain the clause providing for a supply, in case of deficiency, by the commanding general or person appointed by him at each post or place, the person appointed by the commanding general to take command at the post or place is the person authorized to supply the deficiency.

Where the commandant at a post anticipates a failure in supplies contracted to be furnished, he may make provision for them before the failure absolutely occurs; yet, the contractor is not liable for them until the failure takes place; then he is liable whether they were purchased previously or subsequently; for it is the failure and time upon which the responsibility arises.

If a general had a right to draw supplies from a place out of his military department, through the enemy's country, he was bound to furnish an escort from that place through that country. If the case were one of real and imminent danger, the contractor had a right to an escort; and, if it were not furnished, he is exonerated from the consequences of the failure.

OFFICE OF THE ATTORNEY GENERAL,

March 26, 1819.

SIR: In compliance with your request, I have considered the questions of law propounded in the letter of the Second Comptroller of the Treasury, as arising on the contract between Benjamin G. Orr and the acting Secretary of War, and have now the honor to give you my answer.

The first question is as follows:

"1. Under the 5th article of the contract, whether the officer commanding at each post or place is not the person meant, by the terms of the contract, to order or make purchases of supplies, in the event of a failure of the contractor, unless some other person should be designated by the commanding general?"

The article of the contract referred to is in the following words: "5th. The commanding general, or person appointed

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by him at each post or place, in case of absolute failure or deficiency in the quantity of provisions contracted to be delivered and issued, shall have power to supply the deficiency by purchase, at the risk and on the account of the said Benjamin G. Orr, his heirs, executors, or administrators."

I conceive that the officer appointed by the commanding general to take the command at any post or place, is, during the continuance of such command, the person who, by the 5th article, is authorized to supply the deficiencies and failures of the contractor at such post or place; for he is the person to whom the trust is confided to see that the men under his command are properly supplied with food: in truth, he is emphatically the person within the express words of the contract, being *the person appointed by the commanding general at the post or place*. To suppose that, besides the person appointed to take the command at each post or place, there is to be a separate character appointed at the same time at each post or place, in anticipation of failures or deficiencies by the contractor, and with authority to supply such possible failures or deficiencies whenever they should occur, would be so superfluous, so entirely without an object, and so inconsistent with military usage, that it cannot be supposed to have entered into the minds of the contracting parties at the time; and not having been intended, it is not their contract. On the other hand, to suppose that the commanding general is to wait, in every instance, until after the occurrence of the failure or deficiency at every post or place within a military district, covering perhaps many hundreds of miles, and, *after such occurrence*, to issue in every instance a separate order to supply the several deficiencies, would be to give the contract a construction not only inconsistent with that purpose of prompt and abundant supplies which the contract itself was intended to produce, but a construction utterly impracticable in many cases; and this, too, without any conceivable advantage to the contractor, since it can be of no importance to him whether his failures or deficiencies are supplied by the officer placed by the general in the command of a post or place, or by an officer deputed for the particular purpose.

I see no other construction, therefore, which can be fairly

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adopted, than that which I have given, and which I consider as the construction most obvious on the face of the article.

The second question is this :

“2. Whether an officer apprehending a failure is not justified in making purchases, even before an absolute failure ; which purchases become chargeable to the contractor when an absolute failure shall have been established, or remain the property of the government if no failure takes place?”

By the 5th article of the contract, which has been already quoted, I understand the contractor to be liable for such purchases on no other contingency than on the absolute failure or deficiency of the provisions furnished by himself ; but, *that contingency* having occurred, *he* is liable for the substituted supplies ; and it is, in my judgment, perfectly immaterial to the liability of the contractor whether those substituted supplies result from a contract previous or subsequent to the contingency of his absolute failure or deficiency. If a previous contract, he is saved from its consequences by a compliance with his own contract ; if he fails to comply, his liability attaches ; and he cannot, I think, be admitted to defend himself against his liability for the provisions which take the place of those he was bound to furnish, by saying that they were the proceeds of a contract which anticipated his failure. Without entering into the particular facts of this case, (which, from the pressure for my opinion, I have neither time nor inclination to do ; nor is it my duty on the questions of mere law submitted to me,) it is easy to conceive cases in which such anticipating contract on the part of the commander of a post or place may become an imperious duty. In the case, for example, of a contractor who may have subjected a post or an army to previous and repeated disappointments ; or who may have no agent within convenient distance of the post or place ; or whose only known agent may have declared himself without funds, and, under that declaration, may have left the country—can it be conceived that a commander of a post would, under such circumstances, be in the faithful discharge of his duty by waiting for the absolute failure, whose anticipation was so obvious? more especially, since, by using the precaution of a previous contract, he could not subject the contractor to its consequences, except on the

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precise conditions on which he had agreed to be so subjected, to wit: his own failure, or the deficiency of his own supplies. I consider it, therefore, no departure from the contract, but a decision strictly within it, when I say that, in my opinion, the contractor, *on his absolute failure*, becomes liable for the provisions substituted for those which he was bound to furnish, whether the substituted supplies proceed from a contract made previous or subsequent to his failure—the time of the contract being perfectly immaterial; the point of time and the fact of the failure being the circumstances on which alone the responsibility arises.

The third question is,

“3. Whether the contractor, under the 7th article of the contract, to acquit himself of the consequences of a failure, has the right to set up the plea that he could not obtain an escort or guard?”

The facts are, that General Gaines made a requisition on the contractor's agent at New Orleans, on the 11th July, 1817, for 80,000 rations, which was sent by Captain Bee to New Orleans. It does not appear that a copy of this requisition was sent to the contractor or any other of his agents. The question arises, whether the contractor, under these circumstances, had the right to demand an escort or guard, from a place without the limits of his contract and the military department of the commanding general, through a neutral country? This requisition is distinguished from others, inasmuch as it was made only on the contractor's agent at New Orleans.

“Two contracts were made: the one, for South Carolina and Georgia, stipulated the price of the ration at 27½ cents; the other, for Louisiana and the Mississippi Territory, at 14½ cents. The difference in the price of the ration seems to warrant the opinion that it was the understanding of the contracting parties that the supplies for the Georgia contract should be furnished from that State, and not from a distant market.”

The 7th article of the contract, to which this question refers, is in the following words: “7th. That escorts and guards for the safety of the provisions, and for the protecting of the cattle against an enemy, shall be furnished whenever, in the opinion of the commanding officer of the army, or of any post to whom

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application may be made, the same can be done without prejudice to the service; and the said Benjamin G. Orr, his heirs, executors, or administrators, shall not be answerable for any deficiency of supplies at any of the said posts or places, if it shall appear, upon satisfactory proof, that such deficiency was occasioned by the want of proper escorts or guards."

Thus this article expressly stipulates that the contractor shall not be answerable for any deficiency of supplies at any of the said posts or places, "*if it shall appear, upon satisfactory proof, that such deficiency was occasioned by the want of proper escorts or guards.*" I answer the question, therefore, by saying, that, according to the legal construction of the contract, the contractor has a right to set up the plea that he could not obtain an escort or guard; and if it shall appear in proof that the deficiency arose from this cause, he is clearly exonerated from charge in that particular instance: but the deficiency can never arise from this cause, if the route by which the supplies were to be carried did not require an escort or guard. In order to make the plea of the want of escort complete, it is not merely necessary to prove that the contractor called for an escort, but that, from the danger of the route, he had a right to call. As, for example, if the route lay through the country of a savage enemy, so as to expose not merely the provisions, but the lives of the carriers, to danger: in such a case, I believe that a court of law would hold the plea a complete defence to the contractor.

From the facts annexed by the Second Comptroller to this question, it appears that the requisition in this instance was made known only to the contractor's agent at New Orleans. The supply, therefore, was obviously expected from that place. By the requisition itself, enclosed among the papers you were pleased to hand me, the rations were to be delivered at Fort Scott, near the head of the Apalachicola. Through what route were they to pass from New Orleans to the head of the Apalachicola river? From a glance at the map, as well as from the actual course of these operations when under General Jackson, it would seem that these supplies were expected and intended to reach Fort Scott by water—descending the Mississippi into the gulf, and thence up the Apalachicola. Was this the route

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contemplated? or is there any other route, not through the Seminole country? These are questions of fact. If there was no route from New Orleans to Fort Scott, but such a one as would make it necessary for the provisions, and consequently for their carriers, to pass through the country of the Indian enemy, it is in my opinion a case in which the contractor was authorized to call for an escort; and authorized, also, to claim an exemption from responsibility if the escort was not furnished: for against whom can an escort ever be necessary, if not against the very enemy, to sustain the war with whom the supplies are furnished?

“The question arises,” says the Second Comptroller, “whether the contractor, under those circumstances, had the right to demand an escort or guard, from a place without the limits of his contract and the military department of the commanding general, through a neutral country?”

Here are these objections to the demand of an escort thrown together: let us separate them. Had the contractor a right to demand an escort or guard from a place without the limits of his contract? Had the general a right to make a requisition from a place without the limits of the contract? If he had not, there has been no regular requisition, and, consequently, there is no liability on the part of the contractor. If, on the contrary, he had a right to make the requisition on the agent at New Orleans, that agent had the correspondent right to demand an escort. The right of requisition and the right of escort (where necessary) are co-existent and co-extensive. If the requisition is regularly made, it must be obeyed; and if obedience to it will carry the contractor and his supplies through the enemy's country, he has, in my opinion, a clear right to demand an escort.

Had the contractor a right to demand an escort from a place out of the military department of the commanding general? To which I answer, that, if the general had a right to draw supplies from a place out of his military department, through the enemy's country, he was bound to furnish an escort from that place through that country. There is nothing in the contract which requires the contractor to hazard his life or those of his agents in furnishing the supplies: it was to protect him from this hazard, as well as to insure safety to the transport-

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ation of the supplies, that the escort is provided by the terms of the contract.

Had the contractor a right to call for a military escort through a neutral country? Yes; if that country was also the country of the enemy, and the commanding general had the right to call upon the contractor to bring his supplies through that country, the duty of procuring a free and safe passage for the contractor was, in my opinion, on the commanding general, or the government to which he belonged. From the circumstances and character of this particular war, Spain could not, with any show of reason, or of right, refuse a peaceable passage through her territory for the purpose of chastising an enemy whom she herself was bound by treaty to have restrained from committing hostilities on the United States. Vattel says that "an innocent passage is due to all nations with whom a state is at peace, and this duty comprehends *troops* equally with *individuals*."—(Vat. b. 3, chap. vii, § 119.) And by the same author, (ib. § 127,) "the granting such passage gives no room for complaint to the nation against whom it is granted." If such a passage be due among nations, as ordinarily circumstanced, how much more so was it due from Spain in the present instance! Situated as she was in relation to the United States in this war, to have refused a passage to our provisions would, in my opinion, have been of itself a just cause of war. But if the commanding general was forbidden by the neutral rights of Spain from escorting the provisions through the territories of that prince, was not the contractor equally forbidden by the same rights from marching an armed guard with provisions of war through those territories? For I presume it cannot be supposed that the contractor was bound, not only to have brought his supplies through the country occupied by the enemy, but to have brought them with an unarmed body of men, too; and thus, through respect to the neutral rights of Spain, to have exposed his own life, or those of his agents, to the ferocity of a savage enemy.

It may be supposed that the contractor, whether furnished with an escort or not, was bound to have made the attempt to furnish the supplies, even through the enemy's country; because he could but have lost the provisions; and by the 7th article he would not, under those circumstances, have been

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liable for the failure or deficiency. But, in my opinion, this is not the correct construction of the article, nor the purpose for which it was introduced. It is the 6th article which contemplates the case of an attempt to transport without convoy, and which provides expressly for the case of depredations by the enemy, exempting the contractor from the loss in that case, and throwing it on the United States. The 7th article looks to the case of an escort foreseen to be necessary, even to the attempt to transport; and of a failure on the part of the contractor, because the supply was not furnished. For in the case contemplated by the 7th article there is something more to be considered than the mere danger or loss of the provisions. There is the danger and loss of life, which, in my opinion, the contractor is not bound to expose, the escort being withheld.

Upon the whole, my opinion is, that, if the case be one of real and imminent danger, the contractor has a right to the escort; and if it be not furnished, and the failure proceed from this cause, he is by the 7th article exonerated from the consequences of such failure. So that the questions under this article must, I should presume, be always questions of fact, and not of law. Was the danger a real and imminent danger? Was the escort demanded, and refused? Did the failure proceed from this cause? Nor should I think the danger less real and imminent because it had been once or twice encountered without loss, any more than I should think the danger of a battle less real or imminent because men sometimes go through it unhurt. In a word, if the danger be real and imminent, the escort demanded and refused, *and a failure ensue from this cause*, the contractor, I think, is legally entitled to the protection of the 7th article of his contract.

Those being the only three questions of law submitted by the letter of the Comptroller, and having given you the best opinion on them that I am capable of forming, I have nothing to add except my regret at the length at which I have thought it my duty to examine the last question, from the previous proceedings which I understand to have taken place in the case.

I have the honor to be, &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

United States Bank Bills receivable at the Treasury.

INTEREST ON CLAIMS.

Interest is in the nature of damages for withholding money which the party ought to pay, and would not or could not; but where the holder of a claim omits for a long space of time to make application for the payment, and the act of Congress directing payment is silent as to interest, he does not come within the reason of the rule.

OFFICE OF THE ATTORNEY GENERAL,

April 3, 1819.

SIR: I have examined the case of Aquila Giles, and see no reason, in this instance, to depart from the usual practice of the Treasury Department. The act of Congress does not direct the payment of interest; nor does it, as in the case of Mrs. Hamilton, refer to any principles of settlement from which it can be inferred that interest was intended to be allowed. The act merely refers to the warrant for \$500, as the basis of settlement. The warrant thus referred to does not carry interest on its face; and I understand it to be the sole fault of Mr. Giles himself that it has not long since been presented and paid, or funded. Interest is in the nature of damages for withholding money which the party ought to pay, and would not or could not. But here it appears, on the face of Mr. Giles's own memorial, that he has never made an application for payment; and, therefore, there has been no withholding payment against his consent.

If Mr. Giles conceives himself to be aggrieved by the practice of the Treasury in similar cases, he has his remedy before Congress, who, if they think it equitable, can direct the payment of interest, as they did in the case of John Thompson.

I have the honor to be, &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

UNITED STATES BANK BILLS RECEIVABLE AT THE TREASURY.

Under the 14th section of the act incorporating the Bank of the United States, the treasury must receive its bills in payment of debts due to the United States.

RICHMOND, *April 15, 1819.*

SIR: In answer to your letter of the 8th instant, I have the honor to state it as my opinion, that by the 14th section of the

Duties on Goods Destroyed by an Enemy.

act incorporating the Bank of the United States, I do not consider the treasury at liberty to refuse the bills of the bank, or of its offices, in payment of debts due to the United States, wheresoever those bills may be payable. I am fully aware of the inconvenience of this opinion. We have to construe the law, however, and not to make it; and since the 14th section expressly declares that the bills or notes of *the corporation* (without any other designation, and without exception) shall be receivable in *all* payments to the United States, it seems to me that every paper which satisfies the description of being a bill or note of the corporation must be receivable. The corporation is *one*; all the paper which it issues (wheresoever made payable) fits the description precisely of being bills or notes of the corporation; nor are they less *bills or notes of the corporation*, whether they are made payable in Boston or Savannah. To decide that such bills or notes shall be receivable only where they are payable, would be, it seems to me obvious, to add a new provision to the 14th section, and thereby to exercise legislative, not executive or judicial power.

I have the honor to be, &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

DUTIES ON GOODS DESTROYED BY AN ENEMY.

The destruction of goods by a public enemy does not release the owner from the payment of duties which had been secured according to law.

RICHMOND, April 15, 1819.

SIR: I have received your communication of the 12th instant, requesting my opinion on the question whether the destruction of goods by a public enemy releases the owner from the payments of the duties on those goods which had been secured according to law; and I answer the question in the negative. The importation being complete, and the duties secured by bond, the subsequent destruction of the goods by the enemy can no more release the obligor from the payment of the duties than the same act would entitle him to have the duties refunded, if he had in fact paid them. On the contrary,

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he stands on the common footing of the many sufferers by the enemy during the war, who have no relief but such as Congress may choose to grant.

I have the honor to be, &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

CONTRACTS FOR SUPPLIES.

The contractor is not liable to pay for rations furnished in case of his failure, except such as may be furnished by the commanding general, or person appointed by him at the post or place where the rations were stipulated to be furnished.

ATTORNEY GENERAL'S OFFICE, May 3, 1819.

SIR: On the question submitted by you in relation to Mr. Orr, I am of the opinion that the contractor is not liable for the thirty thousand rations purchased by Colonel Brearly of J. S. Thomas, on the 15th of September, 1817:

1. Because, by the 5th article of the contract, (on which, if on any part of the contract, the liability of the contractor must rest,) the stipulation is, "that the commanding general, *or person appointed by him at each post or place*, in case of absolute failure, &c., shall have power to supply, &c., at the risk and on the account of the said Benjamin G. Orr, &c.;" by which I understand that either the commanding general himself must make the contract of supply, or that it must be made by some person appointed by him *at each post or place*. The alleged failure took place at Fort Scott, and Colonel Brearly, I understand, was stationed at Fort Hawkins, one hundred and fifty miles from Fort Scott—the interval between the forts being the Indian country. Had Colonel Brearly, therefore, (thus situated, and thus to remain situated, too, until after the time appointed for the delivery of the rations,) been instructed in the most express terms to supply the failures or deficiencies at Fort Scott, he could not, in my opinion, have fitted the description of the person authorized by the terms of the contract to supply such failures or deficiencies at the expense of the contractor, because he would not have been a person appointed

by the commanding general at the post of Fort Scott. Nor is this a mere verbal interpretation of the contract: there is very good reason for the construction, and that reason is most strikingly illustrated by the very instance which has raised the question. Had Colonel Brearly been at Fort Scott, he would not have made the contract of the 15th September, because he would have known that the fort had been previously supplied. He made his contract in ignorance of this fact, and that ignorance arose from his being at the distance of one hundred and fifty miles from the point to be supplied; or, in other words, from his not fitting the description of the person by whose contract of substitution the contractor had agreed to be bound. But,

2. If the fact of his being stationed at another and a distant fort does not withdraw him from the description, there is another fact which does; which is, that he was not appointed by the commanding general to supply the contractor's failures or deficiencies at Fort Scott. General Gaines's letter of the 20th July to Colonel Brearly (which is understood to be relied on as constituting such appointment) cannot, I think, by any fairness of interpretation, be so construed. It seems to be directed to other objects; the subject of rations is introduced merely incidentally, and towards the close of the letter, for the purpose of informing Colonel Brearly of the accommodations which might be expected at Fort Scott on his arrival. If any reliance can be placed on A. D. Stewart, (who is unknown to me, but whose affidavit has been furnished by the contractor,) it is very clear that General Gaines did not himself understand his letter as giving Colonel Brearly the authority which he exercised in making his contract of the 15th September; and, indeed, the date of that letter (the 20th July) compared with the latest date at which the thirty thousand rations were to be furnished, (the 31st July—only eleven days,) and the distance, and consequently the time necessary for communication between the forts, it is scarcely conceivable that the letter was intended to convey any such authority. Besides, if General Gaines intended to devolve on Colonel Brearly so important a duty, would he have done it in terms so vague and ambiguous? and this the more especially, when, in another part of the letter, he was on

the subject of instructing Colonel Brearly what provisions he would be relied on to furnish, to wit: provisions for the troops on their march from Fort Hawkins to Fort Scott.

On my construction of the contract, the question of notice, and of the party who is bound to give it, mentioned in the remarks endorsed by you on the Comptroller's letter, can never arise: the officer who is substituted by the general for the contractor being at the post to be supplied, will of course have notice when the contractor's supplies come in, and consequently the giving notice at a distant post can never become necessary. Such a duty (that of giving notice) seems to be nowhere contemplated by the contract; for the very reason, I apprehend, that, according to a fair construction of the language of the contract, the necessity for such notice could not occur. But, if Colonel Brearly was appointed, and regularly appointed, to supply the contractor's failures or deficiencies, and notice were necessary to prevent any subsequent contract by the substitute, I should incline to the opinion that the reception of the contractor's supplies at Fort Scott, in the present instance, (though after the day of the requisition,) would absolve him from the consequences of any posterior contract by the general's appointee, and impose on the general the necessity of countermanding his order. Indeed, if the General had given an order to Colonel Brearly to supply a failure which had actually occurred, nothing could discharge Colonel Brearly from the performance of the duty enjoined by that order, short of a countermanding order from the general himself: a mere notice from the contractor, (then under an actual default,) without the sanction of the general, would have been disregarded by him; at least, I think it ought, under such circumstances, to be disregarded.

I will observe, finally, that it appears to have been the opinion of General Gaines himself, at one time, that the requisition in question had been substantially complied with, or at least that no culpable negligence was attributable to the contractor in this particular instance. I refer to his letter of instructions to Lieutenant Scott of the 5th of August, 1817, and more especially to his letter to the Secretary of War of the 7th May, 1818, in which (speaking of the requisition) he says: "I am under

Bounty Lands under the Act of 1816.

the impression that the delay in the receipt of the requisition was owing to the failure of the mails, *and not chargeable to the neglect of the contractor.*" It is admitted that the provisions which arose from Colonel Brearly's contract were never sent to Fort Scott, but were consumed at Forts Hawkins and Mitchell; they did not, therefore, supply any failure or deficiency at Fort Scott: they seem not to have been in fact required; because there was no interval in which Fort Scott was without provisions. Nevertheless, as there was an absolute failure on the part of the contractor to meet the requisition in point of time, if Colonel Brearly had been appointed, and regularly appointed, within the terms of the contract, to supply that failure, I should have been of the opinion that the contractor was liable. My opinion, that he is in this instance not so liable, rests on the ground that, on the only evidence shown me, Colonel Brearly was not appointed at all to supply this failure; and, if so appointed, that he was not regularly appointed in regard to Fort Scott, within the terms of the fifth article, so as to bind the contractor.

I send, herewith, a letter which I received from the contractor, with its enclosures, on the subject referred to me; it reached me at Richmond at the same time with your communication on the subject.

I have the honor to be, &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

BOUNTY LANDS UNDER THE ACT OF 1816.

A person who enlisted as a soldier in the war of 1812 and served as such until commissioned, but who resigned his commission before the close of the war, is entitled to bounty land, provided the enlistment was for five years, or during the war.

RICHMOND, *July 29, 1819.*

SIR: I received at this place the letter from Jeremiah N. Sterling, on which you have requested my opinion. Mr. Sterling is an applicant for land bounty under the third section of the act of the 16th of April, 1816, entitled "An act making

Bounty Lands under the Act of 1816.

further provisions for military services during the late war, and for other purposes." He states that he enlisted as a soldier, and served during the late war, until he was promoted to the rank of a commissioned officer, which commission he resigned *before the conclusion of the war*. And the single question presented by his case is, whether that resignation cuts him off from the bounty provided by the section of the act in question; or, in other words, whether, to entitle him to the land bounty, he was not bound to have served *under his commission* until the end of the war?

In considering the just construction of this section, it is observable that it provides for those classes of persons for whom no previous provision had been made, to wit:

1. All soldiers above the age of forty-five, or under the age of eighteen, who had been enlisted to serve for five years or during the war, and who had faithfully served during the war and had been regularly discharged.

2. The representatives of *such* soldiers as had died whilst in the service of the United States.

All soldiers who had been enlisted and had faithfully served during the war *until they had been promoted to the rank of commissioned officers*, who, if they had served during the war under their enlistment and been regularly discharged, would have been entitled to a bounty in land. Under this third provision, the only questions in relation to Mr. Sterling are—

1. Was his enlistment as a soldier of that character, that if he had served under it during the whole war, and been regularly discharged, he could have been entitled to the land bounty; *i. e.* was he enlisted for five years, or during the war?

2. Did he serve under that enlistment *until he was promoted to the rank of a commissioned officer*?

If the facts of the case answer both these questions in the affirmative, he is, in my opinion, clearly entitled to the bounty under this act. To require that he should have served *under his commission till the end of the war*, in order to entitle him, is to require what the act of Congress does not require. If Congress intended the service so to continue, they have not said so. Their words are, "all soldiers who have been enlisted and have faithfully served during the late war *until they*

Right of Aliens to Hold Property.

have been promoted to the rank of commissioned officers." The moment the soldier is so promoted, his right attaches, and he is from that moment placed exactly on the footing of the soldier who had served during the war, and until regularly discharged. Any other construction would render the words "*until they have been promoted to the rank of commissioned officers*" utterly senseless; whereas they are obviously used, and used for the express purpose of marking the very epoch and the event on which the right to the bounty was intended to attach. The policy of the law, I presume, was to promote emulation in the ranks, and to reward the successful competitor.

I have the honor to be, &c.,

WM. WIRT.

To the SECRETARY OF WAR.

RIGHT OF ALIENS TO HOLD PROPERTY.

An alien can inherit, carry away, and alienate personal property, without being liable to any *jus detractus*; but not real estate.

RICHMOND, July 30, 1819.

SIR: I have received at this place your communication of the 23d instant, presenting for my opinion certain questions submitted to you by Mr. Gahn, the Swedish chargé d'affaires to the United States, to which I hasten to answer.

An alien can, in the United States, inherit, with the faculty of carrying away and alienating, every species of *personal* property, without being liable to any *jus detractus*. But he cannot inherit real or fast property at all: nor is there any power in the general government, as I conceive, to alter, either by law or treaty, the provisions of the particular States in this respect. The 6th article of the old treaty of amity and commerce, between the United States and Sweden, is understood as applying to personal property only.

I have the honor to be, &c.,

WM. WIRT.

To the SECRETARY OF STATE.

Cadets at West Point.

CADETS AT WEST POINT.

Cadets are soldiers, receiving the pay of sergeants, and bound to perform military duty in such places and on such service as the commander-in-chief shall order; and the corps to which they are attached is a part of the military peace establishment.

As a part of the corps of engineers, they form a part of the land forces of the United States, and have been constitutionally subjected by Congress to the rules and articles of war, and to trials by court-martial. (See act of 1802, Laws of U. S., vol. 3, pp. 456-'7, § 26, 27, 28; also acts of 1812, id. vol. 4, pp. 366-'7; also id. pp. 404, 433; also act of 29th January, 1813, vol. 4, p. 492; also act of 5th July, 1813, vol. 4, p. 541; also act of 28th January, 1814, vol. 4, p. 644; also act of 10th February, 1814, vol. 4, p. 645; also act of 27th January, 1815, vol. 4, p. 778; also act of 3d March, 1815, vol. 4, p. 825; also act of 24th April, 1816, Sess. Laws of 1816, p. 71.)

OFFICE OF THE ATTORNEY GENERAL,

August 21, 1819.

SIR: I have examined, with careful attention, the question you have submitted to me, as to the subjection of the cadets at West Point to the rules and articles of war, and to trial by courts-martial; and now proceed to give you the result of that examination.

It is proper to observe, on the threshold of this inquiry, that the genius of our constitution and laws favors the trial by jury. Before the Revolution, we had learned from Great Britain to consider that form of trial as the great palladium of our most sacred rights; and on the adoption of the constitution, the privilege was deemed sufficiently important to be secured to the people by positive and repeated provisions in that instrument. Thus, by the 2d section of the 3d article of the constitution, it is provided that "the trial of all crimes, except in cases of impeachment, shall be by jury," &c.; and by the 5th amendment to the same instrument, it is further provided that "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, &c., &c., nor be deprived of life, liberty, or property, *without due process of law*," &c. The 7th amendment, looking to questions of property even of trivial value, provides that "in suits at common law, where the value in controversy shall

Cadets at West Point.

exceed *twenty dollars*, the right of trial by jury shall be preserved," &c. So that Congress has no power to pass a law which shall deprive the person accused of a criminal or otherwise infamous offence, of his trial by 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.

Even in relation to the land and naval forces, (including the militia when in actual service,) Congress have never considered the mere act of stamping on those bodies a military character, by ordering them to be raised, organized, and called into service, as being sufficient, of itself, to subject them to trial by court-martial under the rules and articles of war; because this would be to abrogate a high constitutional privilege by implication. In every instance, therefore, in which Congress has impressed a military character on any body of men, whom they intended to divest of the civil right of a trial by jury, besides the impressment of that military character, they have uniformly and expressly declared that they should be subject to the rules and articles of war. With the view to test the accuracy of this position, I have collated all the laws on the subject, to which I beg leave to refer you.

See the resolve of the old continental Congress of the 12th April, 1785, (vol. 1, L. U. S., p. 669, note;) that of the same body 3d October, 1787, (pp. 668, '69, '70,) concerning the military establishment; also the act of 29th September, 1789, referring to the last mentioned resolve, (vol. 2, L. U. S., p. 74, § 4;) the act of the 30th April, 1790, for regulating the military establishment of the United States, § 13, (vol. 2, L. U. S., p. 102;) the act of the 3d March, 1791, for raising and adding another regiment, &c., § 10, (*id.* 234;) the act of the 5th March, 1792, for making further and more effectual provision for the protection of the frontiers, § 11, (*id.* 257-'8;) the act of the 9th May, 1794, providing for raising and organizing a corps of artilleryists and engineers, § 4, (same vol., p. 404;) the act of the 3d March, 1795, for continuing and regulating the military establishment of the United States, &c., § 14, (same vol., pp. 490-'1;) the act of the 30th May, 1796, to ascertain and fix the military establishment of the United States, § 20, (same vol., p. 559;) the act of the 27th April, 1798, to provide

an additional regiment of artillerists and engineers, § 2, (vol. 3, p. 43;) the act of 28th May, 1798, authorizing the President to raise a provisional army, § 2, (vol. 3, p. 50;) the act of the 16th July, 1798, to augment the army of the United States, § 8, (vol. 3, p. 108;) the act of the 2d March, 1799, giving eventual authority to the President to augment the army, § 3, (vol. 3, p. 261;) the act of the 16th March, 1802, fixing the military peace establishment of the United States, (vol. 3, p. 453;) the act of the 28th February, 1803, in addition to the act last mentioned, § 3, (same vol., p. 531;) the act of the 2d April, 1808, to raise for a limited time an additional military force, § 5, (vol. 4, p. 163;) the act of the 8th January, 1812, authorizing the President to raise certain companies of rangers, for the protection of the frontier, § 4, (vol. 4, p. 366;) the act of the 11th January, 1812, to raise an additional military force, § 10, (vol. 4, p. 367;) the act of the 8th April, 1812, in addition to the act to raise an additional military force, § 2, (vol. 4, p. 404;) the act of the 16th May, 1812, making further provision for the army of the United States, § 2, (vol. 4, p. 433;) the act of the 29th January, 1813, in addition to the act entitled "An act to raise an additional military force," § 6, (vol. 4, p. 492;) the act of the 5th July, 1813, to amend the act in addition, &c., § 2, (vol. 4, p. 541;) the act of the 28th January, 1814, to cause certain regiments to be enlisted for five years, § 2, (vol. 4, p. 644;) the act of the 10th February, 1814, to raise three regiments of riflemen, § 4, (vol. 4, p. 645;) the act of the 27th January, 1815, to authorize the President to accept the services of State troops and volunteers, § 1 and 4, (vol. 4, p. 778;) the act of the 3d March, 1815, to fix the military peace establishment of the United States, § 7, (vol. 4, p. 825;) the act of the 24th April, 1816, for organizing the general staff, and making further provision for the army, § 6, (sessions acts of 1815-'16, pp. 71, 72.)

On turning to these laws, it is remarkable that in every instance in which troops have been raised, or their number has been augmented by any accession, however trivial, or in which their number has been reduced to a peace establishment, or in which a new and distinct destination has been given to any portion of them, Congress has cautiously introduced a

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provision that they shall be subject to the rules and articles of war. And what is still more remarkable, is, that even after the general act of 1806 had passed, declaring the rules and articles of war, and containing the permanent provision that the armies of the United States should be subject to these rules and articles, Congress, not content to leave after-raised troops to the operation of that general provision, have, in every instance, repeated the provision of their subjection to military law. A course of legislation so long continued and so uniform marks the sacred respect in which Congress have ever regarded the right of trial by jury, and will justify us in assuming it *as their sense*, that this right is never to be taken away by implication; never by the mere impressment of a military character on a body; *never without a positive provision to that effect*.

In relation to the cadets at West Point, then, in order to prove their subjection to the rules and articles of war and to trial by courts-martial, it is not enough to show that Congress has stamped on them a military character; for if we respect the opinion uniformly expressed by the practice of Congress, it must also be shown to have been expressly provided that those cadets shall be subject to the rules and articles of war.

With these principles in view, I shall proceed to examine all the laws which bear on the question submitted, expressing my opinion on the legal construction and operation of each law as it occurs.

The *nucleus* of the military institution at West Point was a corps of engineers, raised under the act of Congress of the 16th March, 1802. (Laws of the United States, vol. 3, pp. 456-7, § 26, 27, 28.)

In order to apprehend more distinctly the intention of Congress in relation to this corps, it may not be amiss to examine the previous laws relative to troops of this description, and to compare them with the two laws bearing directly on the question. Neither the two resolves of the old Congress nor the acts of 1789-'90, before cited, say anything of engineers. The first time they are mentioned in our laws is in the act of 9th May, 1794, (vol. 2, p. 403,) entitled "An act providing for raising and organizing a corps of *artillerists and engineers*," by which seven hundred and sixty-four non-commissioned

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officers, privates, &c., were directed to be engaged for three years, by voluntary enlistment, and were *incorporated* with the previous corps of artillery then in the service of the United States, the joint body being thereafter to be denominated *the corps of artillerists and engineers*; the entire number, exclusive of commissioned officers, being nine hundred and ninety-two. By the 3d section of this law, the whole body was organized into four battalions, each battalion consisting of four companies; and to each company were attached (among others) *two cadets*, with the pay, clothing, and rations of a sergeant. The 5th section made it the duty of the Secretary of War to provide, at the public expense, under the direction of the President, the necessary books, instruments, and apparatus for the use of the corps. The 6th section authorizes the President to cause such proportion of the said corps as he should deem consistent with the public service, to serve in the field, on the frontiers, or in the fortifications of the seacoast. The 4th section *expressly provided* that the whole body should be governed by the rules and articles of war which have been or may be by law established.

Hence there is nothing in the character of the service, in the circumstance of their being *cadets*, nor in that of their being furnished with the necessary books, instruments, and apparatus for study, which, at that time, was deemed sufficient to exempt cadets, among the rest, from the operation of the rules and articles of war. The act of 3d March, 1795, continues this incorporation and organization of the corps of artillerists and engineers; and, in the 14th section, repeats their subjection to the rules and articles of war. The act of 30th May, 1796, makes no change in the situation of the corps of artillerists and engineers. The act of 27th April, 1798, "to provide an additional regiment of artillerists and engineers," directs three battalions, of four companies each, to be raised for this purpose, by enlistment for five years, unless sooner discharged; attaches two cadets to each company; directs the Secretary of War to furnish all necessary books, instruments, and apparatus; and, in like manner, subjects the whole corps to the rules and articles of war. The act of 16th July, 1798, "to augment the army of the United States, and for other purposes," after authorizing

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the raising and organization of twelve additional regiments of infantry and six troops of light dragoons, proceeds, in the 7th section, to authorize the President to appoint any number not exceeding four teachers of the arts and sciences, necessary for the instruction of the artillerists and engineers, at the monthly pay of fifty dollars and two rations per day. The 8th section subjects the *officers, non-commissioned officers, and privates, raised* by virtue of this act, to the rules and articles of war; but does not embrace in that provision the teachers appointed by the President, unless they come under the denomination of *officers, non-commissioned officers, musicians, or privates*, which I do not think was intended; because the previous sections of the law sufficiently indicate who were meant by those terms.

Next in order comes the act of the 16th March, 1802, by which the establishment at West Point was erected. As this act bears directly on the subject of inquiry, it will be necessary to give it a more minute attention. It is entitled "An act fixing the military peace establishment of the United States." And the 1st section declares that, after the 1st of June next following the date of the act, the military peace establishment of the United States "shall be composed of one regiment of artillerists and two regiments of infantry, with such officers, military agents, and *engineers*; as are hereinafter mentioned." The 2d section is employed in organizing the regiment of *artillerists* (not of artillerists and engineers) and the regiments of infantry. All the succeeding sections are confined exclusively to these regiments of artillery and infantry (with the appendages of paymasters and military agents, with their assistants, and of surgeons, with their mates) till we come down to section 9, by which the President is required "to cause to be arranged the officers, non-commissioned officers, musicians, and privates of the several corps of troops now in the service of the United States, in such manner as to form and complete out of the same the corps aforesaid"—that is to say, the corps composed of the regiment of artillery and the two regiments of infantry; and the next section (the 10th) provides that the officers, non-commissioned officers, musicians, and privates of *the said corps* shall be governed by the rules and articles of war. This section,

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therefore, does not embrace the engineers, of whom, as yet, nothing had been said. The sections succeeding the 10th are wholly employed, as the preceding ones had been, in regulations confined to the regiments of artillery and infantry, till we come down to section 26th, where, for the first time, the subject of the engineers is taken up. That section authorizes and empowers the President, when he shall deem it expedient, to organize and establish a corps of engineers, to consist of one engineer; with the pay, rank, and emoluments of a major; two assistant engineers, with the pay, rank, and emoluments of captains; two other assistant engineers, with the pay, rank, and emoluments of first lieutenants; two other assistant engineers, with the pay, rank, and emoluments of second lieutenant; *and ten cadets*, with the pay of sixteen dollars per month and two rations per day;—with a power to make promotions, so as not to exceed one colonel, one lieutenant colonel, two majors, four captains, four first lieutenants, four second lieutenants, and so as that the whole corps shall at no time exceed twenty officers and cadets. The 27th section provides that the *said corps*, (composed solely of officers and cadets,) when so organized, shall be stationed at West Point, in the State of New York, *and shall constitute a military academy*; and that the engineers, assistant engineers, and cadets of the said corps, shall be subject, at all times, to do duty in such places, and on such service, as the President of the United States shall direct. The 28th section assigns the superintendence of the academy to the principal engineer, and authorizes the Secretary of War, under such regulations as the President should direct, to procure the necessary books, &c., for the use of the institution. The 29th section is a repealing one; and here the law stops. There is no provision that this corps shall be subject to the rules and articles of war.

It is here worthy of observation, that this is the first time that *a separate corps* of engineers had been raised by our laws; that there is no instance in the annals of Congress in which a new description of troops has been authorized without an express provision that they shall be subject to the rules and articles of war; that in this very law there is, in the preceding part of it, such a provision *in relation to the artillerists and in-*

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fantry, which gives this omission with regard to the engineers tenfold significance; and that, although a military character has been impressed on this corps, as well by their name as their being fixed as part of the peace establishment, yet that character is, comparatively speaking, rather of an equivocal cast; whereas, in every other case where the most distant and unequivocal military character has been impressed on a newly raised corps, the provision which is wanting here has nevertheless been added. It seems to me very difficult to conceive why, in this identical law, it was thought necessary that the provision should have been so expressly introduced as to the regiments of artillery and infantry, (which were most clearly of an unequivocal military character,) and yet that it should have been so palpably omitted in relation to the engineers—a new corps, who were constituted an academy, and liable to military duty only when called on by the President—unless Congress intended the exemption with regard to the latter corps. But whether they did in fact intend it or not, a review of all the analogous laws which they have passed, the component parts of this very law, and the principle that the trial by jury is not to be ousted by implication, do, in my opinion, justify the conclusion, that, so far as the question rests on the act of the 16th March, 1802, the members of this military academy were not subject to the rules and articles of war.

Next in order follows the act of the 25th February, 1803, in addition to the preceding act, (vol. 3, Laws U. S., p. 530.) The first section of this act contains merely a provision in relation to the regiment of artillerists. The second section authorizes the President to appoint one teacher of the French language, and one teacher of drawing, to be attached to the corps of engineers, whose compensation shall not exceed the pay and emoluments of a captain in the line of the army. The third section provides that “the commanding officer of the corps of engineers be authorized to *enlist, for not less than three years*, one artificer and eighteen men, to aid in making practical experiments, and for other purposes; to receive the same pay, rations, and clothing as are allowed to the artificers and privates in the army of the United States, and the same bounty when enlisted for five years, *and to be subject to the*

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rules and articles of war." Who are to be so subject? Most clearly those who are the exclusive objects of the rest of the provisions in this section, to wit: the artificer and the eighteen men. If it should be asked what reason there can be why these men should be more subject to the rules and articles of war than the engineers and cadets who had before constituted the corps, it would be sufficient answer that Congress have so provided. But it seems to me that, if it were necessary to assign a further reason, one might be found without difficulty, in the different footing in other respects in which the two parts of this corps stand; for it is observable that the act of the 16th March, 1802, does not require the engineers and cadets to be *enlisted at all*, much less to be *enlisted for a particular time*. The language of that section is, that the President may, when he shall deem it expedient, *organize and establish* a corps of engineers not from the army then on hand; for, if it had been so intended, it would have been so expressed, as it was in the 9th section as to the regiments of artillerists and infantry. But there is a further reason why it could not have been intended to be drawn from the army then on hand; for, by the 9th section of the law, all the officers and privates of that army, who were not taken into the regiments of artillerists and infantry, were directed to be discharged on the 1st of April, 1802; whereas the corps of engineers were to be organized and established whenever thereafter the President should deem it expedient. Were they to be drawn from the regiments of artillerists and infantry authorized by the previous sections of the act of 1802? It is not so said; and the inference is excluded by the precision in point of number, and the compact and separate form into which those regiments had been previously organized. I understand the 26th section, then, as authorizing the President to organize and establish this new corps by a new and original contract with the members who were to compose it; they were not to be *enlisted*, but engaged for the price stipulated by the law. It is not said for what length of time they were to be engaged; nor is it even said that they were to be commissioned; they were rather an anomalous species of body, to be called into being whenever the President should deem it expedient, and to be formed into a school—an academy

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for military instruction; whereas the artificer and the eighteen men here authorized are *enlisted for three years, and put, in all respects, on a footing with the artificers and privates of the army.* Why is the provision of subjection to the rules and articles of war expressly made as to these men, and again omitted as to the engineers and cadets, as well as to the teachers of French and drawing here authorized, unless the omission was intended? Would it not be a most arbitrary construction which should impute to Congress the intention to subject the original corps of engineers, and the masters now added, to military law, when, on two occasions, most obviously inviting them to the expression of that intention, if it existed, they should, nevertheless, decline that expression, and leave it to be gathered by an inference—an inference, too, unwarranted by their whole course in analogous cases? I cannot think that such an interpretation of the laws would be sound; and, therefore, *as yet*, I see nothing which subjects the engineers, cadets, and teachers at West Point, to the rules and articles of war. Before I leave this part of the subject, I will observe, that, if I am wrong in supposing that the original corps of engineers at West Point was not to be drawn from the then existing army, or from the regiments of artillery and infantry which were thereafter to constitute the peace-establishment of the United States; and if, on the contrary, they were (according to Colonel Hindman's suggestions) to be drawn "from the different arms of the army," (composing the peace-establishment, I suppose he means,) it would not yet follow that, because while belonging to the artillery and infantry they were subject to the rules and articles of war, they would, therefore, be subject in their new character of engineers. On the contrary, every inference would still follow, from the very palpable omission of Congress so to subject them; and, not to multiply instances of the manner in which Congress have legislated in parallel cases, I will call your attention to one only: it is that which you will find in chapter 532, vol. 4, Laws of the United States, page 541. This act, providing for the destination of a part of the troops authorized to be raised by a previous law, and by that previous law expressly subjected to martial law, because it so far changes that destination from the general purposes of war as to limit it

to the defence of the sea-board, expressly repeats their subjection to the rules and articles of war, lest from the mere change of destination they should be considered as being absolved from their liability to those rules and articles under the original law.

We come now to the act of the 10th April, 1806, "for establishing rules and articles for the government of the armies of the United States." The 96th article of these rules and articles is in these words: "All officers, conductors, gunners, matrosses, drivers, *or other persons whatsoever*, receiving pay or hire in the service of the artillery *or corps of engineers* of the United States, shall be governed by the aforesaid rules and articles, and shall be subject to be tried by courts-martial, in like manner with the officers and soldiers of the other troops in the service of the United States." At the passage of this law there was no corps of engineers except that at West Point; they must, therefore, have been intended; and this is rendered the more clear by the consideration that the article in the old rules and articles, from which this is copied, has not the words "or corps of engineers."—(See 1st Graydon, appendix, p. 155, § xvi, art. 1.) These words, therefore, being in the year 1806 for the first time interpolated by Congress, and there being no body to fit the description except the corps of engineers at West Point, I do not see how the conclusion can be fairly avoided, that it was intended to apply to them. They were a corps of engineers; they received the pay of the United States; they were in the service of the United States—as much so as any other troops on the peace establishment: therefore, that corps, *and all other persons in its service*, now became subject to martial law; not only the engineers, cadets, artificers, and eighteen privates, who constituted the corps, but the masters or teachers of the French and drawing, who were *in the service of that corps*. So stood the law when the act of the 29th of April, 1812, was passed, entitled "An act making further provision for the corps of engineers." This act, by the first section, provides that certain officers be added to the corps of engineers, and that there be attached to that corps a company of bombardiers, sappers, and miners. The 2d section provides that the military academy shall consist of the corps of engineers (including, of course, the ten cadets who had been

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originally attached, and then formed a part of it) and certain new professors, in addition to the teachers of the French language and drawing, already provided. (I will merely remark, in passing, that these new professors, thus attached to the corps of engineers, come within the description of the 96th article of the permanent act of 1806, establishing the rules and articles of war, as *persons receiving pay in the service of that corps.*) The 3d section of the act of 1812 provides, that “the *cadets* heretofore appointed in the service of the United States, whether of *artillery, cavalry, riflemen, or infantry,*” (omitting in the enumeration those who had been theretofore appointed in the service of *the corps of engineers,*) “or that may in future be appointed, as hereinafter provided, shall at no time exceed two hundred and fifty; that they may be attached, at the discretion of the President, to the military academy, and be subject to the established regulations thereof; that they shall be arranged into companies,” &c. The section, after going on to describe the discipline of the cadets, proceeds to direct the manner of appointment and qualifications of the cadets thereafter to be appointed. If it were material to the decision of the question which you have submitted to me, I should say that I differed with Colonel Hindman and the court-martial in the opinion, that, by the 3d section, the cadets who had previously constituted a part of the corps of engineers were abolished, or amalgamated with the two hundred and fifty authorized by that section to be attached to the academy; for by the second section it is expressly declared that “the military academy shall consist of the corps of engineers”—that is, the existing corps expressly composed, in part, under the act of 1802, of the ten cadets, who, so far from being abolished, are hereby confirmed; and when you come to examine the component parts of the two hundred and fifty new cadets who are authorized by the third section, you will find no part of the description which applies to the ten cadets who had been previously attached to the corps of engineers; for these ten had not been “heretofore appointed in the service of the United States,” either of *artillery, cavalry, riflemen, or infantry*; the corps of engineers having been by the previous laws erected into a corps *distinct from them all*, and known by a different name; nor were those ten

cadets, already appointed, included in the only remaining part of the description of those "who may *in future* be appointed *in the manner hereinafter provided.*" Whatever might have been the intention of Congress, it is very clear, to my judgment, that they have, by this third section, authorized the President to add to the establishment two hundred and fifty cadets, exclusive of the ten who had been previously appointed under the act of 1802. But to proceed directly to the point in question: the cadets embraced in the third section were to be attached, at the discretion of the President, to the military academy; and when so attached, they were to be subject to the established regulations thereof. What is the meaning of this phrase, *attached to the military academy*? What is meant by *the military academy*? Does it mean the buildings in which the military education was taught? No; Congress have not left us in the dark on this point; they have expressly defined what they mean by the phrase, *the military academy*. By the 27th section of the act of 1802 they have expressly declared *that the corps of engineers shall constitute this military academy*; and by the 2d section of the act immediately under consideration, they have repeated "*that the military academy shall consist of the corps of engineers,*" &c. By attaching these cadets, therefore, to the military academy, is clearly meant *attaching them to the corps of engineers, with their train of professors who constitute that academy; and, while so attached, they compose a part of that corps.* Being thus identified with the corps, if this were a case in which implication could be suffered to speak, it might be fairly held that they became, by irresistible consequence, subject to all the laws which bound that corps. Congress, however, with their habitual caution, have saved us the necessity of collecting their intention by inference, in this respect, by expressly declaring that the cadets thus attached to the pre-existing military body, known by the name of *the military academy*, should be subject to the *established regulations* of that body. What were these regulations? One of them was (under the act of 1802) that that body should be subject at all times to do duty in such places and on such service as the President should direct. Another was (under the act of 1806) that that body should be governed by the rules

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and articles of war, and be subject to be tried by courts-martial; and the section under consideration expressly declares that the two hundred and fifty cadets shall be subject to the same regulations.

It is said, however, by Colonel Hindman, that the 96th article of the rules and articles of war embraces only the case of cadets in the service of the artillery and corps of engineers; and that these cadets, not being in the service of either of those corps, or of any other corps, are not comprehended by that article. In answer to this, it might be very fairly insisted, that those cadets, *after their attachment to the corps of engineers*, come within the very description of the 96th article—being *persons who receive pay in the service of the corps of engineers*. But let it be admitted that the new cadets are not within the description of the 96th article: can it be denied that the original body who composed the military academy were within that description? For if they were, the act of 1812 places the new cadets precisely on the same footing, by subjecting them expressly to the same established regulations.

Lest it should be thought that this phrase *established regulations* has a narrower sense than that which I have assigned to it—that it alludes, for example, to the allotment of the hours for study, for exercise, for relaxation and refreshment, for sleep, &c.—it may not be amiss to observe that “the same rules and regulations” are the terms employed by Congress, in parallel cases, with an unquestionable reference to a subjection to martial law. In support of this, see chap. 376, § 2, (vol. iv, p. 405,) chap. 532, § 2, p. 541. In chap. 599, § 4, (vol. iv, p. 645,) the phrase here is, that the new troops *shall be placed, in every respect, on the same footing as the other regular troops of the United States*. But if this phrase “established regulations” is to have the restricted sense which I have supposed, then the new cadets are not subject to do duty when and where and how the President shall direct. The construction which would subject them to this duty cannot fairly avoid the other.

It is suggested by Colonel Hindman, on behalf of the court-martial, that these cadets are merely students. In one sense they are so; and so was the old corps known under the name of artillerists and engineers; so was the original corps of engi-

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neers who constituted the military academy. For both "books, instruments, and apparatus for study," were expressly provided by law; yet this character of students did not exempt them from a liability to martial law. But if the suggestion is intended to place these cadets on the footing of civil students, clothed with all their civil privileges and immunities, it is proper to remark that these cadets occupy a very different ground. They are enlisted soldiers; they engage, like soldiers, to serve five years, unless sooner discharged; they receive the pay, rations, and emoluments of sergeants; they are bound to perform military duty in such places and on such service as the commander-in-chief of the army of the United States shall order; and, finally, by the act of the 3d March, 1815, fixing "the military peace establishment of the United States," the corps to which they were attached, and of which they form a part, is expressly recognised as a part of that military establishment. (See the act, vol. 4, Laws United States, p. 825.)

I have given you all this trouble, sir, from my respect for the court-martial with whom I have been obliged to differ, as well as from the real delicacy and importance of the question; and after every allowance for the genius of our constitution and laws, and after rejecting everything like implication and inference from the consideration of this question, I come to the conclusion that the corps at West Point form a part of the land forces of the United States, and have been constitutionally subjected by Congress to the rules and articles of war, and to trial by court-martial.

I have the honor to be, &c.,

WM. WIRT.

To the SECRETARY OF WAR.

 PRE-EMPTIONS ON MISSOURI BOUNTY LANDS.

The rights of pre-emption given to settlers by the act of the 12th April, 1814, attach to settlers on lands set apart for bounties by the act of 6th May, 1812, who settled thereon prior to the surveys; but not to those who settled thereon subsequently.

The President cannot appoint registers and receivers for the land districts, until there shall be sufficient land surveyed to authorize the opening of land offices.

Pre-emption on Missouri Bounty Lands.

The pre-emption claims cannot be ascertained and decided upon by any other agency than that of registers and receivers of the land districts in which they are situate.

Legislation, to free the subject of granting patents from embarrassment, recommended.

OFFICE OF THE ATTORNEY GENERAL,

August 28, 1819.

SIR: I have adverted to the several acts of Congress to which you have referred me by your statement relative to the public lands west of the Mississippi and in the Territory of Missouri, and have now the honor to answer the questions you have submitted for my opinion.

1. Your first question is, whether the rights of pre-emption given to settlers by the act of the 12th April, 1814, can be allowed within the range of country designated for military bounties?

Answer.—The act which provides for designating the military bounty lands, passed on the 6th May, 1812, directs, among other things, that the President shall cause to be surveyed two millions of acres in the Territory of Louisiana, (now Missouri,) and provides that the lands *thus surveyed* (with certain exceptions, which do not touch this question) *shall be set apart and reserved* for satisfying the bounties. The act of the 12th April, 1814, provides "that every person (and their legal representatives) who has actually inhabited and cultivated a tract of land lying in the Territory of Missouri, *which tract is not rightfully claimed by any other person*, and who shall not have removed from said Territory, shall be entitled to the right of pre-emption in the purchase thereof." From the general language of this act, the right of pre-emption runs through the whole Territory, except where the tract for which the settler contends is rightfully claimed by any other person. No such claim can, I conceive, exist as to lands *which were vacant and unappropriated at the time of the settlement*. The military bounty lands are set apart and reserved (*i. e.* appropriated) *from the time of the surveys*. My opinion, therefore, is, that all settlers on these lands, *prior to the surveys*, are entitled to the right of pre-emption, under the act of the 12th April, 1814. But not so those who have settled on them since the surveys

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were made; because, after the surveys, they were no longer vacant and unappropriated. From that time, a *rightful claim* existed in behalf of the soldiers, which a subsequent settlement could not divest. The survey was notice to all the world, and the settler was bound, at his peril, to take notice of it; but, with regard to those who made their settlements before the surveys, they had no such notice, and stand upon the same ground of merit with other settlers.

2. Your second question is, Can the President now proceed to the appointment of the registers and receivers of the land districts created by the act of the 17th February, 1818; no public lands, distinct from the military lands, having been surveyed in those districts?

Answer. The first section of this act announces the purpose for which the new land offices were to be opened; it was *for the disposal of the lands of the United States west of the Mississippi river, in the Territory of Missouri.* When we look to the previous laws which establish the system for the sale of public lands, we can have little doubt what kind of disposal was here intended; it is the phrase constantly used, either in the title or body of those laws, when provision is made for a general sale of all the lands within the district designated. The first section of the act immediately before us having arranged the land districts for which the new offices were to be opened, the second section gives to the President the authority in question: "So soon as, in the opinion of the President, there shall be a *sufficient quantity* of the public lands surveyed, within all or either of the land districts hereby established, to authorize the opening of all or either of the land offices aforesaid, he shall cause the same to be opened, and proceed, from time to time, to appoint, by and with the advice and consent of the Senate, for each of the said offices, a register and receiver." Here, the power of the President to appoint does not arise until there shall have been a *sufficient quantity of the public lands surveyed* to justify opening the offices. This is not the language which would have been used, if military surveys had been intended; and even if this could be a question, all doubt is removed when we proceed to the third section, wherein the President is authorized, on opening any one of these land offi-

Pre-emption on Missouri Bounty Lands.

ces, to direct so much of the public lands lying in such district as shall have been surveyed according to law, *to be offered for sale*—which most certainly could not have been intended as to military bounty lands. It is to my judgment, therefore, very clear that the single case in the contemplation of Congress, as being that on which the President's power of appointment is to arise, was the return of surveys of such of the public lands as are for sale; and that any appointment made by him previous to such returns would be void, as being made without authority.

It is asked, whether the law cannot be so construed as to intend the appointment *whenever there are duties for the register and receiver to perform*? The answer is, that Congress have clearly limited the power of appointment to a single and a different contingency, to wit: the survey of a sufficient quantity of the public lands to justify opening the offices for sale. Their language clearly indicates this as the single contingency on which the power is to arise; and the legal maxim is, that whenever the language of a law is free from doubt, there is no room for construction. At the same time, there can be little question, that if Congress had looked to the case which has occurred, of pre-emption rights within the range of the military bounty lands which required to be acted on by the register and receiver, by the provisions of the act of the 12th of April, 1814, they would have authorized their appointment in time to meet that contingency.

3. Another question is, whether the pre-emption claims can be ascertained and decided upon by any other agency than that of the registers and receivers of the land districts in which they are situate?

Answer. I think not. The power is expressly given to them, without any power of revision elsewhere. The language of the law is, that "in every case where it shall appear, *to the satisfaction of the register and receiver of public moneys of the land office*, that any person who has delivered his claim of notice is entitled, according to the provisions of this act, to a preference, such person so entitled shall have a right to enter the same, on his producing a receipt from the receiver," &c.

4. If the register and receiver of public moneys cannot now

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be appointed, shall the issuing of military patents be now suspended until the public lands shall be surveyed, or until legislative interposition can be had? Or,

5. Shall the lottery and issue of patents be continued, without regard to the pre-emption claims which may exist in the range of country designated for the location of the military bounties?

These are questions rather of expediency than of law. I will, however, beg leave respectfully to suggest, that if the Executive concur in the opinion, that settlements prior to the surveys of the military lands give the settlers a right of pre-emption in those lands, they will find themselves in the predicament of being called on to execute two conflicting laws; and cannot proceed to allot and grant the military lands throughout, without the danger (and, indeed, the certainty) of counteracting that which secures the right of pre-emption. The obligation on the Executive to execute both laws is equal; and since it is impossible to execute both without the aid of registers and receivers, (whom, as yet, the President is not authorized to appoint,) I would, with great deference, advise the suspension of the lottery and issue of military patents, until the legislature can clear the course by a new law.

I have the honor to be, &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

 COURTS-MARTIAL.

A plea before a court-martial of a former arrest and discharge is bad; a former trial, only, is a defence under the 87th article of the Rules and Articles of War.

As to the perspicuity and precision of the charges, if the description of the offence is sufficiently clear to inform the accused of the military offence for which he is to be tried, and to enable him to prepare his defence, it is sufficient.

OFFICE OF THE ATTORNEY GENERAL,

August 29, 1819.

SIR: I have examined the proceedings of the general court-martial held at Detroit last month, in the case of Lieutenant

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Cassaway, and have now the honor to hand you my opinion on the points of law made by the lieutenant in his defence.

He offered, first, a plea in bar to the trial, setting forth a former *arrest* on the same charges, and a discharge *without trial*. His plea was not well founded. The only provision on the subject is that which is contained in the 87th article of the Rules and Articles of War: "no officer, non commissioned officer, soldier, or follower of the army, shall be *tried* a second time for the same offence." But a *mere arrest* is no *trial*; and the case, therefore, is not within the provision.

The reference made in the plea to the 7th article of the amendments to the constitution of the United States, is an error either in the pleader or in the copyist; the article intended is, I presume, the 5th amendment, which provides that no person shall "be subject, for the same offence, *to be twice put in jeopardy for life or limb*." But a mere arrest, even in cases punishable in life or limb, is not considered as constituting this jeopardy. The principle is derived to us immediately from the common law. It is a maxim of this law, "that a man shall not be brought into danger of his life more than once for the same offence;" but, to give the benefit of this maxim, it is necessary that he should have been actually *acquitted* or *convicted on a former trial*, and the record of this fact must be produced. In Lieutenant Cassaway's case, there has been no former *acquittal* or *conviction*, and *no former trial*; and therefore there is no legal ground for his plea in bar.

Meantime I must suggest that the steps which have been taken in relation to Lieutenant Cassaway in this case, as stated in the evidence of General Macomb, are not free from legal censure. (See Tyler's Essay on Military Law, pages 165-6.) The note on the last page is particularly worthy of notice: "*every charge should be preferred at the time when the fact or facts on which it turns are recent; or, if knowingly passed over,*" (as was clearly the case here,) "*ought not, either in candor or in justice, to be in future brought into question.*"

The lieutenant, in his defence, objects to the want of precision in the charges: 1. As to *the time* at which the offences are alleged to have been committed. The writers on military law whom he quotes (viz: 2d McArthur, p. 6; Tyler, 219;

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and Macomb, 65-6) do require minuteness and precision in specifying the time, "whenever it is possible to be thus particular." They all agree, however, that this minuteness and precision are not always within the reach of the prosecutor; hence they allow him a latitude in the statement of the time. "He may," says Tytler, (and Macomb after him, pages 66-7,) "charge the fact or facts to have been committed on such a day of such a month, or on one or other of the days of that month, or of the month immediately preceding, or that immediately following." McArthur says: "But as the crime charged may have been committed, and yet there be a mistake or doubt as to the precise day, the consequences of such a mistake may be guarded against by adding 'or on the day or days preceding, or on the day or days immediately following, or,' " he adds, to one of the days of the month immediately preceding or following! So that the books allow a range of three months as to the laying of the time. The time is laid with much more precision in the specifications against Lieutenant Cassaway, and are sufficient, on authority. This latitude is not allowable in courts of civil jurisdiction; and it is therefore needless to follow the prisoner in his references to Hale and Hawkins.

2. The want of precision in the description of the offences. The prisoner says that technical words must be used in describing offences: that the technical word in the 45th article is *drunkenness*, whereas the word used in the charge is *inebriation*. It would certainly have been more formal to have used the term which is used in the Article of War, if the design was to punish the prisoner upon that article; the description, however, is sufficiently clear to inform him of the military offence for which he was to be tried, and to enable him to prepare his defence, which is all that is necessary in a case of this kind.

I have the honor to be, &c.,

WM. WIRT.

To the SECRETARY OF WAR.

COURTS-MARTIAL.

Courts-martial have the power to reconsider any judgment and sentence rendered by them during the term or sitting, and to change the judgment and

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sentence even to death where the former imposed only imprisonment. (Tyler, pp. 173, 345.) But the execution of a sentence of death is murder unless the court pronouncing it consisted of thirteen commissioned officers, where that number could have been convened without manifest injury to the service. (See 64th article of Rules and Articles of War.)

OFFICE OF THE ATTORNEY GENERAL,

August 29, 1819.

SIR: I have examined the proceedings of the general court-martial held at Fort Shelby, in June last, in the case of private Peter Williamson, charged with desertion, to which the prisoner pleaded guilty. The court, on the 14th of June, sentenced him to confinement at hard labor, with a ball and chain attached to his leg, for the remaining term of his enlistment, &c. ; and, having adjourned to the ensuing day, at the suggestion of one of the members of the court, the sentence in the case of Peter Williamson was reconsidered, and, after due deliberation, the court substituted the following sentence: "That he, the said Peter Williamson, be shot to death." The question submitted to me is, whether the court had the power, on the 15th, to change the sentence which they had pronounced on the preceding day, and to make the substitution, which they did make, of the sentence of death.

In courts of civil jurisdiction, when sitting even in criminal cases, the court is not concluded by an opinion which they may have expressed in any one day, but has the power to reconsider; and, after such opinion, at any future day of its session, the whole subject being completely within its control until the end of the term. On recurring to the authors who have treated of military law, I perceive no difference between martial and civil courts in this respect: the term of the martial court continues from the time of its assemblage until its adjournment *sine die*; the term of the civil courts of the nation continues from the time of their assemblage until their adjournment to the court in course. And I am not apprized of any difference in the powers of the two courts over the subjects which severally belong to them during the continuance of their respective terms. If a civil court of criminal jurisdiction, therefore, may lawfully reconsider and alter, during the term, any opinion which it may have pronounced on a previous day of

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the same term; so, in like manner, I conceive, may a court-martial.

An opinion prevails, I understand, that when a court martial has once expressed and entered on its minutes an opinion on any subject, its power over that subject is gone, and the court *quoad hoc* is at an end; or rather its power is gone, because the court is at an end. But I have met with no authority which supports this opinion. A general court-martial convened for general purposes, (as its name imports,) or, as the record here expresses it, "for the trial of such prisoners as may be brought before it," continues a court with full powers while it has any business to do, of which it alone is the judge; and, while it does so continue a court, its power of judicial deliberation and decision over all the subjects which may have been brought before it is as full on the last day of its sittings as on any preceding day. If it be not so, it differs in its constitution from all other courts with which I am acquainted. And I cannot, therefore, adopt the opinion that such a difference exists, unless some authority of weight can be shown for it; or unless some reason for this difference, peculiarly applicable to courts-martial, can be shown: neither of which have I yet been able to discover.

The idea that the court is at an end, and its power gone, by the act of entering an opinion on the journal of its secret proceedings, might be productive of infinite mischief, as it would preclude the power of correcting any and every error, even of misconception or inadvertence, and is utterly inconsistent with every sound notion of a deliberative body. Whereas, leaving the court-martial, like the civil court, in full possession of the power of considering and reconsidering the subjects which belong to it during the whole of its session, while it gives them all the full advantage of time, caution, circumspection, and the best use of their faculties, is not liable, so far as I can discern, to any one disadvantage.

This position, too, that the court is at an end, and its power gone, by the expression of its first opinion, is so far from being warranted by the received authorities, that the direct reverse of it is declared by them to be the law. They insist that the court is not dissolved, *even by its own adjournment sine die*;

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that it can be finally dissolved *only by the authority of the officer who called it*, being, until such dissolution, subject to be reconvened *by his order, to reconsider the opinion they have pronounced*. The authorities to this point are express: "As no sentence of a general court-martial (says Tyler, p. 173) is complete until it has received the approbation of his Majesty, or of the commander-in-chief, to whom that power has been specially delegated, the King, or such commander, disapproving of the sentence, may order the court to reconsider or review their proceedings, and recommend to them an alteration of their judgment." And again, (p. 345 :) "The revisal of a sentence by the same court which pronounced it, is not, properly speaking, an appeal; which always implies the review by one court of judicature of the sentence of another." It is no more than a reconsideration of the cause by the same tribunal, on a remittal and recommendation of the commander, who is "authorized to approve or to suspend its sentences." "A power," he adds, "of high expediency and good policy, and which has often been exercised to the most beneficial ends." Macomb, 32, 33, and also McArthur, 173, are in strict accordance with these quotations. Major Macomb, in his appendix, (pp. 195, 196,) gives the form of an order by a general officer dissolving a court after approving its sentence, which is apparently extracted from a case that really occurred; and shows the practice, as well as the theory, of the courts to be in direct conflict with the idea that the court is at an end by the expression of its opinion on any one day of its sittings.

On the whole, I am of the opinion that the court had the power to alter, on the 15th June, the opinion which they had expressed on the preceding day; and that their final opinion on the 15th is regularly and legally pronounced. This being a case, however, of life and death, I beg leave to recall to your recollection, sir, that, by the 64th article of the Rules and Articles of War, it is required that general courts-martial shall not consist of less than thirteen, where that number can be convened *without manifest injury to the service*. The court in the case of Williamson having consisted of *five* commissioned officers only, was not a legal court if *thirteen* could have been convened without manifest injury to the service. The phrase,

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you will observe, is not "where that number (thirteen) can be *conveniently* convened," but where they *can* be convened *at all*, not only without *probable* injury, but without *manifest* injury to the service. It is difficult to conceive an emergency in time of peace so pressing as to disable the general officer who orders the court from convening thirteen commissioned officers on a trial of life and death, *without manifest injury to the service*. And if a smaller number act, without such manifest emergency, I repeat that they are not a lawful court; and an execution under their sentence would be murder. With all the respect, therefore, which we ought to feel for our officers, I suggest it to you, sir, as a matter of legal propriety, that, *in every case of life and death at least*, the President ought to be satisfied of the *manifest injury* which the service would have sustained in convening a court of *thirteen*, before he gives his sanction to a sentence of death by a smaller number.

I have the honor to be, &c.,

WM. WIRT.

To the SECRETARY OF WAR.

 RESCINDING PATENTS FOR LAND.

The holder of an unpatented location cannot dispossess one holding under a patent from the United States by any common law proceeding, but he may institute a proceeding in chancery for the purpose of rescinding a patent improperly granted.

The general standard of remuneration, where title fails, is the purchase money, and interest; the improvements to be paid for by the successful party.

ATTORNEY GENERAL'S OFFICE,

August 31, 1819.

SIR: There is no legal procedure (by which *I* mean, as I presume you do, a procedure at common law) by which the holder of an unpatented location can dispossess persons holding under patents derived from the United States. But the holder of a location may institute a suit in chancery for the purpose of rescinding a patent which has been improperly granted to another; and this, I conjecture, is what is meditated in the case submitted by Mr. Meigs. General McArthur, and those who claim under him, mean (as I infer from the case, so loosely stated) to insist on the paramount title of Virginia to appropriate, by her warrant, what has been called

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"the military reserve in Ohio." They mean to deny that Congress alone had the right to say what should be the limits of that reserve; or, if Congress alone had this right, they will then insist that Congress has exercised it in such a way as to confirm the exclusive right of Virginia to appropriate the lands in dispute, and to abolish the grants to purchasers under the United States. If they are right in any one of these positions, the result will be a decree rescinding the patents granted to purchasers under the United States as having been improvidently granted. I understand from Mr. Meigs's letter that 60,000 acres of land are in this predicament. The case is important, and the questions, *if I have rightly conceived them*, not free from difficulty. I do not understand that an opinion is asked of me on the probable fate of the meditated suit; if it be, we must have the case more precisely stated, so as to be on a certainty as to the character, object, and grounds of the suit, instead of being left, as we now are, to conjecture.

As to the ultimate responsibility of the United States, in case their patents should be rescinded: I cannot conceive what measure of responsibility Mr. Meigs's correspondent can have adopted, to carry it up to a million of dollars for the loss of lands in a country whose whole area is only 60,000 acres. The general standard of remuneration, in such cases, is the purchase money, with interest. As to the improvements, they are, I take it, to be paid for by the successful party, who reaps the benefit of them. Such is the general principle in the English courts of equity, as to permanently beneficial improvements made by a holder who thinks himself the rightful proprietor, but who is afterwards ousted from the possession; and such also is the statutory regulation in some of the new States. I cannot say it is so in Ohio, not having been furnished with the laws of that State.

Until I know something more precise of the nature of this controversy, I cannot estimate the difficulty of the case, nor consequently advise, farther than I have incidentally done, as to the expediency of the United States engaging other counsel to aid in the defence.

I am, &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

Navy Agents—Extra Service.

NAVY AGENTS—EXTRA SERVICE.

The office of navy agent not having been created by law, there has been no law defining its duties, from which to determine whether the navy agent at New York has or has not rendered extra service.

In general, it is the duty of navy agents to execute such instructions as they may from time to time receive from the executive departments.

The Secretary of the Navy has the contingent fund of the department entirely at his disposal, from which he may draw for the purpose of compensating any services rendered in any of the relations of his department which are of a contingent character.

OFFICE OF THE ATTORNEY GENERAL,

September, 1819.

SIR: In answering the questions relative to the case of the late Doctor Bullus, submitted by the Secretary of the Navy, through you, for my opinion, I must beg leave to invert their order, and to consider two of them together.

1. Is the superintendence of the erection of the public buildings in the navy-yard at New York, under the orders of the Secretary of the Navy, to be deemed *extra* service in the navy agent at that place?

2. Did the purchasing and forwarding from New York supplies for the lake service, under like orders, properly belong to the duties of Doctor Bullus, as navy agent for New York? or are these acts also to be considered as *extra* service?

It is not possible to say whether any service be *extra* to the duties of an office, unless we know what those duties are. These questions were, I presume, referred to me under the impression that our laws had defined the duties of navy agents; but this is not the case. The office was not created by law; and there is not, and never has been, among us, any law which defined its duties.

In tracing the origin of this office, in order to see if I could gain any ground on which to answer the Secretary's questions as a lawyer, I find that the office grew out of the act of Congress of the 27th March, 1794, entitled "An act to provide a naval armament." On the 21st April following, the Secretary of War (for it was before the separation of the War and Navy Departments) writes to the Secretary of the Treasury that the President had come to the conclusion to employ naval agents,

for the purpose of procuring the labor and materials necessary for building the ships authorized by that act, and superintending the work. On the 25th June, he gives him the names of three agents who were appointed in pursuance of this object; and, on the 14th of the following month, he requests the Secretary of the Treasury to have placed in the hands of the naval agents, who had definitively accepted of their appointments, (and whose names he gives,) certain sums of money with which to commence their operations. We have here very distinctly the origin of the office; but neither the books of the War nor of the Navy Departments show the commissions or letters of appointment to those first agents, so as to give us the duties which were assigned to them, and which, of course, by their acceptance, they undertook to perform. From that day to the present, however, navy agents have continued to be appointed by letters which are extant, have discharged their duties under the orders and instructions of the Navy Department, and have settled their accounts of the disbursements of public moneys placed in their hands; so that *practice* must, I presume, have settled by this time the range of their duties. And to the practice of the department, (in the silence of the law,) I must beg permission to refer back the questions which have been submitted to me.

If there be no practice to guide the Secretary to an ascertainment of the duties of navy agent, (though this is scarcely conceivable,) no other source remains from which we can hope to collect the necessary information, save the letters of appointment or commission under which Doctor Bullus consented to act. Let us see, then, whether these furnish us with a standard of the duties in question.

Doctor Bullus was originally appointed prior to the act of 3d March, 1809, and, consequently, when the power of appointment was in the President alone. The letter announcing his appointment bears date the 8th of February, 1808, and, after that annunciation, proceeds thus: "Your general duties as navy agent are, *to execute such instructions as you will, from time to time, receive from this department.*" And this is the only account which the letter gives of the duties of the office. It proceeds next to the compensation, in these words: "As a

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compensation for your services, you will be allowed two per cent. on all sums of money paid and expended by you on public account; one per cent. on all sums of money received on all public property sold by you; and a half per cent. on all sums of money paid for the purpose of recruiting, paying off a crew, and the like services." If, in the non-existence of any law, or any practice of the Navy Department, we are to look to this letter as giving us the only measure of the duties of navy agent, we can scarcely say that they are without any limits, except the discretion of the President and Secretary of the Navy. Nor was the appointee at all interested in having them more definite; because the more his duties were multiplied, (involving, as they necessarily must, from their general nature, the expenditure or receipt of public moneys,) the more his commissions were unavoidably augmented; and had the terms of that appointment continued, it is much more probable that an appointee would have complained of having too little than too much to do. In this posture of things came the act of the 3d March, 1809, which, recognising the office *without any definition of its duties*, affects it only as to the mode of appointment and the compensation; requiring, as to the former, that it should be made by and with the advice and consent of the Senate; and, as to the latter, that it should *in no instance* exceed the compensation of the purveyor. Under this law, Doctor Bullus was nominated by the President, and appointed anew, with the concurrence of the Senate, as navy agent of the port of New York. His commission, under this new appointment, gives only the following designation of his duties: "He is therefore carefully and diligently to discharge the duties of navy agent, by doing and performing all manner of things thereunto belonging; and he is to observe and follow such orders and directions, from time to time, as he shall receive from me or the future President of the United States of America, or his superior officer set over him." Under language so general as this, I cannot say that any act which the President or Secretary of the Navy (who is a superior officer set over him) might call upon the agent at New York to perform for the naval service of the United States, was *extra* service; more especially if it was an act for the performance of which it was not necessary for

the agent personally to leave the place of his appointment. On the contrary, in the absence of all positive law and all explanatory practice, I am of opinion that Doctor Bullus, by accepting an office whose duties were declared by the commission of his appointment to extend to the execution of all such orders and instructions as he should from time to time receive from the President of the United States and the Secretary of the Navy, had placed himself at their discretion, and subjected himself, as a matter of official duty, to an observance and obedience of all instructions and orders which should come from those officers touching the service of the navy; and on this hypothesis, the pleasure of the President and Secretary of the Navy giving the only law upon the subject, no service for the advantage of the navy, which they have called upon him to perform, can, with any propriety, be denominated *extra service*.

I can see nothing which opposes this conclusion, save the fact that Doctor Bullus was appointed navy agent *for the port of New York*; and hence the duties which it was contemplated for him to perform, it is natural to suppose, had relation to that port. Had his commission stopped here, I see not how the objection could have been answered; but what are we to say to the copulative *and*, which ushers in a new class of duties, subjecting the appointee to the orders of the President and Secretary of the Navy *without qualification*? Had there been anything to restrict these orders *to the port of New York*, then it is very clear that orders, pointing to any other port or place, would have been out of the commission, and consequently would have imposed on the appointee *extra* duties. But it seems obvious to me that the intention was to bind the agent to the execution of all orders, touching the naval service, which were to be executed in New York—such, for example, as purchasing naval supplies of any kind there, to be forwarded thence, whithersoever directed by the department, &c., &c.; for I cannot conceive that the government, having an agent appointed and paid expressly for the naval service at New York, and requiring naval supplies from that place for any other, intended to subject itself to the necessity of sending a supplemental and special agent to that port on every such occasion; and it is upon this principle that I account for the general

language of the letter of appointment in 1808, and of the commission in 1809. Upon the whole, if the practice of the Navy Department be as silent in relation to the duties of the navy agent as our acts of Congress are, (of which *practice* the Secretary is the sole judge,) and if the case be to turn exclusively on the construction of Doctor Bullus's commission, I should pronounce the services described in the questions to belong to the duties of his office, and consequently not to be *extra* services.

3. The remaining question is, whether the Secretary of the Navy is vested with any discretionary power to make what may be deemed an equitable allowance for *extra* services rendered by a navy agent?

The question, it is presumed, relates to the power of the Secretary over the contingent fund. This is certainly placed entirely at his disposal; and it is undoubtedly competent for him to draw on it for the purpose of compensating any services rendered in any of the relations of his department, which are of a *contingent* character—that is, such as might or might not happen, and which Congress could not easily foresee, and therefore could not provide for specifically. And I see not why such services may not be as well performed by one who holds the office of navy agent as another; nor, when so performed, why they should not be equally compensated as if they had been performed by any other. But, then, the services must be *contingent* in their character; and they must also be *distinctly* separated from the duties of navy agent.

As to what is termed *extra allowance to a navy agent*, I consider the question as having been correctly settled immediately after the passage of the act of the 3d March, 1809. That act, you will observe, provides that the compensation allowed to the agent shall not exceed one per centum on the public moneys disbursed by him, *nor, in any instance, the compensation allowed by law to the purveyor of public supplies*. The compensation to the purveyor, as fixed by law, is two thousand dollars *per annum*; and I find that, on the 18th of the same month in which the act was passed, a question arose, and was made by the then acting Secretary of the Navy to the Comptroller of the Treasury—whether this act authorized any allow-

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ance to the navy agent for clerk-hire, a messenger, stationery, store rent, and fuel for his office: these expenses being allowed to the purveyor of public supplies, whose compensation furnished the standard for that of the navy agent. But the Comptroller decided that the clerk hire, &c., allowed to the purveyor constituted no part of the *compensation* of that officer; that it was provided for by a separate appropriation; that it did not go to the purveyor; that it did not pay him for any services which he had rendered; that the act of the 23d February, 1795, which fixed *the compensation* of the purveyor at \$2,000, was that to which the act of 3d March, 1809, referred as giving the standard of compensation to the navy agent; and that, until Congress, in the latter instance, should make the appropriation for clerk-hire, &c., which they had done in the former, the allowance could not be made by the accounting officers of the government. After this principle had been uniformly pursued by the Treasury practice for seven years, the same question was revived in 1816; the Attorney General (my predecessor) was consulted; and, ultimately, the original decision of the Comptroller was affirmed. After this, I find, however, on the records of the navy office, a circular letter from the then Secretary of the Navy, under date of June 6, 1817, addressed to John Bullus, esq., and others, which, in opposition to the decisions already mentioned, and to eight years' uniform practice, informs those gentlemen that an allowance *will be made them* of office rent, clerk-hire, &c., including all the articles precisely for which, under the existing laws, I think an allowance had been uniformly refused theretofore. On this point my opinion is, that no *extra* allowance can be made by the Secretary of the Navy to a navy agent for services rendered by him *in the discharge of the duties of his agency*; the act of 3d March, 1809, having expressly declared that his compensation should in *no instance* exceed \$2,000.

But, I repeat: the admission for services standing clear of his agency, and of a contingent character, the Secretary of the Navy has as much right to make an equitable allowance to Doctor Bullus, as to any other individual citizen. Applying this principle to the services described in the two first questions: if, according to the practice of the Navy Department, those services were out of the sphere of Doctor Bullus's agency

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duties; and if they can be considered as of a contingent character, the estate of this gentleman is certainly entitled to a compensation out of the contingent fund, which compensation the Secretary has the power to award. Both these inquiries are rather questions of practice than of law; and are, therefore, much more proper for the decision of the head of the Navy Department, than for the law officer of the government. Having, however, presented such reflections on the first branch of the inquiry as seemed to me to promise any aid to the Secretary's consideration of the case, I will remark on the last branch,—that the services specified in the two first questions can scarcely be considered as *contingent*; for, that public buildings would be necessary in the navy-yard at New York, and that naval supplies were necessary to sustain the war on the lakes, were *certainities* very easily foreseen and provided for, if Congress thought them not sufficiently provided for already. It has been said, in support of Doctor Bullus's claim for the supplies, &c., for the lake service, that he not only discharged the duties for his own agency at New York, but that he also discharged the duties of several distinct agencies: for example, those of the naval agency on Lake Champlain, those of the agency on Lake Ontario, &c. If this position be correct, Doctor Bullus has been very improperly permitted to act in those separate agencies; he was nominated as agent for New York; he was approved by the Senate as agent for New York; he was commissioned as agent for New York; and his bond and surety was limited to that agency. If the agencies at Champlain, Ontario, and Erie, are separate agencies; if Doctor Bullus has been called, by the mere authority of the Navy Department or of the President, (without the concurrence of the Senate, and without giving bond and surety according to law,) to perform the duties of those separate agencies; and if the Secretary can now compensate, at pleasure, the agent thus appointed out of the contingent fund; then the act of 3d March, 1807, is a nullity. In this view of the case, the whole proceeding has been unlawful; and, therefore, it is not to the law that the representatives of Doctor Bullus must look for compensation.

I have the honor to be, &c.,

WM. WIRT.

To the ACTING SECRETARY OF THE NAVY.

Naval Courts-Martial.

NAVAL COURTS-MARTIAL.

No sentence of a naval court-martial, held within the United States, can be carried into effect until confirmed by the commander of the fleet in which the offence occurred, or by the officer ordering the court.

OFFICE OF THE ATTORNEY GENERAL,

September 23, 1819.

SIR: In answer to yours of the 21st instant, I have the honor to state it as my opinion, that no sentence of a naval court-martial held within the United States, although not extending to the loss of life, nor to the dismissal of a commissioned or warrant officer, can be carried into effect until confirmed by the commander of the fleet in which the offence occurred, or by the officer ordering the court. This is the express language of the 41st article of the rules and regulations for the government of the navy, which we are not at liberty to extend by construction. Under the phrase "the officer ordering the court," the President and Secretary of the Navy, alone, are included; because, by the 35th article, they are the only officers authorized to order a naval court-martial *at home*. No commandant of a navy yard, therefore, or of a single ship lying in port, has power to confirm the sentence of a domestic court, although in a case inferior to death or dismissal, because that power is, in express terms, restricted to *the commander of the fleet, or the officer ordering the court*; within neither of which descriptions do those officers come. In a case occurring in our fleet when at home, the court, although convened on the application of the commander, is convened by order of the President or of the Secretary of the Navy; and the sentence, when pronounced, (if it do not extend to death or dismissal,) may be confirmed either by the commander of the fleet or the officer who ordered the court. In all other cases occurring at home, the sentence must be confirmed by the President, if he ordered the court; or by the Secretary of the Navy, if he was the officer who ordered it.

I have the honor to be, &c.,

WM. WIRT.

To the ACTING SECRETARY OF THE NAVY.

Salaries of Officers of Arkansas Territory.

SALARIES OF OFFICERS OF ARKANSAS TERRITORY.

The salaries of the governor and judges of Arkansas Territory did not commence until the 4th of July, 1819.

OFFICE OF THE ATTORNEY GENERAL,
September 28, 1819.

SIR: The case relative to the governor, &c., of the Arkansas Territory, submitted for my opinion on yesterday, reached me after the offices had been closed, or you would have received my immediate answer.

I understand the case to be this: The President, under the authority of the act of Congress, has appointed and commissioned the governor and judges of that Territory, in the recess of the Senate; their commissions bear date prior to the 4th of July last, and import that those officers are entitled to the emoluments of their offices from the date of their respective commissions. They accordingly claim their salaries from the date of their commissions; and the question is, whether they are so entitled, or entitled only from the 4th day of July, 1819.

The act of the 2d March, which establishes the Arkansas Territory, calls it into being on the 4th day of July, 1819; until that day there was no such Territory, and, consequently, until that day there could be no officers of that Territory. The governor and judges, therefore, whatever may be the date of their commissions, did not commence their legal existence until the 4th day of July, 1819; until this day there were no such offices as those of the governor and judges of the Arkansas Territory, and, consequently, until then there could be no emoluments of those officers; for to suppose the emoluments of an office to exist before the office itself, would be to suppose the consequence to precede its cause.

Again: salary is a compensation for services; but until the 4th of July, 1819, there could be no services rendered by those officers, because, until then, neither they, as officers, nor the Territory to which they are attached, had a being.

I am, therefore, very clearly of the opinion that their salaries can commence only from the 4th day of July, 1819. The expression in their commissions, as to the date of their emoluments, is a mere inadvertence, arising probably from copying

Virginia Land Warrants.

an inapplicable form; and, being a mere act of improvidence, has no binding force on the United States. It could not have imposed on the officers who accepted those commissions; because the law under which they issued was open to their inspection, and they must therefore be considered as having legal notice of the fact that there was, and could be, no Arkansas Territory, nor, consequently, any officers of that Territory, prior to the 4th day of July, 1819.

I have the honor to be, &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

VIRGINIA LAND WARRANTS.

Land-warrants, by the laws of Virginia, are not mere chattels; but are regarded as a kind of inchoate title to lands, and descend to heirs.

A land-warrant held in the right of a *feme covert* must be assigned by her with her husband, in order to transfer it.

OFFICE OF THE ATTORNEY GENERAL,

October 8, 1819.

SIR: By the laws of Virginia, land-warrants are not considered as mere chattels; they consequently do not go to the executor, but to the heirs. They are a kind of inchoate title to the fee simple of lands, and are not taken by the husband as of the personal property of his wife. I should not, therefore, think that the husband has the sole and absolute disposition of a land-warrant held in the right of his wife; nor that he can, either by himself or his agent, assign it. The Commissioner of the Land Office is right, I think, as to the manner in which he proposes to issue the patent; and I should have thought so, even if the laws of South Carolina on the subject had been as alleged in the assignment of the warrant; because, as this is a Virginia land-warrant, the mode of transfer must follow the law of Virginia, and not the law of the domicil.

WM. WIRT.

To the SECRETARY OF THE TREASURY.

Duties of Collectors concerning the Slave-Trade.

DUTIES OF COLLECTORS CONCERNING THE SLAVE-TRADE.

By the act of 22d March, 1774, to prohibit the carrying on the slave-trade from the United States to any foreign place or country, the collector cannot require a bond as a prerequisite to giving a clearance, except upon the oath or affirmation of some citizen.

OFFICE OF THE ATTORNEY GENERAL,

October 8, 1819.

SIR: The questions submitted for my opinion on Mr. Ellery's communication of September 17, are—

1. Whether the collector of the customs can, under the 3d section of the act of the 22d of March, 1774, entitled "An act to prohibit the carrying on the slave-trade from the United States to any foreign place or country," require the bond authorized by that section as a prerequisite to clearance, *on his own knowledge, without the oath or affirmation of any citizen?*

2. Whether, in the case of Tayer, stated by Mr. Ellery, it would be advisable to institute a prosecution for a breach of the laws in prohibition of the slave-trade?

On the first question, it is to be observed that this is a penal statute, which is to be strictly construed; and that the sole authority for the collector's demand of the bond is derived from this statute. Unless the statute, therefore, gives the authority in the case propounded by the question, such authority does not exist. The words of this section are: "that the owner, master, or factor of each and every foreign ship or vessel clearing out for any of the courts or kingdoms of Africa, or suspected to be intended for the slave trade, *and the suspicion being declared to the officer of the customs by any citizen on oath or affirmation, and such information being to the satisfaction of the said officer,* shall first give bond," &c. Suppose a collector sued for damages in detaining a vessel for want of this bond: in filing his special plea of justification, must he not found it exclusively on this section? and must not his plea, therefore, make the precise case on which alone the section authorizes the detention? I conceive he must. And would he make the case by his plea, were he merely to state that *he* suspected the vessel of being designed for an illicit trade in African slaves? Would it not be argued (and fairly argued) in support of a

Duties of Collectors concerning the Slave-Trade.

demur to such plea, that *his suspicion* was not enough? that the law does not stop with saying "if the vessel be suspected of being intended for the slave trade," (which it would do if Congress had meant to found the authority on suspicion merely,) but explicitly superadds to the fact of being suspected, "and the suspicion being declared to the officer of the customs by any citizen on oath or affirmation." Nor does it stop here; but adds further, "and such information being to the satisfaction of the said officer." So that, to make the justification complete, the three things must concur: the vessel must be suspected; the suspicion must be declared on oath; and the information must be to the satisfaction of the officer of the customs. It is in favor of the liberty of the citizen that all these precautions are required to justify the collector to interpose by demanding a bond. Had the law intended to place the owners or masters of vessels at the discretion of the collector, its language would have expressed that intention. Under the embargo laws, where such discretion, from the extremity of the case, was intended to be confided, it is expressly given. The language of the 11th section of the act of 1808 is, "that the collectors of the customs be, and they are hereby, respectively authorized to detain any vessel ostensibly bound with a cargo to some other part of the United States, whenever, in their opinion, the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the President of the United States shall be had thereupon." Even under this clear and strong language, the power given to the collector appeared so enormous, and so liable to abuse, that several successive cases were brought up to the Supreme Court, for the purpose of trying the question whether, besides entertaining the opinion, the collector was not bound to show that his opinion was well supported by the facts. (See the case of *Otis vs. Wilkins*, 9 Cranch, 339, and the cases there cited.) It is true that, on the language of this statute, the court decided that it was enough that the collector honestly entertained the opinion under which he acted, whether that opinion was well or ill founded; but it is very manifest, from a review of the cases, that the court hold the opinion, that whoever seeks to justify a restraint imposed on the liberty of the

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citizen under a special law, must bring himself clearly within that law. And on this principle I am decidedly of opinion that, under the 3d section of the act which we are considering, a collector would not be justified in demanding the bond on anything short of a suspicion declared on oath, and the information so given being satisfactory to him. Nor can I conceive that this opinion will be followed by any practicable inconvenience, where the officers are honestly engaged in the execution of the law; and if they are not, they ought to be removed. If the appearances are such as to excite suspicion, what difficulty can there be in declaring that suspicion on oath? But if it were otherwise, I should hold it much better to leave the law to the correction of Congress than to extend it by construction. The mischief intended to be remedied is, indeed, a great one; but when the remedy is expressly given by Congress, and the case circumstantially described in which that remedy shall be applied, in my opinion it would be an act of legislation, not of construction, to apply the remedy to a different case. But, although the collector is not, in my opinion, authorized to demand a bond under any other circumstances than those specified by the act of Congress, he is certainly authorized to seize, under the 1st section of the act, any vessel which shall be either fitted out or caused to sail contrary to the provisions of that act. And although, from concealment usually practised on such occasions, he may fail to obtain a decree of condemnation, yet, if he can show probable cause to the satisfaction of the court, he will not by such seizure subject himself to damages.

On the second question, I am of the opinion, that, under the circumstances stated by Mr. Ellery, Tayer ought to be prosecuted.

I have the honor to be, &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

SUPPRESSION OF THE SLAVE-TRADE.

The act entitled "An act in addition to the acts prohibiting the slave-trade" does not authorize the President to appropriate any part of the sum therein specified

Suppression of the Slave-Trade.

to the purchase of land on the coast of Africa or elsewhere, for the purposes of a settlement, nor to the transportation of free people of color to Africa, nor to the purchase of carpenters' tools for the purpose of making a settlement in Africa, nor to the payment of the salary and expenses of transporting an agent from this country to Africa.

ATTORNEY GENERAL'S OFFICE,

October 14, 1819.

SIR: I have considered the subject on which the President wished you to consult Mr. Crawford and myself previous to seeing the colonization committee, to wit: What is the authority given to him under the act of the 3d of March last, entitled "An act in addition to the acts prohibiting the slave-trade," and what measures he may and ought to adopt, in concert with the colonization society, under that act? By its last section, one hundred thousand dollars are appropriated *for the purpose of carrying that law into effect*. This sum must, therefore, be appropriated *to the purposes of the law, and to no other*. What are those purposes? The first section authorizes the President to cause the armed vessels of the United States to cruise on the coasts of the United States and of Africa, for the purpose of seizing any vessels of the United States engaged in the slave-trade, in violation of any of our laws; and directs that the negroes, mulattoes, and persons of color, found on board of any ship or vessel so seized, shall be delivered to a marshal of the district, if brought into a port of the United States, or, if elsewhere, to such person as the President shall appoint, in the manner thereafter directed. The second section authorizes the President to make such regulations as he may deem expedient for the safe-keeping, support, and removal, *of all such negroes, mulattoes, or persons of color, as may be so delivered and brought within the jurisdiction of the United States*; and the same section further authorizes him "to appoint a proper person or persons, *residing on the coast of Africa*, as agent or agents for receiving the negroes, mulattoes, or persons of color, delivered from on board of vessels seized, in the prosecution of the slave trade, by the commanders of the United States armed vessels." The third section gives a bounty for negroes, &c., so captured. The fourth section directs the mode of proceeding in court, on information lodged with the attorney for any district that any negro has been imported therein

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contrary to our laws, and, on the ascertainment of this fact by the jury, directs the marshal to take such negroes, &c., for safe-keeping, subject to the orders of the President.

This act, constituting the sole authority of the President, must be strictly pursued; and he cannot apply a cent of the \$100,000 appropriated to any other object than those specified by the act. He cannot, therefore—

1. Appropriate any part of it to the purchase of land on the coast of Africa or elsewhere, for the purposes of a settlement.

2. Nor to the transportation of any of the free people of color in this country to Africa, nor of any other negroes or persons of color than such as are seized and captured, or ascertained by the verdict of a jury under that law to be free.

3. Nor to the purchase of carpenters' tools, &c., &c., for the purpose of making a settlement in Africa.

4. Nor to the payment of the salary and expenses of transporting an agent from this country to Africa; because the second section limits his appointment expressly to "a proper person or persons *residing* on the coast of Africa."

All that the law gives him power to do is, to keep safe the negroes, &c., imported contrary to our laws, and to send such negroes, &c., out of the limits of the United States to Africa or elsewhere; and if to Africa, to such agent as he shall have appointed under the second section of the last act.

The act does not appear to have contemplated either a removal of emancipated slaves, or of those born free here, nor the incurring of any expenses on the coast of Africa. As a measure co-operating with the colonization society, it is altogether inadequate, or was perhaps projected on the calculation that the society itself had funds sufficient to meet all the expenses not directly provided for by the act.

I have thrown together these hasty views for the purpose of being submitted to Mr. Crawford directly, if you please, rather than delay the case, on account of my indisposition, for a conference with him to-morrow.

I am, sir, very respectfully, your obedient servant,

WM. WIRT.

To BENJAMIN HOMANS, Esq.,

Navy Department.

Suppression of the Slave-Trade.

SUPPRESSION OF THE SLAVE-TRADE.

The former opinion reconsidered and reaffirmed, with some doubts of its correctness, (Mr. Crawford to the contrary,) and the President advised not to exercise any inferential powers until Congress shall express their intentions more clearly.

ATTORNEY GENERAL'S OFFICE,

October 16, 1819.

SIR: Since my letter of the 14th instant, touching the powers of the President under the act of the last session in prohibition of the slave-trade, I have conferred with Mr. Crawford on the subject, and find that we differ somewhat in our construction of the law. Mr. Crawford thinks that, under the power given to the President by the 2d section "*to make such regulations and arrangements as he may deem expedient for the safe keeping, support, and removal beyond the limits of the United States, of all such negroes, mulattoes, or persons of color as may be so delivered and brought within their jurisdiction,*" coupled as it is with the power "*to appoint a proper person or persons residing upon the coast of Africa as agent or agents for receiving the negroes, &c., delivered from on board of vessels seized,*" &c., is included the power to do anything which he may deem expedient to their removal beyond our limits, such as—

1. To provide a place to which they shall be removed on the coast of Africa.
2. To send over carpenters and tools, to prepare a shelter against the weather.
3. To provide for their support and safety in the place to which they shall be removed.
4. To organize a government for them; and,
5. If he shall deem it essential to their safe and comfortable removal, to send over and intermix with them a portion of the more intelligent free population of color from this country; though I understand from Mr. Crawford that this last is not a measure which he would deem expedient. Mr. Crawford thinks that the language of the act sustains this construction: that the grant of the principal power to *remove* would pass all the incidental power necessary to give it effect; but that the incidental powers themselves are so expressly granted, by the

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power to make all arrangements which the President shall deem expedient to the removal: that the power to appoint an agent on the coast of Africa, to receive the negroes, would have been idle, if it was intended that the agent should merely receive, and then turn them loose to shift for themselves—and that on a coast, too, to which they would be strangers—Sherbrough being the place in contemplation for their reception; and the slave coast, from which they would probably be brought, lying far to the south of it: that Congress could never, under the guise of humanity, have intended a proceeding so barbarous: that the measures to be taken on the coast of Africa, as essential to the removal of the slaves, were left unspecified, because it would be necessary that they should bend to circumstances which could not be anticipated by Congress, but that words are used of a sense large enough to invest the President with the full exercise of his discretion over the case: that if the law is to be strictly expounded, so as to confine the powers of the President to a mere removal of those negroes out of the United States, without any provision for their reception elsewhere, it will be incapable of being carried into effect: that the grant of so large a sum as \$100,000, for the purpose of carrying the law into effect, forbids so narrow a construction: that, by his construction, the plain objects of the law can be effected, whereas by the opposite one they cannot; and that, since the language of the act permits it, that construction should be preferred which will give the law effect, not that which will defeat it. This is a very strong view of the case, and is, very probably, the correct one. I regret, however, that so large a mass of powers has been thrown on the President, under an expression so narrow as to make arrangements for the removal of the negroes, &c., beyond the limits of the United States, and the appointment of an agent on the coast of Africa to receive them; more especially since it would have been so easy to have added to the words “to receive them,” “and to make provision for their support and safety,” or words to that effect. This great ramification of powers proposed to be exercised by the President on the coast of Africa, being entirely constructive and inferential, and deduced from expressions most unnecessarily narrow, if it was their intention to pass these great pow-

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ers, I cannot concur in advising their exercise until Congress shall remove the great responsibility of the President, by making their intention more clear; thinking it better that the case should suffer some delay, than that the President should run the risk of overstepping, by construction, the real purpose of Congress. I think it very probable that the law was passed under the impression that the colonization society would have taken all the preparatory steps of providing a place, house, &c.; and that nothing would remain for the President to do, but to send the negroes out to them—to be received, indeed, in the first instance, by an agent of the United States, whose official report would be necessary to inform the President how many had been received, as a safeguard to the execution of the law, and a check on the claim of bounties. Hence I account for the narrowness of the language used by Congress; narrow, at least, in my judgment, compared with the objects imputed to them.

Mr. Crawford also thinks that the power to appoint a proper person, &c., *residing* on the coast of Africa, authorizes the appointment of an agent *to reside* there; and, consequently, that the President may appoint a person here, and send him out to reside as an agent at *Sherbrough*, or elsewhere. In support of this opinion, he says that Congress could not but have known that there was no person already residing there qualified to act as agent; and that the word “*residing*” was unguardedly used, from the haste with which the law was passed—it having been passed very near the close of the session. This has great force in it, too; but I fear it would be rather too bold a construction to execute what we may conjecture they intended, and not what they have said. This difficulty, however, Mr. Crawford suggests, may be surmounted by the colonization society sending out an agent to be there commissioned by the President.

I presume the President wishes to learn from the colonization society what they expect him to do; and, from Mr. Crawford and myself, our opinions as to what he may do, under the law, in promotion of their views.

I would, therefore, respectfully suggest it to you, that, after showing this letter to Mr. Crawford, to see if I have correctly

Claim arising under New York and New Hampshire Boundary

apprehended his views, it be sent to the President, if Mr. Crawford shall approve of its being so sent.

I am, sir, very respectfully, your obedient servant,

WM. WIRT.

To BENJAMIN HOMANS, Esq.,

Navy Department.

CLAIM ARISING FROM ADJUSTMENT OF NEW YORK AND NEW HAMPSHIRE BOUNDARY.

By the settlement of a disputed line between New York and New Hampshire, the owners of lands thrown into the latter State, and subsequently into Vermont, and the title ultimately extinguished by a compromise, for a pecuniary consideration, have no valid claim to indemnity from the government.

OFFICE OF THE ATTORNEY GENERAL,

October 20, 1819.

SIR: I have examined carefully the memorial of George Clarke, which you have submitted for my opinion, and perceive no duty which it devolves on the President of the United States. Mr. Clarke complains of an injury sustained by the settlement of a disputed line between the States of New York and New Hampshire, whereby his lands, held by title under the former State, were thrown into the latter, and eventually into Vermont, and his title ultimately extinguished by the compromise, for a pecuniary consideration; of which he, in common with other individual sufferers by the arrangement, was invited to partake, but which he declined, on the ground of its alleged inadequacy. He insists that, as a British subject, those States had no right, by arrangements between themselves, to affect his title; and that, having done so, the government of the United States is bound to indemnify him. I cannot perceive the force of these considerations. This memorialist is not the only sufferer by this arrangement. It was not levelled at him as a British subject. It was a compromise for the general good, to which individual interests were made necessarily and properly to give way; and Mr. Clarke is only one of many of those individual sufferers. I can perceive no justice in his claim to be made an exception. The circumstance of his being a British subject has, I think, no force in it. By the 9th article

Qualified Grants.

of the treaty of 1794, to which he refers, it is expressly stipulated that British subjects who hold lands in the United States shall continue to hold them, and *in like manner as if they were natives*. And in the instance to which Mr. Clarke refers, he has been placed exactly on the footing of native proprietors; of which, I think, he has no more right to complain, than he would have of the imposition of a land tax, the establishment of a right of way, or any other charge to which lands held by natives are subject for the common good.

I have the honor to be, &c.,

WM. WIRT.

To the SECRETARY OF STATE.

QUALIFIED GRANTS.

The United States cannot divert land granted for the express and single purpose of a light house site, to any use wholly unconnected with the object of the grant, without violating the spirit and terms of the cession.

OFFICE OF THE ATTORNEY GENERAL,

November 15, 1819.

SIR: It appears to me that the principles assumed by Mr. Trapier in his letter, submitted for my opinion this evening, are correct. A general grant of land puts the grantee into entire possession of the subject, and leaves the use of it to his pleasure merely; but a grant for a particular purpose is a qualified grant, and the grantee cannot put the property to a different use, without violating the terms of the contract. The land in question is admitted to have been *voluntarily* ceded to the United States, for the *express* and *single* purpose of the erection of a light house; in my opinion, the United States cannot justly apply it to any other purpose, without (and much less against) the consent of the grantor. A diversion of the property to any other object, would, I think, be a violation of the spirit as well as the terms of the cession. The appropriation of the land to any use connected with the establishment of a light-house, or incidental to its support—as, for example, the erection of habitations, the culture of gardens, &c., for the use of the workmen employed in building the light-house, or of the keepers of the

 Allowances to Marshals.

light-house after its erection—would be within the condition of the grant. But its application to a use *wholly unconnected with the object of the grant*, as it would be a departure from its intention, would, in my opinion, be an abuse of the cession, and a wrong to the grantor; and this more especially, if, as Mr. Trapier states, (and the facts as stated by him are admitted to be true,) the new and unintended use shall be of a character injurious to the grantor. The injury would be still further aggravated by the admitted fact, that the cession, in this case, was made from motives of public spirit, without any pecuniary consideration to Mr. Trapier.

I have the honor to be, &c., &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

 ALLOWANCES TO MARSHALS.

Under the act of 8th May, 1792, for regulating processes, &c., allowances may be made to marshals for supplying any of the necessaries of life to prisoners.

OFFICE OF THE ATTORNEY GENERAL,

November 16, 1819.

SIR: Your letter of this date submits, for my opinion, the question, whether under the act of the 8th May, 1792, "for regulating processes, &c.," and which in the 4th section provides, among other things, that the marshal shall be allowed "for the *maintenance* of prisoners confined in jail for any criminal offence," any allowance can be made to a marshal for clothing, medicine, and medical attendance of prisoners? The provision is for *maintenance* while confined; and *maintenance*, in this case, includes *all the necessaries of life*, in my opinion. *Maintenance* is not a technical term of the law, in the sense in which it is here used; it is a term of popular use, in which sense it includes everything that is necessary to *maintain life*. Johnson defines it, in his second definition, "supply of the necessaries of life, sustenance, sustentation;" it comprehends, therefore, all that is *necessary* to sustain life, according to this definition. If we pass from this definition of maintenance, to the object and motive of the law, we shall, I think, find this

construction fortified. The prisoner confined on a criminal charge is deprived, by the confinement, of the means of maintaining himself. The power of maintenance, if at large, would extend to all the objects of food, raiment, and medical assistance. The government, which deprives him of the means of providing these things for himself, takes his place, during this disability, of providing them for him; and hence, I think, the reason and justice of the provision extend to all the necessities for which he might provide for himself, unless so restrained. The confinement, in the case presented, is for the purpose of receiving a trial; but it might often defeat a trial, if (as in the late sickly season) the prisoner is to die for the want of medical aid, or to perish, in winter, for the want of clothing. My conclusion, therefore, is, that the term *maintenance*, as used in this act, extends to all the objects which are *necessaries* of life. In the analogous provision of some of the State laws, an exception is made in regard to prisoners whose fortunes are sufficient to sustain them during the confinement; and, in these cases, the expenses of their jail confinement are charged on their estates. But in the act under consideration, there is no correspondent provision; all prisoners are placed on the same footing; and since the restraint or personal exertion is equal on all who are confined for the purpose of trial, and who, until condemned, must be deemed equally innocent, the indiscriminate provision of the act of Congress seems to be the most just.

I have the honor, &c., &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

SURVEYS AND PATENTS UNDER ACT OF MARCH 1, 1800.

By the act of March 1, 1800, the Secretary of the Treasury was required to number the 100-acre lots of the fifty quarter townships progressively, and that the patent to be issued for each should, *inter alia*, give the number of the lot located. Such description cannot be departed from, for no form of description variant from that will pass the title of the United States; nor can any patent be issued until the lots shall have been numbered.

OFFICE OF THE ATTORNEY GENERAL,

December 15, 1819.

SIR: By the 6th section of "An act in addition to an act entitled 'An act regulating the grants of land appropriated for

Surveys and Patents under Act of March 1, 1800.

military services,' &c.,'' passed on the 1st March, 1800, it was made the duty of the Secretary of the Treasury to divide the fifty quarter townships mentioned in the preceding section, and such of the fractional parts of quarter townships as might then remain unlocated, into as many lots of one hundred acres each as shall be equal, as nearly as may be, to the quantity such quarter township or fraction is stated to contain, *and to designate these lots by progressive numbers upon the plat or survey of every such quarter township and fraction respectively.* By the 7th section of the same law, these lots were open to location after a certain period; and by the same section it is expressly required that the patent to be issued on such location shall, in every instance, express the range, township, quarter township, or fraction and *number of the lot located.* It appears that the Secretary of the Treasury did not go through with the duty imposed on him by the 6th section of this law, in *numbering all the lots*; either from the circumstance of there being fractions less than one hundred acres, or from some other cause now unknown, many of the lots remain unnumbered. By the letter referred for my opinion, it appears that an application has been made to the Commissioner of the Land Office to locate two of these unnumbered lots; which he has declined, on the ground that the lots *are unnumbered*, and that consequently he cannot issue a patent for them in conformity with the express requisition of the 7th section of the act just mentioned, which requires him to give in the patent, *inter alia, the number of the lot located.* The Commissioner conceives that he has no power to dispense with any part of the description the law has made necessary: and so think I. The system which has been adopted for the arrangement and appropriation of these lands is beautiful and perfect as it stands; no ministerial officer should be permitted to touch or alter it, in any of its parts. If we begin to dispense with any one requisite of the law, under the notion that it is superfluous, and that the object of specific description can be answered as well without as with it, we may dispense with any other, by the same process of reasoning, and thus the whole system will come to be unhinged. Besides, as the law requires the land to be appropriated by a specific form of description, which it gives, I do not think that any form of

Altering the Number of Naval Commissions.

location or patent, varying from this description, will have the legal effect of taking the title out of the United States, and giving it to an individual.

I have the honor to be, &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

ALTERING THE NUMBER OF NAVAL COMMISSIONS.

The numbering of naval commissions is not the act of the President and Senate, but of the Secretary of the Navy, to prevent questions of rank from arising among officers holding commissions of the same date.

Whenever a change of the number of a commission is proposed, the persons affected by the proposed change ought to be heard as to the facts.

OFFICE OF THE ATTORNEY GENERAL,

December 24, 1819.

SIR: Your letter of yesterday's date submitted for my consideration a memorial of Lieutenant Oellers, and other lieutenants of the navy, addressed to the President of the United States, complaining that Lieutenant Henry S. Newcomb, who had been commissioned on the same day with them, and whose commission was numbered 25, had been transferred to number 6, which number had become vacant by the death of Lieutenant Bullus; by which measure he has improperly obtained precedence of them in rank; and praying for redress. The question which I understand to be referred to me is, whether the Secretary of the Navy has authority to alter the number of Lieutenant Newcomb's commission? There is no law on this subject. The acts of Congress are entirely silent upon it; and it is from them alone that the powers of that officer, like those of every other under government, are derived. Relative rank among officers depends in general on the dates of their commissions. The commissions in this case bear the same date. The numbering the commissions is not an act of the President and Senate, but is, I am informed, an act of the Secretary of the Navy alone, in order to prevent questions of rank from arising among the officers from the circumstance of the identity of date in the commissions. Hence the question referred to

Land Warrants to Canadian Volunteers.

me is obviously not one of law, but of practice merely in the Navy Department. If, however, the Secretary of the Navy has no legitimate authority to alter the number of any one of these commissions, that of Mr. Newcomb, according to the statements in the memorial, has been altered without authority: and the alteration consequently is a void act, which ought to be corrected by restoring the original number. This, however, takes for granted the facts as stated in the memorial. The means of testing their accuracy may, I presume, be furnished at the Navy Department; if not, Mr. Newcomb, the person to be affected by the proposed step, ought, I should think, to have an opportunity of being heard in relation to the facts.

I have the honor to be, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE NAVY.

LAND WARRANTS TO CANADIAN VOLUNTEERS.

Military bounty land warrants to Canadian volunteers, under the act of March 5, 1816, are not assignable. Such warrants, when fraudulently obtained, may be cancelled so as to prevent their use for any mischievous purpose.

OFFICE OF THE ATTORNEY GENERAL,

December 26, 1819.

SIR: The two questions submitted for my opinion are—

1. Are the warrants for military bounty land, granted to certain Canadian volunteers under the act of 5th March, 1816, assignable or transferable?

2. If, before a patent issues which would be predicated on a warrant of this class, it is discovered that the warrant was fraudulently obtained, is the Secretary of War authorized to annul it?

1. The warrant has nothing of a negotiable character on its face. It does not state that the volunteer *and his assigns*, or that the volunteer *or the holders of the warrant*, is entitled to the lands. It certifies only that the volunteer himself is entitled. Nor does the act under which these warrants issue make them assignable; nor does it give any authority to the Commissioner to issue a patent to the assignee or holder of the war-

Power of President to Mitigate Sentence of Death.

rant. Taking the question, therefore, on this act alone, it might well be questioned whether the Commissioner could properly issue a patent to the assignee of such a warrant. But, considering this act as part of a system of legislation on the subject, and therefore to be construed in connexion with the acts of the 6th May, 1812, and the 16th April, 1816, (both of which expressly prohibit the assignment of military warrants for land bounty, and declare the transfer of them invalid;) considering, too, that these warrants to Canadian volunteers are as completely within the policy of these prohibitions as military land warrants of any other description;—I hold it the safer opinion that they cannot pass by assignment or transfer.

2. A warrant obtained by fraud is of no value to the holder, and I cannot, therefore, conceive any injury which can result from cancelling it. On the contrary, the fraud being fixed, I consider it the duty of the Secretary, both towards the government and towards society, to disable the warrant from being used as an instrument of further mischief. But, since the evidence which fixes the fraud must, from the necessity of the case, be always *ex parte* in relation to the holder of the warrant; whose character as well as rights are staked on the correctness of the Secretary's decision, I submit as the better course to cancel the warrant in such a way as to incapacitate it for circulation, without rendering it illegible; noting on the warrant, in a few words, the cause of its cancellation, and then handing it back to the person who presented it, to seek any redress to which he may be entitled before the tribunals of his country.

I have the honor to be, &c., &c.,

WM. WIRT.

To the SECRETARY OF WAR.

POWER OF PRESIDENT TO MITIGATE SENTENCE OF DEATH.

The President may so far mitigate a sentence of death pronounced by a naval court-martial as to substitute a milder punishment in its stead.

OFFICE OF THE ATTORNEY GENERAL,

January 4, 1820.

SIR: Your letter of the 30th ultimo submits, for my opinion, the power of the President to change the sentence of death,

Power of President to Mitigate Sentence of Death.

which has been passed by a general court-martial on William Bainsman, a private in the marine corps, into a sentence of "service and restraint for the space of one year; after which, to cause him to be drummed from the marine corps as a disgrace to it."

By the 42d article of the rules and regulations for the government of the navy of the United States, (to which the marine corps is subjected by vol. 3, Laws United States, p. 96,) it is provided that "the President of the United States shall possess full power to *pardon any offence* committed against these articles, after conviction, *or to mitigate* the punishment decreed by a court martial," (same vol., p. 358.) The power of *pardon* the offence does not, in my opinion, include the power of changing the punishment; but the power to mitigate the punishment decreed by a court-martial cannot, I think, be fairly understood in any other sense than as meaning a power to substitute a milder punishment in the place of that decreed by the court-martial; in which sense, it would justify the sentence which the President purposes to substitute in the case under consideration. The only doubt which occurs to me as possible, in regard to this construction, is, whether the power of mitigating a punishment includes the power of *changing* its species; whether it means anything more than *lessening the quantity*, preserving nevertheless *the species of the punishment*. But there is nothing in the force of the terms in which the power is given that ties us down to so narrow a construction. Had the phraseology been—"the President shall have power to *remit in part, or in whole*, the punishment decreed by the sentence of a court-martial," he would have been restricted to the single mode of mitigation which the objection supposes—that of *lessening the quantity*; but a power of mitigation, in *general terms*, leaves the manner of performing this act of mercy to himself; and if it can be performed in no other way than by changing its species, the President has, in my opinion, the power of adopting this form of mitigation. Such is precisely the case under consideration. A sentence of death cannot be mitigated in any other way than by changing the punishment. To deny him the power of changing the punishment in this instance, is to deny him the power of mitigating

Power of President to Mitigate Sentence of Death.

the severest of all punishments; while you leave open to him the comparatively insignificant power of mitigating the milder class of punishments; or, in other words, to refuse mercy in the case in which, of all others, it is most loudly demanded. To say that the President may pardon a capital offence altogether, and thereby annul the sentence of *death*, is no answer to this argument. Congress foresaw that there were cases in which the exercise of the power of entire pardon might be proper; they, therefore, in the first branch of the article under consideration, give to the President the power of entire pardon. But they foresaw, also, that there would be cases in which it would be improper to pardon the offence entirely; in which there ought to be some punishment; but in which, nevertheless, it might be proper to inflict a milder punishment than that decreed by the court-martial: and hence, in another and distinct member of the article, they give him, *in general terms*, the separate and distinct power of mitigation. To deny him the exercise of this power in relation to a sentence of death, and to throw him, in such a case, on his own power of entire pardon, as the only act of mercy which he can exercise, would be to compel him, contrary to his reason and judgment, to extend the greatest mercy to those who had deserved it least; for while it is true that sentences of death are those which appeal most strongly to mercy, because they deal in blood, it is no less true that they are precisely those which are least worthy of an entire pardon, because they are pronounced only in cases of enormity. In other words, they are those in which the power of mitigation applies with peculiar propriety. I think, therefore, from the generality of the terms in which the 42d article of the rules and regulations for the government of the navy of the United States gives to the President the power to mitigate the punishment (any punishment) decreed by a court-martial, as well as from the obvious reason of the power, that the President has the right to mitigate a sentence of death; and that every argument for the exercise of the power in inferior cases, applies *a fortiori* to such a sentence. And since a sentence of death can be mitigated only by changing it, my opinion is, that the President has the power, in the case of

Power of President to Mitigate Sentence of Death.

William Bansman, to substitute the milder punishment which he contemplates.

It is proper to state, however, that a different construction is practically given to this power in the Department of War; for there the power of mitigation is not understood as giving the power to change the punishment. In how many instances this different construction has been given, or whether the President has, by any sentence which has reached him through that department, been called upon to pass on it, I am not informed. If this construction in that department has grown out of the exercise of the power of mitigation given to the commanding officers who order the courts martial, under the 89th article of the Rules and Articles of War, (see vol. 4, Laws United States, p. 26,) it is very easily understood why the power of mitigation has never been exercised in such cases by changing the species; but, on the contrary, has been exercised only in lessening the quantity; because, by that article the power is confined to mitigating sentences other and less than sentences of death and cashiering an officer—in which inferior sentences the power of mitigating may be exercised without changing the species, merely by lessening the quantity. But if this be the origin of this practical construction in the Department of War, it furnishes no rule for a case where there can be no mitigation without a change. The practice under the English law carries the power of *mitigating* the sentence of a court martial much farther than is necessary to the construction for which I contend. McArthur (in his first volume, page 181) gives us the case of Lieutenant Colonel Jephson, who was sentenced to be suspended from rank and pay for six months. The King, from the circumstance of the detriment which the army would sustain from so long a suspension of a field officer at so critical a juncture, (it was in 1804, and in Ireland,) deemed it indispensable that Jephson should retire; permitting him to receive the regulated price for his commission from the officer who should be appointed to succeed him. "This," says McArthur, "on a superficial view, appears to be an alteration of the sentence." But he defends it on the ground that it does not *add* to the judgment; that it subjects

Title to the Pea Patch.

him to less punishment, not to more than the court had prescribed; and was, in truth, merely a *mitigation* of the sentence.

I have the honor, &c.,

WM. WIRT.

To the SECRETARY OF THE NAVY.

TITLE TO THE PEA PATCH.

The United States, being in possession of the Pea Patch under title derived from the Duke of York, may require a prosecutor to show title in himself, before any proof of title need be deduced; and a prosecutor, under deed taking for its western boundary the east side of the Delaware river and bay, can never reach the Pea Patch.

OFFICE OF ATTORNEY GENERAL,

January 5, 1820.

SIR: It is only within a few days back that I have been put in possession of copies of all the documents that can be found relative to the title to the island in Delaware river, called the Pea Patch. Even yet, the grant from the Crown, on which the title of the State of Delaware to that island is founded, has not been procured and forwarded. If such a grant ever existed, (of which the district attorney for Delaware doubts,) and its production should hereafter become necessary, it may be, I presume, obtained through our minister at London. But I apprehend it will not be necessary on the trial of the suit which Doctor Gale has instituted against the officers of the United States: because the plaintiff *must show a title in himself, before the defendant* in possession can be required to produce any proof of title; and Doctor Gale, according to the evidence before me, can show no title in himself; and because, if he could exhibit proof which would call upon us to show our title, we can rest, I think, securely on our length of possession under the title derived from the Duke of York, afterwards King of England.

The territorial title of the State of New Jersey, under which Doctor Gale claims, takes for its western boundary, in the most express terms, the east side of the Delaware bay and river. Such is the language of the grant to the Duke of York; and

Patents for Inventions.

such the language of that duke's deed to John Lord Berkley and Sir George Carteret. Doctor Gale, by stopping at the east side of the Delaware, will never get to the Pea Patch; and consequently cannot show such a title in himself as to authorize a judgment in his favor. The State of Delaware (whose title we hold) claims under a deed from the Duke of York to William Penn, conveying to him the town of New Castle, and all that tract of land lying within the compass or circle of twelve miles about the same, situate, &c., upon the river Delaware; and all the islands in the said river, and the said river and soil thereof, lying north of the southernmost part of the said circle of twelve miles about the said town. If any question could exist whether the twelve miles about the town, here mentioned, indicated a circle whose radius (and not whose diameter) was twelve miles, it will be removed by reference to the next or supplemental deed from the Duke of York to William Penn, which, designing to convey the residue of the present State of Delaware, takes for its beginning a point on the Delaware river, twelve miles south of the town of New Castle: clearly manifesting that the former deed was considered as conveying the title to that point. All that part of the river (with all the islands in it) which lies to the north of this point, having then been conveyed to William Penn, and the Pea Patch being an island in the river to the north of that point, it seems clear to me that it is included in this deed; and consequently that the United States, who claim under it, have the best, and, indeed, the only valid title.

I have the honor, &c.,

WM. WIRT.

To the SECRETARY OF WAR.

PATENTS FOR INVENTIONS.

No patent for an invention can properly issue, unless the applicant makes oath that such invention hath not, to the best of his knowledge, been known or used in this or any foreign country; and if it turn out that any patent shall

Patents for Inventions.

have been issued for an invention theretofore known and used, the same shall be utterly void.

OFFICE OF THE ATTORNEY GENERAL,

January 12, 1820.

SIR: Doctor Thornton's communication of the 7th instant, which has just been submitted for my opinion, presents the following case and questions:

Mr. Duplat, an alien, who has resided within the United States for two years, applies for a patent for a discovery in the useful arts, of which he is the original inventor, but which he put into extensive operation in France before he came to this country. The act of the 17th April, 1800, which extends the privilege of obtaining patents to aliens who have had a residence of two years among us, provides that every person petitioning for a patent shall make oath, before such patent shall be granted, that such invention hath not, to the best of his knowledge, been known or used, either in this or any foreign country; and it provides, moreover, that any patent which shall be obtained for any invention, which it shall afterwards appear had been known or used previous to such application for a patent, should be utterly void. From the facts already stated, Mr. Duplat cannot take the oath required by this law; and the question which I understand to be submitted to me, is, whether the oath required by this law can be dispensed with? or whether it can be so modified as to let in the present applicant, who is confessedly the original discoverer of the invention for which he seeks a patent?

My opinion is, that the law is imperative; and that no patent can issue in the case until Mr. Duplat shall have taken the oath in the terms in which it is prescribed by Congress.

Whether Congress, in prescribing the oath in these terms, have not gone beyond their intention; whether the law ought not to be amended in this particular; and how it ought to be amended; are questions which, I presume, were not intended to be referred to me, since my province is confined to answering questions of law merely, on the laws as they stand.

I have the honor to be, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF STATE.

The Slave-Trade.

THE SLAVE-TRADE.

The act of 3d March, 1819, applies to all negroes previously brought into the United States contrary to the provisions of any of the acts of Congress on the subject, and not disposed of by State laws.

OFFICE OF THE ATTORNEY GENERAL,

February 2, 1820.

SIR: The slaves to which Governor Clarke alludes, having been imported prior to the act of the 3d March, 1819, do not fall within the sphere of the powers and duties assigned to the President by the 1st and 2d sections of this act. These slaves appear to have been introduced in the fall of 1817, or in the following winter; at which time, by the laws of the United States, they were subject to be disposed of by the laws of the several States. If they were not proceeded against under the State laws, I understand that proceedings may now be had against them under the 4th section of the act of Congress of March 3, 1819, which provides "that when information shall be lodged with the attorney for the district of any State or Territory, that any negro, &c., has been imported therein, contrary to the provisions of the acts in such case made and provided, it shall be the duty of the attorney forthwith to commence a prosecution by information; and process will issue against the person charged with holding such negro, &c.; and if it shall be ascertained by the verdict of a jury that such negro, &c., have been brought in contrary to the true intent and meaning of the acts, &c., then the court shall direct the marshal of the said district to take the said negroes, &c., into his custody for safekeeping, subject to the orders of the President, &c." I understand this section of the act of 1819 as applying to all negroes theretofore brought in against the provisions of any of the acts of Congress on the subject, who had not been disposed of previously by the State laws; and, consequently, that if these negroes are in this predicament, and are now in any State or Territory of the United States, proceedings may still be had against them under that section; but that the President has nothing to do with them until they shall, by the judgment of a court, be placed in the hands of the marshal, subject to the orders of the President; and that when so

Duties of the Attorney General.

placed in the marshal's hands, the President may order them, if he pleases, to the coast of Africa, under the spirit of the act in which this 4th section is found.

I think, also, that it is due both to the government and to General Mitchell that a prosecution should be instituted against him for the penalty given by the laws of the United States for the importation of slaves: such a prosecution will give him an opportunity of acquitting himself if innocent, and will inflict a just punishment on him if guilty.

With respect to the propriety of submitting this case to Congress, on their call for information as to the practices in evasion or violation of our slave laws, Governor Clarke's communication appears to me to come directly within the object of the call; and being derived from so respectable a source as the governor of the State of Georgia, I cannot perceive with what propriety it can be withheld.

I have the honor, &c., &c.,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

DUTIES OF THE ATTORNEY GENERAL.

The Attorney General's duties are confined to the prosecution and conduct of certain suits in the Supreme Court, the giving of his advice and opinions on questions of law when required by the President and heads of departments, and the discharge of duties concerning the sinking fund, and cannot be enlarged by the incumbent of the office without a violation of his official oath.

It is not his duty to give official opinions to the House of Representatives.

ATTORNEY GENERAL'S OFFICE,

February 3, 1820.

SIR: The order of the House of Representatives of the United States, of the 28th January last, "that the petition of Joseph Wheaton, and the accompanying documents, together with the report of the Committee of Claims, of the 6th January instant, thereon, be referred to the Attorney General of the United States, and that he be requested to report his opinion thereupon to this House," was handed me by Major Wheaton (the petitioner) this evening, together with the documents which are now returned.

Duties of the Attorney General.

The duties of the Attorney General's office are specified by our laws, and are confined to the following heads:

1. "To prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned."
2. "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."
3. "To discharge the duties of a commissioner of the sinking fund."

The Attorney General is sworn to discharge the duties of his office *according to law*. To be instrumental in enlarging the sphere of his official duties beyond that which is prescribed by law, would, in my opinion, be a violation of this oath. Under this impression I have, with great care, perused all the documents which have been handed to me in this case, for the purpose of ascertaining whether the order with which I have been honored from the House of Representatives falls under either head of my official duties; and it appears to me that it does not. A reference to the law will show, I think, that this is indisputably clear.

I had the honor to intimate this impression in the case of Major Thomas, referred to me officially by the House of Representatives, in the session of 1818-'19, in the hope that if it was thought advisable to connect the Attorney General with the House of Representatives in that character of legal counsellor which he holds by the existing law towards the President and heads of departments, a provision would be made by law for that purpose.

No such provision having been made, and believing, as I do, that in a government purely of laws it would be incalculably dangerous to permit an officer to act, under color of his office, beyond the pale of the law, I trust I shall be excused from making any official report on the order with which the House has honored me. It is true that in this case I should have the sanction of the House for the measure; and it is not less true that my respect for the House impels me strongly to obey the order. The precedent, however, would not be the less dangerous, on account of the purity of motives in which it origin-

Customs—Revenue Laws.

ated. The maxim is as old, at least, as republican Rome, that *omnia mala exempla ex bonis orta sunt*: on this ground I hope to be excused by the House of Representatives for declining their request. And I assure you, sir, that it gives me more pain to be thus obliged to decline it, than it would give me trouble to make the report; but in a conflict between my wishes and my sense of duty, there ought to be no question which I should obey. I may be wrong in my view of the subject. The order may be sanctioned by former precedents; but my predecessors in office have left nothing for my guidance; and I am constrained, therefore, to act on my own construction of the law as it stands.

I have the honor to be, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SPEAKER

of the House of Representatives of the United States.

CUSTOMS—REVENUE LAWS.

If foreign armed ships adopt the character of merchant ships, they must be subject to the consequences thereof, and be treated as merchant ships by our revenue officers.

OFFICE OF THE ATTORNEY GENERAL,

March 12, 1820.

SIR: I have examined the case stated by the collector at Norfolk, together with the opinion of Mr. Bradford, then Attorney General, on an analogous case in 1794.

It is very probable (perhaps certain) that Congress, in framing our revenue laws, did not contemplate the case of a public armed ship of a foreign nation entering our ports with merchandise on board, and with the intention to land such merchandise for sale and consumption within our jurisdiction; because that is an employment to which it was not to have been expected, *a priori*, that public armed ships would be put. It is, however, equally clear that Congress intended to impose a duty on all foreign merchandise imported into our country, howsoever imported. And if a foreign armed ship, departing volun-

 Forfeiture for Smuggling.

tarily from her appropriate character, chooses to adopt that of a merchant ship, she must, I think, be subject to all the consequences of such adoption, and be treated by our revenue officers as a merchant ship; there being no principle of national comity known to me which requires a nation to permit a foreign armed ship to trade in her ports, in evasion of her revenue laws.

I have the honor, &c., &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

FORFEITURE FOR SMUGGLING.

The innocent purchaser of a brig under forfeiture for smuggling, takes her subject to the confiscation, as much as the purchaser of a stolen horse takes it subject to the claim of the true owner.

OFFICE OF THE ATTORNEY GENERAL,
March 18, 1820.

SIR: I have examined carefully the petition of Isaac Entwisle, with the documents annexed to it, which you have submitted for my opinion. It is alleged, and appears to be true, that Mr. Entwisle purchased the brig Cumberland in entire ignorance of the fact that a forfeiture had attached to her by a previous act of smuggling. Such forfeiture, however, had attached, and followed her into the hands of Mr. Entwisle; nor do I think that the private purchase, under these circumstances, purged the offence, and removed the forfeiture, any more than the private sale of a stolen horse would divest the title of the original and true proprietor. Such is my opinion on the strict law of the case. It is, however, a very hard case on Mr. Entwisle; and, with great deference, I think a fit one for the act of grace which the petition solicits.

I have the honor to be, sir, most respectfully, your obedient servant,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

Liability of Sureties for Collectors of Taxes.

LIABILITY OF SURETIES FOR COLLECTORS OF TAXES.

Sureties of collectors of taxes appointed under the act of the 22d July, 1813, are liable for their delinquencies under the act of 1815 to the amount of the penalties of their bonds.

OFFICE OF THE ATTORNEY GENERAL,

March 27, 1820.

SIR: The question whether the sureties of Samuel M. Reed, who was appointed a collector of direct taxes and internal duties under the act of 22d July, 1813, are liable for his delinquencies, under the act of January 9, 1815, is one of those legal questions in relation to which one would not be surprised at a judicial decision the one way or the other. As well from its delicacy and difficulty, as from the circumstance that the decision of your department is final on the parties, I have held the case longer under consideration than I could otherwise have wished, and now proceed to give you the result of this consideration.

It is a settled principle, both of law and in equity, that a surety can be no further bound than he has expressly bound himself by his own stipulation. Giving the sureties in the present instance the full advantage of this principle, let us see how far their stipulation extends; because thus far, and no farther, can we bind them.

The act of the 22d July, 1813, under which Mr. Reed was appointed, did not, itself, impose a direct tax. It was a measure preparatory merely to a system of direct taxation, to which the emergencies of the country had forced Congress to look. It was a measure of *permanent* preparation, not for the execution of a single direct tax, but for a course of them, through a succession of years, which was at that time manifestly in the contemplation of Congress. With this view, this act arranged the States into collection districts, provided for the appointment of assessors and collectors, and prescribed their duties in detail; which duties they were expressly required to execute *whenever* Congress should impose a direct tax. Such is expressly the language of the 4th and 5th sections; and the law is unlimited in point of duration. It is prospective, then, without limitation. It is a permanent arrangement for the assessment and

Liability of Sureties for Collectors of Taxes.

collection of all future direct taxes, &c., that should thereafter be imposed by the authority of the United States; and the appointments to office made under its authority are also to be permanent. If no act imposing a direct tax had been passed at that session, the appointments must, nevertheless, have been made under the act of the 22d July; and the officers so appointed would have stood ready, according to the express language of the law, to have entered on the discharge of their duties whenever Congress should impose a direct tax, and as often as they should impose such taxes. The appointments being permanent, it is reasonable to anticipate that the bond of office required from the collector would be co-extensive with the tenure by which he held his office; that is to say, would bind him and his sureties so long as he should hold the office of collector. It is the 18th section of the act of the 22d July, 1813, which requires and prescribes the bond: "*which bond shall be payable to the United States, with condition for the true and faithful discharge of the duties of his office according to law, and particularly for the due collection and payment of all moneys assessed upon such district.*" There is certainly nothing in this language which limits the obligation of this bond to the first direct tax that should be thereafter imposed; it is certainly general enough to look throughout the whole time during which the collector should hold the office, and to bind him and his sureties throughout. Unless there be something, therefore, to limit the generality of this stipulation, the obligor and his sureties must be bound to answer any delinquency which might thereafter occur, to the full amount of the penalty of the bond. The circumstances to be relied on as affecting this limitation are, I apprehend, these:

1. The collector is required to give this bond whenever the assessor is about to hand in to him a list of assessed property for collection, and before receiving such list.

2. The bond is required to be in at least double the amount of the taxes assessed in such list.

Hence, as Congress intended such bond to be given as often as any list was about to be handed to the collector, and has given the amount of such list as the standard of the penalty of the bond, it may be argued, with great plausibility, that Con-

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gress intended each bond to stand as a security for the faithful collection of each list, separately and respectively; for the penalty, it will be said, of any bond, is too inadequate to found the belief that Congress intended to rely on any bond as the permanent bond of office. And this argument, it may be said, is fortified by the act of 9th January, 1815, (under which the delinquency in question is understood to have arisen,) whereby the collector, before receiving any list under that law, is also required to give bond, &c. To the last argument, however, it may be answered, that the same section of the act of 1815 which requires this new bond from the collector, expressly provides that nothing therein contained should be deemed to annul or otherwise to impair the obligation of the bond theretofore given by any collector: and to the whole argument, that the criterion given for the penalty of each successive bond was the only one which, from the nature of the case, could be safely assumed by Congress; that, if it had been their intention to limit the obligation of each bond to the particular list handed in, it would have been very easy to have given the bond this discriminating and special character; that the general language which they have prescribed for the condition of the bond is directly at war with the restricted purpose imputed to it; and that, from this generality of language, we are authorized to infer that Congress intended these successive bonds *ex abundanti cautela*, as so many reinforcements to the general purpose of securing a faithful discharge of the collector's duties—each bond binding from its date throughout.

On the whole, I deem it the better opinion, that the sureties are bound for the delinquency, under the act of 1815, to the amount of the penalty of their bond.

I am, sir, &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

PARDONS.

The power of absolute pardon given to the President by the constitution includes the power of issuing a conditional one. Yet there is great danger that conditional pardons may result as absolute ones, from the difficulty of enforcing

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conditions after the offender shall have been released from the custody of the law.

The condition, in order to be effectual for any purpose, must be such that a resort need not be had to the power of arrest in the original case.

Pardons may be issued before conviction. They pre-suppose an offence, and nothing more; and there is neither any constitutional nor legal provision which requires them to be preceded by a trial, a verdict, or a sentence. They may be founded on a confession in writing.

OFFICE OF THE ATTORNEY GENERAL,

March 30, 1820.

SIR: I have been indisposed since I received your communication of the evening before last, and am still unable to leave the house safely; which I hope will be my apology for having delayed my answer, and for making it now more imperfect than I could wish it.

The power of pardon, as given by the constitution, is the power of absolute and entire pardon. On the principle, however, that the greater power includes the less, I am of opinion that the power of pardoning absolutely includes the power of pardoning conditionally. There is, however, great danger lest a conditional pardon should operate as an absolute one, from the difficulty of enforcing the condition, or, in case of a breach of it, resorting to the original sentence of condemnation; which difficulty arises from the limited powers of the national government. For example: you could not pardon on a condition to be enforced by the officers of a State government—as, for instance, working at the wheelbarrow in the streets of Baltimore, under the superintendence of the town officers—because you have no political connexion with these officers, and, consequently, no control over them. But suppose a pardon granted on a condition to be executed by officers of the federal government—as, for example, to work on a public fortification—and suppose this condition violated, by running away; where is the power of arrest, in these circumstances, given by any law of the United States? And suppose the arrest could be made; where is the clause in any of our judiciary acts that authorizes a court to proceed in such a state of things? And, without some positive legislative regulation on the subject, I know that some of our federal judges would not feel themselves at liberty to proceed *de novo* on the original case. It is true, the King of

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England grants such conditional pardons by the common law; but the same common law has provided the mode of proceeding for a breach of the condition on the part of the culprit. We have no common law here, however; and hence arises the difficulty.

I understand from Judge Duvall that convicts have been pardoned by the President of the United States on condition of joining the navy of the United States: evidence of which, if it be so, may, I presume, be found in the Department of State. This is a safe and practicable condition; for although in case of desertion the original sentence of condemnation could not be resorted to, yet the new offence of desertion leads to the same catastrophe. If a condition can be devised whose execution would be certain, I have no doubt that the President may pardon on such condition. All conditions precedent would be of this character; *e. g.*, pardon to a military officer under sentence of death, on the previous condition of resigning his commission.

On the second question, whether pardon can precede condemnation, I am of the opinion that the President may, if he chooses, grant such pardon. There is nothing in the terms in which the power of pardon is granted which requires that it shall be preceded by a sentence of conviction on the verdict of a jury. There is nothing in the force of the term *pardon* which implies a previous condemnation. A pardon presupposes an offence, and nothing more. If the party confesses his guilt, every degree of certainty as to the fact of the perpetration of the offence is gained that a trial could gain; because, if he were arraigned and pleaded guilty, no jury would be empanelled, and no evidence would be heard in the case, but judgment would be entered on his own plea. But where a pardon is granted on the voluntary confession of one who has not been indicted, the confession should be in writing, and the pardon founded on the specific offence confessed; in other words, it should be a special pardon, so as not to protect the party against a prosecution for any more aggravated offence than he has thought proper to confess. And it is proper to suggest, further, that it would be much safer, as a general rule, to require a previous trial and condemnation; because all previous pardons

Fees of Imprisoned Witnesses.

must be granted on *ex parte* representations, by which the President may be deceived; whereas, on a full trial on the plea of not guilty, the court and jury will never fail to recommend to mercy, if there be any ground for such recommendation; and the President will thus be placed on a sure footing. The latter course, too, so far as I am informed, is more consonant with the general practice both of the State and federal governments, and is least exposed to discontent and censure, of which there is always danger from the adoption of a new, although a legal course.

I have the honor to be, sir, most respectfully, your obedient servant,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

FEES OF IMPRISONED WITNESSES.

Witnesses imprisoned on account of their inability to give security for their appearance at court are not entitled to any compensation beyond the one dollar and twenty-five cents per day for attending court and five cents per mile for travelling expenses, allowed in act of February 28, 1799.

OFFICE OF THE ATTORNEY GENERAL,
March 31, 1820.

SIR: You ask my opinion on the following questions:

1. Is a person detained in prison as a witness in a criminal case, from his inability to give security for his appearance in the recognizance required by law, entitled to the compensation of a witness for the time he is so detained?

2. If he is so entitled, must not the expense of his subsistence be deducted from the compensation to which he would be entitled?

In answer to which, I have to state, that the only act of Congress now in force, which makes any provision on the subject of compensation to witnesses, is, I believe, the act of the 28th February, 1799, which gives to each witness one dollar and twenty-five cents for each day *he shall attend in court*, and five cents per mile for travelling expenses. I answer the first question, therefore, in the negative; and this is an answer to the

Duties on Saltpetre.

second also. If there be any hardship in the case, Congress can remove it.

I have the honor to be, sir, most respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

DUTIES ON SALTPETRE.

Saltpetre was free from duty under the laws of the United States on the 3d of May, 1803.

OFFICE OF THE ATTORNEY GENERAL,
March 31, 1820.

SIR: I am of the opinion that saltpetre was free from duty under the laws of the United States on the 3d of May, 1803, when the importation of that article was made by Gibbs & Channing into Newport, Rhode Island.

The exemption of that article from duty was declared by the act of the 4th July, 1789, laying a duty on goods, wares, and merchandise, imported into the United States. It was repeated by the act of the 10th August, 1790, "making provision for the payment of the debts of the United States;" and was again repeated by the act of the 2d May, 1792, "for raising a further sum of money for the protection of the frontiers, and for other purposes therein mentioned." These are permanent acts, fixing the rate of duties; all of them declaring the exemption of saltpetre from duty.

The acts relied on as repealing this exemption are two; which were passed in 1797 and 1798, in the expectation of an immediate rupture with France. The first of these is the act of the 14th June, 1797, "prohibiting, for a limited time, the exportation of arms and ammunition, and for encouraging the importation thereof." By the 5th section of this act, arms of a certain description (theretofore subject to duty) which should be imported into the United States within one year, and all sulphur and saltpetre which should be imported within two years after the passing of that act, were declared free of duty, anything in any former law to the contrary notwithstanding.

Pay of a Purser.

The second is the act of 7th April, 1798, "to continue in force" the former act. By the 2d section of this act, the provision of the act of 1797 as to sulphur and saltpetre, which has been just cited, was continued in force for one year from and after the 14th June, 1800, and from thence to the end of the next session of Congress, and no longer. At the end of this time, then, the provisions of the act of 1797 ceased.

But is it declared that the provisions of the acts of 1789, 1790, and 1792, shall cease? It is not. Those acts (constituting one act, because they were *in pari materia*) formed a permanent system of tariff, which, in my opinion, remained wholly unaffected, so far as saltpetre is concerned, by the acts of 1797 and 1798:

1. Because these latter were temporary acts, looking to temporary purposes, widely different from the purpose of establishing a tariff.

2. Because they contain no provision of repeal as to the duty-laws.

3. Because these laws had themselves expired in May, 1803, so as to be incapable of operating a perpetual repeal of a permanent law.

4. Because they never professed to do more than to continue for a limited time an exemption which had been previously established by a perpetual law; and it has been expressly decided in England, that "if a statute, before perpetual, be continued by an affirmative statute for a limited time, this does not amount to a repeal thereof at the end of that time." A decision which I take to be in point.

I have the honor, &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

PAY OF A PURSER.

The pay of a purser stops with the acceptance of his resignation, subject to the settlement of his accounts—the condition of the acceptance only keeping the office alive for the purposes of a settlement, and not for accruing compensation.

OFFICE OF THE ATTORNEY GENERAL,

April 3, 1820.

SIR: By reason of indisposition, and demands of a prior date on this office, I have not had it in my power to open your

Pay of a Purser.

communication of the 24th ultimo, touching the case of John Darby, until this morning.

The question which you submit for my opinion is, whether the claim for pay preferred by Mr. Darby can be allowed by virtue of the authority of any existing law? This question is accompanied by a mass of documents composed of accounts, copies of letters, &c., &c., a short statement of facts for the Fourth Auditor of the Treasury Department, and a counter-statement by Mr. Darby. As my official duty is confined to the giving my opinion on questions of *law*, I consider myself as having nothing to do with the settlement of controverted questions of *fact*; and as the statement of facts made by the Fourth Auditor is the only official statement among the documents handed to me, I shall take it for granted that it is that statement on which my opinion is desired. By this statement I learn that John Darby was appointed purser in the United States navy on the 9th April, 1804, and ordered to the ship John Adams, bound for the Mediterranean, in 1805. On the 15th March following he was ordered to Washington for the purpose of settling his accounts. On the 26th August, 1805, he was furloughed. On the 9th October he was ordered to gun-boat No. 1; he declined obeying this order, and tendered his resignation. On the 29th November, 1805, he was informed his resignation was to be considered as accepted when his accounts should be settled. The Auditor adds, that he never came forward to settle his accounts until the 20th April, 1819. His claim is for pay as purser up to the 30th March, 1812, when all appointments to that office, previously made, were abolished.

It does not appear that he has performed any service as purser, or that he has been called on to perform any, since his resignation was tendered; and I understand that, after such a conditional acceptance as that which was made in this case, the office is considered in the Navy Department as at an end as to all purposes, except the simple settlement of the accounts.

Connecting this position with the fact as stated by the Fourth Auditor, that Mr. Darby "never came forward to settle his accounts until 20th April, 1819," I am of the opinion that he

Pensions to Wounded Cadets.

is not entitled to pay as purser from the time his resignation was thus tendered and thus accepted.

I have the honor to be, &c.,

WM. WIRT.

To the SECRETARY OF THE NAVY.

PENSIONS TO WOUNDED CADETS.

The cadets at West Point who have been or may be wounded whilst in the line of their duty are entitled to be placed on the list of invalids, as provided in the acts of March 16, 1802, April 29, 1812, and March 3, 1815.

The 3d section of the act of 1812, making provision for the corps of engineers, provided that the cadets theretofore appointed in the service of the United States, as well as those who might in future be appointed, should, at the pleasure of the President, be attached to the Military Academy at West Point, made subject to the regulations thereof, and to be thereby consolidated with the original corps of engineers.

Being consolidated with the original corps, they could not, therefore, be properly distinguished from them afterwards, but were subject to be called into actual service whensoever and wheresoever it might please the President, and were made amenable to the rules and articles of war.

So that it follows, as a legal consequence, that the cadets attached to the Military Academy at West Point are entitled to the benefits of the provision made for wounds and disabilities received in the line of their duty by the 14th section of the act of 1802.

OFFICE OF THE ATTORNEY GENERAL,

April 8, 1820.

SIR: I avail myself of the earliest hour at which prior engagements would permit it, to give you my opinion on the question "whether cadets who are wounded in the line of their duty are entitled to pensions?"

By the 1st section of the act of the 3d of March, 1815, "fixing the military peace establishment of the United States," *the corps of engineers* was expressly authorized to be retained; and, by the 7th section of the same act, it was provided that the several corps authorized should be entitled to the same provision for wounds and disabilities, &c., as was authorized by the act of the 16th of March, 1802, entitled "An act fixing the military peace establishment of the United States."

By the letter on which your question is endorsed it appears that the inquiry relates to the cadets at West Point. If these

Pensions to Wounded Cadets.

cadets, then, constitute a part of the corps of engineers retained on the peace establishment by the act just cited, they are, by its express enactment, entitled to the same provision for wounds and disabilities as was authorized by the act of the 15th of March, 1802. Do those cadets constitute a part of that corps?

By the 26th section of the act of the 16th of March, 1802, just referred to, a separate and distinct corps of engineers was, for the first time, authorized to be raised; and it was to consist, among others, of ten cadets.

By the next section of the same act it was provided that the corps of engineers, thus organized, should constitute the Military Academy at West Point. Thus, in its origin, these ten cadets did constitute a part of the corps of engineers. By the 3d section of the act of the 29th of April, 1812, "making provision for the corps of engineers," it was enacted that the cadets theretofore appointed in the service of the United States, as well as those who might in future be appointed, as thereafter directed, might, at the pleasure of the President, be attached to the Military Academy at West Point, and be subject to the established regulations thereof. By the same section it was provided that, in order to qualify them to be thus attached, they should, among other things, have engaged *to serve for five years*, unless sooner discharged; and that they should be entitled to the pay and emoluments allowed by law to cadets in the corps of engineers.

I have had the honor, on a former occasion, to express to you the opinion that the legal effect of this section of the act of 1812 was to consolidate with the original corps of engineers the cadets thus authorized to be added, so that they could no longer be distinguished, in any respect, from that corps; that, like them, they were subject to be called into actual service whenever and wheresoever it pleased the President to call them; and that, like them, they were at all times subject to the rules and articles of war. Nor have I seen any reason to change this opinion; more especially since I understand it has been approved both by the President and yourself. The cadets, thus composing a part of the corps of engineers, are embraced, by every provision affecting that corps, in general terms; and, consequently, are embraced by the provision of the 7th section

Ursuline Nuns of Orleans.

of the act of the 3d of March, 1815, before cited. That section, as we have seen, is, that the several corps authorized by that act (of which the corps of engineers was one) should be entitled to the same provision for wounds and disabilities, &c., as was authorized by the act of the 16th of March, 1802. The only remaining question is, whether the act thus referred to authorizes pensions for wounds and disabilities?

It is proper to observe, that the reference thus made to the act of the 16th of March, 1802, is not made for the purpose of ascertaining who was entitled to the provision made for wounds and disabilities; for that was already ascertained, as we have seen, by the act of 3d of March, 1815, itself. But the reference to the former law is made solely for the purpose of ascertaining what the provision was which was thereby made for wounds and disabilities; and, on turning to the 14th section of the former law, we find it enacted "that if any officer, non-commissioned officer, musician, or private, in the corps composing the peace establishment, shall be disabled, by wounds or otherwise, while in the line of his duty in public service, he shall be placed on the list of invalids of the United States, at such rate of pay," &c.

Thus (contrary, I confess, to my impression on the first presentation of the question) I find myself brought to the conclusion that the cadets attached to the Military Academy at West Point are entitled to the benefits of this provision for wounds and disabilities received in the line of their duty.

I am, &c., &c.,

WM. WIRT.

To the SECRETARY OF WAR.

 URSULINE NUNS OF ORLEANS.

The Ursuline nuns of New Orleans have possessory title to their enclosures that cannot be disturbed; the evidence, as to residence, is imperfect; suspension of sales suggested, to afford Congress an opportunity of acting upon the claim.

OFFICE OF THE ATTORNEY GENERAL,

April 11, 1820.

SIR: I have examined the case of the Ursuline nuns of New Orleans, which you did me the honor to refer to me on yes-

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terday; and proceed to give you the best opinion I have been able to form on the imperfect and *ex parte* evidence by which their memorial is supported.

They appear to have had a continued possession of more than seventy years of all the grounds embraced by their enclosure; which, I understand, embraces the whole of the four squares bounded by Levee, Ursuline, Royal, and Garrison streets, except so much thereof as is occupied by the hospital, barracks, quarters, &c., distinguished by a yellow color on the plat accompanying their memorial, and marked C.

There was an attempt, in the year 1799, to disturb their possession to that portion of these grounds which lies on the back of the barracks, as appears by the document marked D; but it seems not to have been successful.

To so much of these grounds, therefore, as is embraced by their enclosure, they have, I think, a title by possession, which cannot be justly disturbed.

They allege, however, that the whole of the four squares was originally granted to their order; that Louis XV, in violation of the grant, took possession of that part of it now occupied for military purposes; that although, from a regard to the public good, and with reference to the exercise of charity to the sick in the hospital, they yielded to this invasion of their rights, yet so soon as the use of the property for the specific purpose for which it was taken from them ceased, they insist that the right reverts to them; and hence they enter their protest against the sale of the hospital and barrack grounds, and pray you to suspend the exercise of the power given to you by the act of the 20th April, 1818, until they can have an opportunity of bringing their claim before Congress.

In support of this claim, they refer to evidence which is not produced; of the effect of which, therefore, it is impossible to speak. That which they do produce is too light and inconclusive to be assumed as the basis of legal title; and as to the hospital and barrack property, the evidence of long possession is against them.

Nevertheless, as they ask a suspension of your proceedings only until they can have an opportunity of submitting the full evidence of their claim to Congress, I submit it, that unless

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the public service demands an immediate sale, it is a question fairly addressed to the grace of the President; whether it would not be better to afford them this opportunity.

I have the honor, &c., &c.,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

BREVETS IN THE MARINE CORPS.

There is no act of Congress now in force which recognises any such office as that of Brevet Major of marines.

OFFICE OF THE ATTORNEY GENERAL,

April 22, 1820.

SIR: In answer to your letter of yesterday, I have the honor to state it as my opinion, that, as no such office as that of Brevet Major in the marine corps is recognised by any act of Congress now in force, the President cannot confer that rank under the act of 1814.

I have the honor, &c., &c.,

WM. WIRT.

To the SECRETARY OF THE NAVY.

THE WABASH SALINE.

The general power given to the President to lease the Saline on the Wabash carries with it all the incidental powers necessary to a settlement with the lessees, to transfer the kettles to a subsequent lessee, or to a former one, for a debt growing out of a lease of the works.

Taylor, Wilkins, & Morrison are not entitled to pipes found on the premises and paid for to the preceding lessees, but only for permanent and useful improvements made by them, and which were previously authorized by the President.

OFFICE OF THE ATTORNEY GENERAL,

April 22, 1820.

SIR: I proceed, at the earliest moment I have been able to command, to answer your questions relative to the claim of Taylor, Wilkins, & Morrison, for their improvements at the Saline on the Wabash.

The Wabash Saline.

The first question is: "Were the lessees entitled to compensation for pipes found on the premises by them, and paid for to the preceding lessees, if they remained in a state of repair to be used?"

The answer must of necessity be drawn from the lease; that alone is the contract of the parties. The Treasury advertisement is no part of the contract. The only provision of the lease which can be relied on as supporting the claim presented by this question, is the following: "It is further agreed, on the part of the United States, that the said Jonathan Taylor & Co. shall be paid by the United States a fair price, at the expiration of the present term, for all improvements *that shall be made by them* of a permanent and useful kind, which shall have been previously authorized by the President of the United States."

The pipes, to which the question relates, were not *made by them*. I answer this question, therefore, in the negative.

2. The second question is: "Are houses, sheds, cisterns, and reels, permanent and useful improvements within the meaning of the lease?"

This is a question of fact. Questions relative to permanent improvements under leases of lands for agricultural purposes, have been, indeed, so often made and decided, that it is well settled what are such improvements under such leases. This, however, will not assist us in the decision of an analogous question in relation to a lease of salt-works. I presume that houses, sheds, cisterns, and reels, are all necessary to the process of making salt; but whether the particular houses, sheds, cisterns, and reels, which were constructed by those lessees, were permanent and useful improvements, depends on a variety of circumstances, without a knowledge of which the question cannot be safely answered. They might be all built of such materials, and these so slightly put together, as not to deserve the name of permanent improvements; and all of them that were *fixed*, might be so situated as not to deserve the name of useful improvements. I understand that the making of salt calls for a great consumption of fuel. The pipes, in regard to which so much anxious provision is made in these leases, may be (for aught that I know) intended to carry the

The Wabash Saline.

salt water to cisterns near the woods; it being cheaper, perhaps, to carry the water to the immediate neighborhood of the fuel, than to bring the fuel to the water. The consumption of fuel in one quarter, in the course of three years, (for which this lease was made,) might make it necessary to change the direction of the pipes; consequently, the position of the cisterns, and (for aught I know) of the houses and sheds too; so that those built under the preceding lease might be no longer useful to the succeeding lessee. This, therefore, is not only a question of fact, but of complicated fact. I am sure that I shall be excused from answering it. It can be safely answered only by going on the ground, seeing the articles, and having their several uses explained.

3. The third question is: "Was the exclusion from the valuation of one-third of the pipes laid by the lessees according to the stipulation?"

The lessees can claim for the pipes only under the stipulation that has been quoted. If the one-third excluded were *permanent and useful improvements, previously authorized by the President*, they were improperly excluded.

4. The fourth question is: "Can the assent of the President of the United States be inferred from any or all the acts of the government which have been enumerated?"

These acts were: 1. That the government had an agent on the spot, whose assent is presumed from his not objecting to the improvements; and 2. That, in the subsequent lease to John Bates, there is a stipulation on his part that he will receive and pay for all the permanent and useful improvements that had been made by the said Taylor & Co., and produce their receipts for such payment.

The stipulation between Taylor & Co. and government has been already quoted. It is, that they shall be paid for all improvements of a permanent and useful character, "which shall have been previously authorized by the President of the United States."

The first act of the government relied on as founding an inference of this previous authority on the part of the President, (if, indeed, it can be called an act,) is the silence of the agent. Before such an inference can be justified, it must be shown

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that the powers of this agent extended so far as to authorize him to represent the President of the United States in this respect. There is no proof of any such power before me. But if there was, I cannot perceive how his mere silence justifies the inference in question. The lessees were at liberty to make any improvement they pleased on their own account. If they contemplated an improvement with which they meant to charge the government, their contract required that they should submit their project beforehand to the President, and receive his previous authority for making it. If they commenced an improvement without asking for such authority, the only fair inference which could be drawn under the contract, was, that they were making the improvement for their own convenience and on their own account. The mere silence of the agent in such a case would prove nothing.

The lease to Bates was *inter alios acta*. The meaning of his stipulation is, that he will pay Taylor & Co. for all that they were authorized to charge to the government; but it does not by any means ascertain what they were authorized to charge to the government. This depends on their own lease, which requires them to show an authority from the President previous to the creation of the improvements. This they must show, and cannot justly infer, I think, from either of the acts in question.

It is stepping aside from the question, (but not uselessly, I conceive,) to suggest that the claimants were concluded by the arrangement made between the authorized agents Street and Bates. If Street acted with full power, they were bound the instant the arrangement was made, and could not be unbound themselves by the manner in which they might think proper to word their receipt for the money paid under that arrangement. Besides, they knew that Bates had assumed the responsibility of the government; and in releasing him, as even their receipt professes to do, they release the government.

5. The fifth question is: "If additional compensation ought to be made to the lessees, can that be done by the President, by transferring to them, without the authority of a law for that purpose, the kettles now in the possession of the State of Illinois, but the property of the United States?"

Pensions to Indigent Soldiers.

The general power given to the President to lease the saline, carries with it all the incidental powers necessary to a settlement with the lessees; and since it seems that he might, for valuable consideration, transfer the kettles to a subsequent lessee, I do not perceive why he cannot, with equal propriety, transfer them to a former lessee for any debt growing out of a lease of those works.

I have the honor to be, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

PENSIONS TO INDIGENT SOLDIERS.

The form prescribed in the 1st section of the act of 18th March, 1818, in relation to certain indigent persons who performed duty in the land and naval service of the United States during the revolutionary war, to verify the amount of property of the applicant, except the oath of the party and the certificate of the clerk, must be gone through with in open court of record.

A court of record, within the contemplation of the acts of Congress, is a court expressly made so by the law of the State which creates it; which has been solemnly adjudged by the tribunals of the several States to be so; which proceeds according to the course of the common law, with a jurisdiction unlimited in point of amount, keeping a record of its proceedings, and which has the power of fine and imprisonment.

It was the intention of Congress to make the amount of the schedule the test of the indigence of the applicant; and that, consequently, the relief given by the former act is to be continued in every case in which the schedule shall exhibit proof of such indigence that the income of the property is inadequate to the support of the applicant.

OFFICE OF THE ATTORNEY GENERAL,

May 9, 1820.

SIR: I have now the honor to answer, in their order, the three questions submitted for my opinion yesterday, on the act of Congress of the 1st instant, supplementary to the act of the 18th March, 1818, providing for certain persons who served in the land and naval service of the United States, in the revolutionary war.

1st. Whether the whole of the form prescribed in the 1st section, to verify the amount of property of the applicant, except

Pensions to Indigent Soldiers.

the oath of the party and the certificate of the clerk, must not be done in open court?

Answer.—That section requires the party to present in open court the schedule of all his property, subscribed by himself, and accompanied by the affidavit, the form of which is given by the section. This affidavit must be annexed to the schedule, and must either have been previously sworn to before some judge of the court, or must be sworn to in open court, when the schedules to which it is *annexed* shall be presented. The court, to which the schedule is thus presented, affix a value to the property: all this is to be done in open court, and made matter of record; for by the term *court*, used in the section, is meant the court *in session*. I answer the first question, therefore, in the affirmative.

2d. Whether by “court of record,” mentioned in the 1st section, is included courts of special jurisdiction—such, for example, as a court of ordinary, even when it is a court of record, as it has been decided to be in some of the States?

Answer.—Courts of special jurisdiction may, nevertheless, be courts of record. All the courts of the United States are courts of special, not of general jurisdiction; yet they are courts of record. The phrase “court of record” is borrowed from the English law, and it is proper to look to that law for its meaning. According to the English law, those only are courts of record which proceed according to the course of common law; which have jurisdiction in all actions, real, personal, and mixed, above the value of forty shillings; which have the power to fine and imprison; and which enroll or record their proceedings in perpetual testimony thereof. According to that law, the mere fact of keeping a registry of its proceedings is not enough to make a court a court of record. For the court of admiralty and the ecclesiastical courts do this: yet are they not courts of record, in England; because they do not proceed according to the course of the common law, but according to the course of the civil and canon law. The “court of ordinary” mentioned in the question, is, I presume, the prerogative court of England, whose function it is to grant probate of wills and letters of administration; this is one species of ecclesiastical courts, and, in England, is not a court of record, for the

Pensions to Indigent Soldiers.

reason just mentioned—that it proceeds by the civil and canon law, not by the common law.

It is further to be remarked, that in England the erection of a new tribunal, with a power to fine and imprison, is, of itself, sufficient to constitute the new tribunal a court of record. With this view of the English law on the subject, it is proper to state that, in my opinion, all are courts of record, within the contemplation of the act of Congress:

1. Which are expressly made courts of record by the law of the State which creates them;
2. Which have been solemnly adjudged by the tribunals of the several States to be courts of record;
3. Which proceed according to the course of the common law, with a jurisdiction unlimited in point of amount, keeping a record of their proceedings;
4. Which have the power of fine and imprisonment;

And that courts which proceed according to the course of the civil and canon law, having neither of those attributes, are not courts of record, although they may keep a registry of their proceedings and possess a seal.

The great multitude and variety of courts which exist in the different States, and the very loose and incorrect notions which are afloat as to what it is that constitutes that technical being, "a court of record," will render it difficult for you to apply these principles to every case that may be brought before you from every part of the Union. You have a right, however, to be satisfied—and, indeed, you are required by the law to be satisfied—that the court whose certificate is offered, is a court of record. This proof can be easily supplied by the minute of the court, in every instance; it may, on the face of the proceedings, state itself to be a court of record; state why it is such; for example, "being a court of record, expressly so declared by the statute of the State which created it," or "expressly so adjudged by the tribunals of the State," or "having the power of fine and imprisonment," &c. This may be required by the regulations which you will publish under the act; and it is, fortunately, a requisition with which a compliance is very easy.

3d. Whether the words of the 3d section, "in such indi-

Pardon of Piratical Murder.

circumstances as to be unable to support himself without the assistance of his country," do not comprehend those only who are incapable, without the aid of the government, of supporting themselves, except by private or public charity?

Answer.—I think that it was the intention of Congress to make the amount of the schedule the test of the indigence of the applicant; and that, consequently, the relief given by the former act is to be continued in every case in which the schedule shall exhibit proof of such indigence, that the income of the property is inadequate to the support of the applicant.

I have the honor to be, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF WAR.

PARDON OF PIRATICAL MURDER.

The power of pardon neither requires nor authorizes the President to enter into an investigation of facts, not set up nor proven at the trial, which, if true, should have been thus interposed to the indictment, after a trial, conviction, and an appeal, and decision adverse to the accused has been made by the Supreme Court of the United States; nor to pardon the accused.

OFFICE OF THE ATTORNEY GENERAL,

May 9, 1820.

SIR: I have examined attentively the petitions for pardon presented by Rosewaine, Hornes, and Warrington, convicted of a piratical murder before the circuit court of the United States for the district of Massachusetts, which have been referred to me by the direction of the President.

The ground taken by the prisoners is, that they sailed from Buenos Ayres in a regularly-commissioned privateer of that government, called the Tuckerman; that by this privateer a Spanish ship was regularly captured, and ordered for Buenos Ayres for adjudication; that, not being willing to go back to that country, the prize crew (of which they were part) rose on the prize-master, who was killed in the affray; after which, they brought the ship into the United States, and delivered her up to the original Spanish owners; that from the regularity of

the privateer's commission, and the consequent regularity of the capture, it results that the offence (if one has been committed) is an offence against the government of Buenos Ayres, and not against the United States; and hence, that they have been convicted before a court which had not jurisdiction of the offence; that they were not able on the trial to avail themselves of this ground of defence, because their poverty disabled them from procuring evidence of the leading fact—the regularity of the privateer's commission.

If the fact be as they have stated it, I believe they are right in the conclusion of law; and that, instead of being executed in the United States, they are amenable for this offence to the laws of Buenos Ayres only.

But why was not an affidavit made of this fact, and a continuance asked, to give them time to produce the proof of it? It is scarcely conceivable that a continuance thus asked would have been refused; and considering the masterly ability with which they were defended on their trial, (of which there was full proof in a written argument before the Supreme Court,) it is as little conceivable that the motion would have been omitted, had there been any ground for it in the facts of the case. These facts now come to the President on a statement entirely *ex parte*, not supported by one tittle of testimony—not even by the oath of the petitioners themselves. There is no certificate of facts from the judges who presided at the trial—from the jury, from the counsel of the United States, nor even the counsel for the prisoners. All the questions of fact which were made in the case on the trial have been settled by a jury, who have not recommended the prisoners to mercy. All the questions of law were referred to the Supreme Court, where they were most ably argued in behalf of the prisoners, and most solemnly decided against them. And now the case is presented to the President on a new set of facts, which it is admitted was not before the jury—these facts, too, entirely unsupported by proof; and from the posture in which the case now stands before the President, entirely unsusceptible of any but *ex parte* proof, because there is no one to cross-examine a witness, nor to collect proof on the part of the prosecution.

These facts, and the question of law growing out of them,

New Madrid Land Claims.

belonged to the merits of the case on the trial. The petitioners propose to the President nothing less than to enter into a new trial of the cause, on a new set of facts leading to new conclusions of law—and this in the absence of the accuser and his witnesses; for the President must either do this, or take the facts for granted as they have been stated by the petitioners, and found an immediate pardon on that assumption.

I do not think that the power of pardon either requires or authorizes him to do the one or the other of these things; but that, on the contrary, to do either would be an abuse of that power.

I have the honor to be, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF STATE.

NEW MADRID LAND CLAIMS.

Patents under the act of 17th February, 1815, must issue to the owner at the date of the act, if alive; and if dead, to the heirs or devisees. The act attaches no assignable quality to the charity which it bestows; and being the only authority for issuing a patent, its terms must be strictly pursued.

The rectangular system of public surveys must be observed and conformed to in the location of certificates.

OFFICE OF THE ATTORNEY GENERAL,

May 11, 1820.

SIR: I have examined the letter of the Commissioner of the General Land Office, with its enclosures, referred to me yesterday; and after an attentive consideration of the act of Congress of the 17th February, 1815, "for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes," I am of opinion—

1. That the patent must, under the provisions of this act, issue to the person who was the owner at the date of the act; or, in case of his death, to his heirs or devisees. The act attaches no assignable quality to the charity which it bestows; and the act being the only warrant of authority to the Commissioner to issue a patent at all, he must pursue that authority

strictly. Even if these charities (for they are nothing else) were assignable, there is no sufficient evidence of assignment in the particular case submitted to me. The certificate of the clerk of a court "that there appears of record in his office a regular chain of title" from A to Z, is an extra-official act, and entirely nugatory. He is a mere recording officer, and may certify copies from his record. But the law has not made him a judge of what is a valid deed, or a valid assignment, or what the legal operation of their terms to pass title. It was not the intention of Congress to make these charities a subject of speculation. The law was passed to help the poor who had been rendered indigent by a visitation of God, not to enrich the speculator. It was not their intention to encumber the Commissioner of the Land Office with the laborious duty of tracing the genuineness of a long chain of assignments, with all their usual concomitants of fraud and oppression, if not of forgery and perjury. The act looked to the immediate relief of the sufferers; and hence, by the terms of the act, the relief is strictly confined to them; so that I see nothing either in the language or object of the law to authorize the issuing of a patent to any person other than the owner at the date of the act; or, if he be dead, to his heirs or devisees.

2. I am of opinion that it was not the intention of Congress, in authorizing the sufferers "to locate the like quantity of land on any of the public lands of the said Territory, the sale of which is authorized by law," to change or affect in any manner that admirable system of location by squares, which had been so studiously adopted in relation to all their territories. This is manifest from the consideration that they have made the avowed object of the act yield to this arrangement. The avowed object of the act was to give to the sufferer the *same quantity* of land which he had lost by the earthquakes; yet it is provided, that if he had lost less than 160 acres of land, (the smallest subdivision of a section,) he was still to have a patent for 160 acres. If he had lost more than 640 acres, (the exact quantity of a section,) he was still to have but 640 acres; so that in the first instance he is to receive more than he has lost, and in the last less—for no other conceivable reason, than the desire of Congress to preserve the uniformity and symmetry of

Suits for Indemnity.

the system which had been previously adopted for the location and settlement of all those territories. On your last question I am, therefore, of the opinion that the locations under this act must conform with the general plan of surveying the public lands.

I have the honor, &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

SUITS FOR INDEMNITY.

A marshal may bring suit against a defaulting deputy, whenever the marshal has become liable to a suit on his bond to the United States by reason of the delinquency of such deputy. (7 Johnson's N. Y. Rep., p. 168.)

OFFICE OF THE ATTORNEY GENERAL,

May 12, 1820.

SIR: The question whether General Moore, the marshal of Virginia, can proceed against the sureties of his deputy before he obtains from the United States an acknowledgment of his having paid the sum for which the deputy was a defaulter, will depend on the stipulations of the bond given by the deputy and his sureties. The laws of the United States are silent as to any such bond. It is an affair entirely between the deputy and his principal, whether there shall be any such bond at all; and, if there shall, what its stipulations shall be. I must see the bond, therefore, before I can answer your question safely.

In the absence of the bond, I can only say that, if it be a bond to indemnify and save harmless, I do not think that actual payment, on the part of the marshal, is a necessary preliminary to his right to proceed against the sureties. I understand from General Moore's letter that the United States have obtained a judgment against him. This I hold to be a sufficient foundation for a proceeding *on such a bond* against the sureties of his deputy. It has been decided in a highly respectable State court, that the institution of a suit merely, and even the liability to a suit, is, *on such a bond*, a sufficient foundation for a suit against those who have bound themselves

 Computation of Time for Redemption.

to indemnify the plaintiff. (*Kip vs. Brigham*, 7 Johnson's Reports, p. 168.)

I have the honor, &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

COMPUTATION OF TIME FOR REDEMPTION.

The words "within two years *from* the time of sale," used in the clause of the act of Congress giving the owners of lands sold for the taxes of 1815 and 1816 the right to redeem them of the purchasers at the tax sales, exclude the day of sale from the computation. (See 27 Henry VIII, ch. 10; 2 Dyer, 186; Moor, S. C., 40; 1 Henry Blackstone R., 13; and Cowper, 714, for authorities as to computations of time.)

OFFICE OF THE ATTORNEY GENERAL,

May 13, 1820.

SIR: The case presented for my opinion on the letter of S. Jones is understood to be as follows:

On the 21st day of July, 1817, certain delinquent lands, on account of the direct tax of 1815-'16, were sold. On the 21st July, 1819, they were redeemed, or offered to be redeemed; but the purchaser at the collector's sale refuses to receive the money paid for the redemption, and insists on a title—contending that the redemption ought to have been made on the day before, that is, on the 20th July, 1819. The question is, whether the redemption was made in proper time.

The words of the act of Congress are: "The owners, &c., shall have liberty to redeem the lands, &c., *within two years from the time of sale*, upon payment," &c. When did the two years, in this case, expire? To enable us to answer this question, it is necessary to ascertain when the count is to begin. Is it to begin on the day of the sale, or on the day after? If on the day after, (to wit, the 22d,) it is clear that the two years did not expire until the midnight of July 21, 1819, and consequently the redemption is in time.

The language of the act is, within two years from the time of sale. Does not this word *from* exclude the day of sale from the computation? There is good authority for saying that it

Computation of Time for Redemption.

does. The statute of 27 Henry VIII, ch. 10, requires that all deeds which shall be effectual to pass land shall be enrolled "*within six months next after the date of the deed.*" In the case of *Thomas vs. Popham* (2 Dyer, 186, and Moor 40, S. C.) it was decided, under this statute, that a deed enrolled on the last day of six calendar months, *excluding the day of date from the computation*, was well enrolled.

The statute of 2 Will. and Mar., stat. 1, c. 5, sec. 2, authorizes the sale of goods distrained for rent, if the owners shall not, *within five days after such distress*, replevy, &c. In the case of *Wallace vs. King* and others, (1 Henry Blackstone's Rep., 13,) it was decided that this right to replevy did not expire until the evening of the 6th day, which excluded the day of the distress from the calculation.

Powell, in his treatise on Powers, (p. 456.) says that the legal import of the word *from* such a date has been considered as excluding from the computation the *terminus a quo*, through a series of decisions for four hundred years.

If this position, or the cases cited, be correct, the 21st July, 1817, on which the sales were made, is to be calculated in the computation of the two years, and then the redemption is clearly within time.

But in the famous case of *Pugh vs. the Duke of Leeds*, (Cowp., 714,) it was decided that "*from*" may mean *exclusive* or *inclusive*, as it will best effectuate the intention of the parties. If, in the present case, it may, according to this principle, either include or exclude the day of sale, is there any reason for preferring the one or the other mode of computation? It is to be recollected that this is a provision for the benefit of the person whose lands have been sold. Its object is to relieve him from a forfeiture. It ought, therefore, to be liberally expounded, and that construction, in a doubtful case, should be preferred which will effectuate the purpose of relief intended by the act.

Upon the whole, I am of opinion that the redemption was in time, and that the purchaser at the collector's sale is not entitled to a deed.

WM. WIRT.

To the SECRETARY OF THE TREASURY.

Interference with the Judiciary.

INTERFERENCE WITH THE JUDICIARY.

The Executive will not interfere with the judiciary whilst it is in the regular course of giving construction to the acts of Congress, by directing a *nolle prosequi* of a proceeding against a British vessel for a breach of the navigation act of April 18, 1818, after the district court has condemned her to forfeiture.

OFFICE OF THE ATTORNEY GENERAL,

May 15, 1820.

SIR: The British sloop "Pitt" has been condemned by the district court of Delaware as forfeited for a breach of our navigation act of the 18th April, 1818, and the British claimant has taken an appeal to the circuit court of that district, where the cause is still pending. In this posture of things, instead of prosecuting his appeal, he applies to you to enter a *nolle prosequi*. The sloop herself was restored to the claimant on the usual bond, while the cause was before the district court; so that her services to the claimant are not at all fettered by the pendency of the suit; the only question now being the forfeiture of the bond.

On the reference which you have done me the honor to make to me, I am respectfully of the opinion that it is not expedient to give the order. The case is now before that department of the government whose appropriate function it is to expound our laws; and, in my opinion, it would be improper, on the part of the Executive, to step in for the purpose of arresting and putting an end to the prosecution, after a respectable court of the United States has pronounced it well-founded. If the decree which has been pronounced is wrong, it will be reversed either in the circuit or the Supreme Court. A *nolle prosequi* would be a censure on that decree, which I cannot advise the President to pronounce. It is desirable that the construction of our acts of Congress should be settled by the Supreme Court as soon as possible; that is the tribunal which our constitution has appointed to settle it. The President ought not, in my opinion, to defeat this object by stopping a prosecution in its regular course to that tribunal, except in a case of manifest illegality and oppression; which can with no decency be predicated of a prosecution that has been sanctioned, as this has been, by the sentence of a district court.

Effect of Release of Surety.

If the document submitted to me be the whole record in the case, I would further advise either that a new prosecution be instituted, (if practicable,) or that leave be asked to amend the libel by a new count on the act of the 3d March, 1817, within the first section of which the facts, as they appear on this document, very clearly bring the case of the "Pitt," as it seems to me.

I have the honor, &c., &c., &c.,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

EFFECT OF RELEASE OF SURETY.

At common law, the release of one obligor is a release of all the rest; and although the acts of Congress may save the sureties of an insolvent debtor to the United States, the question is doubtful.

OFFICE OF THE ATTORNEY GENERAL,

May 20, 1820.

SIR: The question which arises in the case of Mr. Dundas, is, whether the discharge of the principal, who is in execution, will not discharge his sureties on a duty bond?

At common law, the release of one obligor is a release of all the rest; and, according to this principle, the discharge of Dundas will discharge his sureties, unless this effect be prevented by that provision in the act of the 3d March, 1817, which gives the President the power of discharging an insolvent debtor, and which declares that, notwithstanding such discharge, "the judgment shall remain good and sufficient in law; and may be satisfied out of any estate which may then, or at any time afterwards, belong to the debtor." I can find no judicial exposition of the effect of this provision on the liability of a surety, under a discharge by the President. But the same provision precisely is annexed to the power of discharge given to the Secretary of the Treasury by the act of the 6th June, 1798; and I find one case (and one only) in which the question was raised under a discharge given by the Secretary of the Treasury. This was the case of Hunt, plaintiff in error, against the United States, and reported 1 Gallison, page 32. The case was

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before the circuit court of the United States for the first circuit, and Judge Story decided that such a discharge did not operate as a release of the surety. But, in concluding this opinion, he says: "I have come to this result not without some hesitation; and it was certainly a perilous proceeding to discharge the principal debtor without the assent of his surety. I give no opinion how the law would have been if it had appeared that, upon the discharge, the United States had taken any security, pursuant to the act of the 6th June, 1798." Now, in the case of Dundas, it is proposed to take a security upon the discharge, which will make it the case in which Judge Story says he will not pronounce how the law would be; thereby implying that it would be still more doubtful than the case before him. My own opinion, however, is, that your discharge of Dundas would not discharge his sureties; yet, in the language of Judge Story, "I have come to this result not without some hesitation." In truth, not without so much hesitation that I should not be surprised if it should be otherwise determined by the Supreme Court. That the sureties are determined to make the question, is manifest from their refusal to assent to the discharge—calculating, no doubt, that you have come to the determination to discharge Dundas, even without their consent; and that you will thereby give them a chance of escape, which they do not possess at present.

The peculiar situation in which Mr. Dundas is placed—he a prisoner in Baltimore, and his mother in Alexandria, begging on her death-bed to be permitted to see him—is certainly calculated to make a strong appeal to your sympathy; but it is for you only to decide how far this consideration should lead you to put in jeopardy any portion of the revenue of the United States.

I have the honor, &c., &c.,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

THE PRESIDENT AND THE METROPOLIS.

It is the duty of the President to exercise a general supervision over the subject of the appropriation of the public grounds in the city of Washington; and as the right to occupy and improve any of these grounds depends upon whether

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the improvements are for public purposes, so the power of the President to assent to improvements depends upon whether they are for public purposes, and are useful.

The resolution of the corporation of the city of Washington, proposing to improve a part of the Judiciary Square by erecting thereon a city hall, is to appropriate the public grounds for both a public and a *useful* purpose, and may be approved by the President; provided, that the quantity of ground required neither exceeds nor falls short of the purpose.

The assent of the President to acts of the corporation of Washington should be expressed in the same manner as his assent is expressed to acts of Congress.

OFFICE OF THE ATTORNEY GENERAL,

May 29, 1820.

SIR: I have, in conformity with your request, examined the subject submitted to me to-day, and have now the honor to express my opinion on the two questions: 1st, of your "powers and duties" in relation to the resolutions presented for your approbation by the corporation of Washington; and, 2d, the manner of expressing that approbation.

By the former, as well as the present charter of the city, the corporation is authorized "to occupy and improve, for public purposes, by and with the consent of the President of the United States, any part of the public and open spaces and squares in said city, not interfering with private rights." The limitation on the right to occupy and improve being that it shall be *for public purposes*, the President has no power to assent to any proposition which devotes the property to *any other* than a *public purpose*. And, again, although the purpose be a *public* one, yet I humbly conceive that it is not the *duty* of the President to approve, unless the purpose be also a *useful one*; for it would be easy to put examples of institutions which might be public, and yet not useful. Finally, the proposition might be to appropriate more or less ground than the purpose requires: the check on this is, the approbation of the President.

The first resolution of the corporation proposes to occupy and improve a designated part of the Judiciary Square, by the erection of a city hall. This is both a public and a useful purpose; and the case, I think, is a proper one for the approbation of the President, provided that the quantity of ground required do not exceed or fall short of the purpose; which it does not belong to me to decide. I will barely take the liberty

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to suggest, for the President's consideration, whether, in the establishment of a great and permanent improvement like that of a city hall for the metropolis of the Union, its ultimate grandeur (and not its present state merely) should not enter into the calculation. The particular years in which these improvements are erected, will probably be recorded on the building by the architect himself; and the scale of the appropriation, as well as the style of the building, will become historical monuments of the spirit and taste of the age. The city itself is on a noble scale; should we betray a premature degeneracy of our mode of filling it up?

The next resolution proposes to occupy and improve that part of the public reservation south of the canal, and north of the mall, which was designated on the plan of the city, published under the direction of the then commissioners, in 1792, as a site for the theatre, for that, "*and other public purposes.*"

The last part of this resolution is too vague—"other public purposes." The *purpose* should be specified, that the President may be enabled to exercise the legal check with safety. As the resolution now stands, I cannot advise an approbation of it.

As to the erection of a theatre: I am informed by the mayor of the city, who handed me your communication, that the object of the resolution is that the house, when built, shall belong to the public, and become a source of public revenue by its rent. It appears, also, that the original plan for the city of Washington (then existing only in prospect) was published so far back as 1792, which exhibited, among other things, the present contemplated position for a theatre; that the greater part, if not the whole of the city property, has been sold on the faith of this plan; comprehending the whole scheme of its streets, squares, lots, public places, and the projected purposes of those public places; and that the successive Presidents have acted, uniformly, on the faith of this published plan. I find, also, that the plan of the city has been, impliedly, ratified by Congress in several acts, and, among others, by the present act of incorporation, in the references made by it to the open squares and places indicated by the plan. It is suggested, too, (and justly, I think,) *as a public purpose*, to have the theatre removed

The President and the Metropolis.

from the danger of communicating fire (an occurrence of late so frequent) to the buildings belonging to individuals, on grounds originally purchased on the faith of the plan, which promised such a security. Whatever might have been my opinion on the question, whether the erection of a theatre came within the power to occupy and improve these grounds for public purposes, the facts to which I have adverted leave no doubt with me that the President may, with propriety, approve the second resolution so far as a specific purpose—the erection of a theatre—is expressed.

It may not be out of place to observe, that, in the projection of a city like this, it was natural to anticipate that a theatre would, at some day or other, be built. A city like this without a theatre, would have formed an exception from the civilized world. The people will have amusements of some sort; and a theatre I believe is one of the most innocent and elegant that can be found, adapted to tastes of all sorts. Hence it was, probably, that in projecting the plan of this city, a site was selected for a theatre—and judiciously selected, too, I humbly think; but whether so or not, this site, it seems, was published to the world as constituting part of the permanent plan of the city, and, in all probability, afforded an inducement to purchasers, either from its contiguity, its remoteness, or the security which its position promised to private dwellings. I consider sales made under the public exhibition of this plan, as amounting to a contract between the public and the individual purchasers, from which it would be unwarrantable to depart.

You will observe that the correctness of this reasoning depends on the correctness of the supposition that the plan of the city, which has been exhibited to me by the mayor, who handed me your communication, is a true copy of the original plan, so far as the site for a theatre is concerned, as it is certified by Doctor Thornton to be.

2. As to the manner in which the President should express his assent to an act of the corporation, I observe that the practice has been to do it precisely in the form in which the President *approves* an act of Congress.

I have the honor, &c., &c.,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

The New Madrid Certificates.

LIGHT-HOUSE AT THE MOUTH OF THE MISSISSIPPI.

The contractor to build a light-house at the mouth of the Mississippi is not answerable for the failure of the foundation unless the choice of the same were left to himself.

OFFICE OF THE ATTORNEY GENERAL,

June 6, 1820.

SIR: If the undertaker to build a light-house at the mouth of the Mississippi had contracted to build a house of particular dimensions, *the choice of the foundation being left to himself*, he would have been bound to have made a sufficient foundation to support the building, and would have been answerable in damages if it had failed. But, inasmuch as in the contract with Winslow Lewis the United States specify the particular foundation which they will have, I am of the opinion that, if the contractor complied faithfully with this specification in laying the foundation, he is not answerable for its failure. In this case, if either party is to be considered the insurer of the foundation, it is the party who made the selection—to wit, the United States; and the undertaker would, I think, in a suit against him, be permitted to retain so much of the advance as would cover the cost of the materials and labor furnished by him towards the work, so far as it went.

If, on the contrary, the foundation was not that for which the United States stipulated, then the undertaker is answerable on his bond, and would be forced not merely to refund the advance which he has received, but to answer in damages for the breach of his undertaking.

I have the honor, &c., &c., &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

THE NEW MADRID CERTIFICATES.

When a New Madrid certificate calls for a quantity of land greater than 160 acres and less than 640, and it becomes necessary to subdivide a quarter section, it should only be done by making the subdividing line parallel and co-extensive with the line of the contiguous quarter.

May be located on a fractional section, or part of it, but not so as to appropriate all of the local advantages to the injury of the public.

The New Madrid Certificates.

Locations made in a square, previous to the sectional lines being run, &c., are inadmissible, as the sale is unauthorized until the sectional lines are run.

Holders may take less than 160 acres, provided they can find such a tract liable to sale.

OFFICE OF THE ATTORNEY GENERAL,

June 19, 1820.

SIR: Major Berry's letter of the 17th instant, which you have done me the honor to submit for my opinion, proposes that patents may issue under the act of Congress of the 17th February, 1815; "for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes," in four classes of cases, which I shall consider in the order presented by him:

1. "That patents may issue upon locations made upon certificates for more than 160 acres and less than 640, where the locator takes one or more quarter sections, and so much of an adjoining one as will make the quantity."

In the communication which I had the honor to make to you on the 11th of the last month, I expressed the opinion that it was not the intention of Congress, in this act of charity to the New Madrid sufferers, to permit them, by their locations, to break in upon the plan of sections and their subdivisions which had been adopted for the sale of these territories; and I inferred this from the circumstances, that where a sufferer had lost less than a quarter section, he was still permitted to locate that quantity; and where he had lost more than a whole section, he was reduced, in his right of location, to one entire section; both which regulations are departures from the general and avowed object of the law, (which was to give them the exact quantity they had lost;) and for the adoption of which the manifest reason was, to preserve the entire system as far as it could be preserved. I am still of this opinion. These two cases, however, of the sufferer who had lost *less than a quarter section*, or *more than a whole section*, (the only two cases in which Congress has given an explicit direction,) will not furnish an answer to the case proposed by Major Berry, which is that of a sufferer who has lost *more than a quarter section*, and *less than a whole one*; and yet a quantity not coinciding with any subdivision of the section. In this case, the only guide

The New Madrid Certificates.

given us by the act is, that the party shall have the like quantity of land with that which he has lost; and if to give him this like quantity it becomes necessary to subdivide a quarter section, I do not perceive that it can be avoided consistently with the avowed object of the law. In making this subdivision, however, the policy of the law should be so far respected as not to change the rectangular and quadrilateral form of the residue of the quarter section; which can be effected only by making the subdividing line parallel and co-extensive with the line of the contiguous quarter section which forms a part of his location. Suppose, for example, the party be entitled to 200 acres: he will take one quarter section—160 acres; and from either of the adjoining quarter sections of the same section he will take 40 acres, to be cut off from it by a line parallel and co-extensive with the line of the quarter section which he has previously chosen. By this means he will get the exact quantity to which he is entitled, which meets the express object of the law; and he will get it in the form which interferes the least with the admirable system of our territorial surveys, which so far respects the manifest wish of Congress apparent on the face of the act. No other method occurs which so well attains both these purposes. I proceed to consider Major Berry's second proposition.

2. "That a location may be made to take so much of a fractional section or sections as will make the quantity, where the sections are made so by the river or private claims."

The act authorizes the sufferers to locate the like quantity of land on "*any of the public lands of the said Territory, the sale of which is authorized by law.*" The sale of fractional sections being authorized by law, they are, consequently, open to the location of the sufferers: this, *as a general position*, appears to me unavoidable under the language of this law. If a quarter section and a fractional section together will make the quantity to which the party is entitled, I do not perceive that it can be refused to him; or if a fractional section alone will make the quantity, I should think him entitled to it, as the law now stands; but if there be any local advantage attached to such fractional section (*e. g.*, if one side of it be washed by a river,) he ought not to be permitted so to decide

The New Madrid Certificates.

it as to monopolize the whole of this advantage to himself, but to apportion it equally between the part which he takes and that which he leaves. So, if the quantity to which he is entitled under the law would require several fractional sections to make the complement, bounded by a river, or any other local advantage, the party should not be permitted to string his locations along the shore, so as to pass from one range of sections into another, and thereby to engross the shore to himself; for this would be to abuse the clarity of the law, to the public detriment. It is dangerous to give a general answer to a general and abstract question like this; for that which is true in the general, often becomes erroneous and unjust in its application to particular cases. It is better to put the specific case, and, if necessary, to accompany it by a diagram.

3. "That locations made in a square *previous to the sectional lines being run, &c., &c., &c.*, shall be patented."

This is wholly inadmissible. The authority given is to make these locations on any of the public lands of the Territory *the sale of which is authorized by law*. But the sale is not authorized by law until the sectional lines are run; and, consequently, all locations previously made by those sufferers are unauthorized. The circumstance of their being located in a square, is perfectly immaterial to the policy of the law; for, although in a square, they may not, and most probably will not, quadrature with the sectional lines of the general survey, since squares may lie to any and to every point of the compass—no two contiguous squares quadrating together; whereas the sectional scheme calls for parallel lines throughout the whole Territory.

4. "And, lastly, that where a location shall be made upon a certificate issued in lieu of a town lot, certifying that the claimant may locate any quantity not exceeding 160 acres, and the claimant shall, at his option, locate a piece of land bounded by other claims, so that the whole quantity cannot be had, a patent shall issue for the location."

As a general proposition, this, I think, is to be answered affirmatively; though a diagram in the particular case might change my opinion. The law does not say that the party who has lost less than 160 acres *shall locate that precise quantity*; but that he is authorized to locate and *obtain any quantity of*

Rights of Defendants in Patent Suits.

land not exceeding 160 acres. He may, consequently, if he chooses, take less than 160 acres, if he can find a less quantity together coming within the description of public lands, the sale of which is authorized by law.

The law is imperfect, and requires amendment. The opinions which I have expressed appear to me to correspond with the intention of Congress, so far as that intention is discoverable on the face of this act; yet the case is far from being one of absolute certainty.

I have the honor, &c., &c., &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

RIGHTS OF DEFENDANTS IN PATENT SUITS.

A defendant, when sued by a patentee for an alleged violation of his patent-right, has a right to a copy of the specifications for use on the trial, in order to enable him to show, if he can, that the specification does not contain the whole truth relative to the discovery, or that it contains more than is necessary to the effect desired; and, as the law gives this privilege, it by implication gives the right of using the specification openly and publicly in court.

The established forms of jury trials, in other cases, cannot be departed from in patent cases, even though patentees may desire secrecy. *Nolumus leges mutari, &c.*

OFFICE OF THE ATTORNEY GENERAL,

June 20, 1820.

SIR: During my late absence in Richmond, a communication was left at this office from your department, covering a letter from Mr. Ingersoll, of Philadelphia, to you, and an answer thereto from Dr. Thornton, the superintendent of the Patent Office, endorsed on the envelope "A patent case for the consideration and opinion of the Attorney General;" from which I infer that my opinion is desired only on the particular case which has arisen.

The case I understand to be this: A defendant, sued by a patentee for an alleged violation of his patent-right, has obtained, through his counsel, a copy of the specification filed by the patentee in the Patent Office, as a document material to his defence; but the copy is accompanied by a request that it may

Rights of Defendants in Patent Suits.

be used only for legal and necessary purposes, lest the secret of the discovery should become public, and the patentee should thereby lose the benefit of his exclusive right. The counsel replies that the paper, having been procured for the defence of his client, must of necessity be shown to that client; and that, being an official exemplification of a public document, he cannot consent to hold it under any restriction or injunction of secrecy whatever. To this disclosure of the paper to the defendant, the superintendent of the Patent Office is understood to object; and, if the paper is to go before the jury, he requires that it shall pass through the hands of the court only; that the jury shall have a special oath of secrecy administered to them; and, as necessary to this concealment, I presume it is intended that there shall be no open discussion at the bar on the specification, but that the whole trial shall be in secret.

However desirable it might be, in the class of cases to which the superintendent alludes, (those in which the benefit of the discovery might be used in secret,) that the law were thus, I have only to say that the law is not so written. The 6th section of the act of 1793 permits the defendant to protect himself by proving, *inter alia*, that the specification filed by the plaintiff in the Patent Office does not contain the whole truth relative to his discovery, or that it contains more than was necessary to produce the desired effect, &c., &c. How can he avail himself of this privilege, but by calling for a copy of the specification, so as to enable him to collect and bring his proofs to bear on it? When the law gives a privilege, it gives, by unavoidable implication, all the means of using it. Every defendant, therefore, to an action charging him with the violation of a patent-right, has a right, as soon as he is made a defendant, to call for a copy of the plaintiff's specification; and the superintendent of the Patent Office is bound to furnish it on payment of the fees prescribed by the 11th section of the law; and the defendant has the same right to use the specification on the trial—and to use it in the same way, too, as any other piece of evidence whatever; that is, not merely to exhibit it, but to illustrate by argument the purpose for which he introduces it.

As to changing the established forms of jury trials, in patent

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cases, by clearing the court-house of the suitors, shutting the doors, silencing the counsel, and swearing the jury to secrecy, it is only necessary to say that, if it were proposed, the answer from the bench would be, "*Nolumus leges mutari.*"

I have the honor to be, sir, most respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF STATE.

 EXECUTION OF A CONSULAR BOND.

Attestation is not essential to the validity of a consular bond.

OFFICE OF THE ATTORNEY GENERAL,

June 30, 1820.

SIR: I know not by what accident your communication enclosing Mr. Strong's bond of office has been misplaced, so as never to have been brought to my notice till this time. I regret the accident, although it can have produced no public inconvenience.

It is not essential to the validity of a consular bond that it should be attested. The plea of *non est factum* would, in such a case, be sufficiently met by proof of the handwriting. The acknowledgment of it before Mr. Jay would constitute him a sufficient witness, even if his official certificate should be decided to be insufficient. The bond is herewith returned.

I have the honor, &c., &c., &c.,

WM. WIRT.

To the SECRETARY OF STATE.

 REDEMPTIONS OF LANDS SOLD FOR TAXES.

Minors have the right to redeem their lands sold for taxes at any time within two years from the removal of the disability, by payment of the purchase money, with ten per cent. thereon, and compensation for improvements, whether deeds have been given to the purchasers or not; for no deed is valid unless given in pursuance of law, and the law does not authorize the giving of a deed until the time of redemption shall have expired.

OFFICE OF THE ATTORNEY GENERAL,

July 3, 1820.

SIR: I have examined the subject of Mr. Storer's letter of the 17th ultimo, and cannot perceive that there is any diffi-

Redemptions of Lands sold for Taxes.

culty in the case. The act of Congress of the 22d July, (section 25,) and the act of the 9th January, 1815, (section 30,) expressly reserve to minors the right of redeeming their lands sold for taxes, at any time within two years after the removal of their disability; and they detail the mode of effecting the redemption, with a clearness which requires no commentary.

Mr. Storer asks how the clerk can have any knowledge of the taxes, as none of the papers will be filed with him, but remain with the collector. How is this? The sections which I have mentioned require the collector, in the most express terms, "to deposit with the clerks of the district courts of the United States in the respective States, and within which district the property lies, correct lists of the tracts of land, or other real property, sold by virtue of this act for non-payment of taxes, together with the names of the owners, or presumed owners, of the purchasers of the same at the public sales aforesaid, and of the amount paid by such purchasers for the same." And the redemption is effected by the payment to the clerk of the amount which had been paid by the purchasers, with ten per cent. thereon, and a compensation for all improvements which had been made in the mean time by such purchaser, and which are to be valued in a manner pointed out by the act. If the collectors, therefore, have done their duty, by depositing with the clerk the information required by those acts, the clerk will know everything which it is necessary for him to know, in order to the exercise of the powers confided to him by those acts, and if the collectors have not already given him this information, they ought to do it yet. No time having been prescribed within which it is to be done, it will avail now, I presume, being considered as being done.

With respect to the circumstance that deeds have, in some instances, been actually made to the purchasers, under an assurance that the lands belonged to minors, I cannot think that this produces any serious difficulty. The law being the only authority to the officers to make the deed, no deed can be of any avail, either at law or in equity, which is not made in strict conformity with the law. Now these laws both expressly direct that no deed shall be given in pursuance of such sale, *until the time of redemption shall have expired*. I consider them as

Power of the Secretary of the Navy over the Marine Corps.

perfectly invalid as if they had been given at the moment of the sale.

Mr. Storer's statement is so short and imperfect that I may have misapprehended it. If you find that I have done so, I shall be glad to reconsider the subject, on an explanatory statement. The letter of the collector is returned.

I have the honor, &c., &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

POWER OF THE SECRETARY OF THE NAVY OVER THE MARINE CORPS.

The Secretary of the Navy is the organ through which the President of the United States, who is commander-in-chief, makes known his will to the navy. The orders issued by him being, in contemplation of law, the orders of the President, and the marine corps belonging to the naval establishment, it follows that the Secretary may suspend, modify, or rescind any order issued by the lieutenant-colonel or any subordinate officer of the marine corps, except where a direct authority has been given by Congress to an officer to perform any particular function.

And whether the marine corps shall be doing service on ship-board or on shore, the President's orders may properly pass through the Secretary of the Navy to it, except where the corps shall have been incorporated with the army for a given service on land.

OFFICE OF THE ATTORNEY GENERAL,

July 6, 1820.

SIR: I have the honor to acknowledge your letter, submitting for my opinion the following questions:

"What authority has the Secretary of the Navy over the marine corps? Can he suspend, modify, or rescind an order given by the lieutenant colonel?"

"Is there any distinction in the Secretary's power over such orders; whether they relate to duties on ship-board or on shore?"

By the constitution, the President is made the commander-in-chief of the army and navy of the United States. The Departments of War and of the Navy are the channels through which his orders proceed to them, respectively, and the Secretaries of those departments are the organs by which he makes

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his will known to them. The orders issued by those officers are, in contemplation of law, not their orders, but the orders of the President of the United States. This is manifest from the language of the acts of Congress which establish those departments, and define the duties of the Secretaries. They are called *executive* departments, and the duties of the Secretaries are to execute the orders of the President relative to the army and navy. There can be no doubt that the power of the President is supreme over the marine corps, whether that corps is considered as belonging to the army or the navy, because the President is commander-in-chief of both army and navy; and his power over this corps is sovereign, whether they are doing duty on shipboard or on shore. It results from this military sovereignty that the President may suspend, modify, or rescind, at pleasure, any order issued by the lieutenant-colonel of the marine corps, or any other subordinate officer, except where a direct authority has been given by Congress to an officer to perform any particular function—for example, for a commanding officer to order courts-martial in certain cases. Since, then, the President possesses this power, and since the orders of the Secretaries are, in the eye of the law, the orders of the President, it is as manifest a breach of military subordination to dispute the orders of the heads of those departments, as if they had proceeded from the President in person.

The only remaining inquiry is, Whether the orders of the President to the marine corps should pass through the Secretary of War or the Secretary of the Navy? If this corps belongs to the army, those orders should pass through the Secretary of War; if to the navy, through the Secretary of the Navy. To which body does the corps belong? Its name would seem to answer this question. It is called a marine corps; its characteristic action, then, is to perform duty at sea; and, by its primary and fundamental character, therefore, it belongs to the navy. It is true that the President may order it to perform service on shore; and it is also true that, while performing service on shore, it is made subject to the rules and articles of war; but it would still be the *marine corps* performing service on shore. The order directing it to such service would pass through the Secretary of the Navy, as would all the President's

Wills executed in Switzerland.

orders while engaged in such service, while its action was single or separate from that of the army. No case occurs to me in which the President's orders to the marine corps could regularly pass through any other channel than the Department of the Navy, except one; and that is, where the President should, by an order, incorporate it with an army for any given service on land. In such a case, its identity as a marine corps being, *pro hac vice*, lost in that of the army, and the whole body being for the time one, the commander-in-chief might, I presume, with propriety, pass his orders to the whole body through the Department of War. But in all other situations, whether at sea or on shore, I should consider the Navy Department the proper medium for the transmission of the President's orders to the marine corps, and the orders of the Secretary of the Navy to that corps as being clothed with all the authority of the President. I am happy to find that this opinion, formed as it is on the constitution and acts of Congress, is in strict conformity with the practice of the Navy and War Departments ever since the separation of the former from the latter; in confirmation of which fact, I have the honor to enclose you a letter from the Secretary of War, another from Mr. Homans, (who I believe has been in the Navy Department from its origin,) and another from Commodore Rodgers. I will thank you to return these letters after you shall have perused them, for the purpose of being placed on file in my office.

I have the honor, &c., &c.,

WM. WIRT.

To the SECRETARY OF THE NAVY.

WILLS EXECUTED IN SWITZERLAND.

The validity of a will to pass personal property in this country depends on the law of the place in which it was made.

By the civil law an executor, *eo nomine*, is not essential to the validity of a will; the institution of an universal heir, who stands in the place of an English executor and residuary legatee, being sufficient.

OFFICE OF THE ATTORNEY GENERAL,

July 3, 1820.

SIR: The will of Mr. D'Hauteville being that of a Swiss, made in Switzerland, its validity and efficacy to pass personal

 Courts-Martial.

property in this country depend on the law of the place in which it was made, and not on the law of this country.—(See Huberus, vol. 2, lib. 1, tit. iii, *De Conflictu Legum*.) I am not sufficiently informed of the local laws of Switzerland to decide whether this will conforms to them; but, if testamentary matters are still governed in that country by the civil law, the institution of an executor, *eo nomine*, is not essential to the validity of a will; the institution of a universal heir is sufficient by that law to give the will validity; and, indeed, according to Lord Hardwick, the universal heir under the civil law corresponds with the executor and residuary legatee under the English law—the rights, privileges, and powers of both being the same.—(See Powell's edition of Swinburne, pages 14 and 15 of the seventh London edition—notes.) You will observe that the first clause of Mr. D'Hauteville's will constitutes this universal heir, who, according to Lord Hardwick, stands in the shoes of the English executor. Connecting this view of the subject with the fact that the will has been confirmed and registered by the competent authority in Switzerland, I think there can be no doubt of its validity; and this I understand to be the single question submitted to me. The papers are herewith returned.

I have the honor to be, sir, &c., &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

 COURTS-MARTIAL.

The accused cannot be tried by court-martial after two years from the issuing of the order, even on his own application, unless, by reason of absence or some other manifest impediment, he shall not have been amenable to justice within the time limited by the articles of war.

OFFICE OF THE ATTORNEY GENERAL,

July 25, 1820.

SIR: The 88th article of the rules and articles of war, on which you ask my opinion, provides that "no person shall be liable to be tried and punished by a general court-martial for any offence which shall appear to have been committed more than two years before the issuing of the order for such trial, unless the person, by reason of having absented himself, or

Courts-Martial.

some other manifest impediment, shall not have been amenable to justice within that period." The question you propound is, whether, if the person accused waives the objection of time, and insists on the trial, the court-martial can enter into the examination of facts which occurred more than two years before the date of the order summoning the court?

If this article could be considered as intended *solely* for the benefit of persons accused, I should entertain no doubt that they might waive the time, and that the court might, on their application, proceed safely to the trial, on the ground that every one may waive a legal provision introduced for his own benefit. Thus, it was a rule of the common law, which ripened into a maxim, that an accessory could not be tried before the principal; yet, if he chose it, he might waive this privilege, and, on his own prayer, might be tried before his principal on the other maxim to which I have adverted—" *Quilibet potest renunciare juri pro se introducto*"—(2 Inst., 183; 2 Hawk., P. Cr. ch. 29, sec. 45.) But in looking into the policy of the article of war under consideration, I do not think that it can be properly regarded as confined exclusively to the relief of persons under arrest. On the contrary, I think that its policy had a wider scope; that the prompt prosecution of offences was considered as essential to the general discipline and moral purity of armies; that the design of the rule was to discourage that ill-judged lenity which is so well calculated to destroy the efficiency of an army, and to prevent those inveterate animosities which find their proper nourishment only in the remembrance and prosecution of State offences.

The rule, therefore, being bottomed on these grounds of public policy, I do not think that it is competent to any individual to waive it, or that a court-martial can proceed, even on the application of the arrested party, to examine into offences of more than two years' standing, previous to the order summoning the court, unless the prosecutor can show that the party accused, by reason of absence or some other manifest impediment, had not been amenable to justice within the time limited by the rule.

I have the honor, &c.,

WM. WIRT.

To the SECRETARY OF WAR.

District Attorney of New Jersey.

DISTRICT ATTORNEY OF NEW JERSEY.

The district attorney of New Jersey is entitled to special compensation for attending a State court in behalf of the United States, and for attending upon taking depositions, and for disbursements in the suit; but, if the cause be removed to the circuit court of the United States, and be there attended to by him, his compensation is that which district attorneys are entitled to under the act of 28th February, 1799—being the highest fees which are allowed by the laws of the State of New Jersey for similar services in the supreme court of that State.

OFFICE OF THE ATTORNEY GENERAL,

July 31, 1820.

SIR: I have examined the account for professional services rendered by the district attorney of New Jersey, and submitted for my opinion by his desire; and, although I should have been better pleased to have been spared so delicate an office, yet, thus called on, I shall proceed to discharge it according to the best of my judgment and conscience.

The account is raised for services rendered, and moneys advanced, in the defence of a suit brought by Dr. Gale against an officer of the United States, (Major Babcock,) for the purpose of recovering possession of the island called the Pea Patch, in the river Delaware, which is claimed and possessed by the United States, and on which they have erected, or are erecting, a fortification. The officer who has been sued has no manner of individual interest in the affair—the *United States alone being, in fact, concerned in the defence.*

The professional services rendered by Mr. McIlvaine were rendered partly in the State court, in which the cause originated; partly in the circuit court of the United States, after the removal of the cause into that court; and partly in the country, in attending at a distance to take depositions.

1. As to the moneys advanced to take depositions, I understand that his right to reimbursement is not questioned.

2. As to services in the State court, I have as little doubt that he is entitled to compensation; because I am satisfied, from an attentive examination of the several acts of Congress relative to the duties of district attorneys, that it was never expected of these officers to do more than to attend to the interests of the United States *in the courts of the United States* in their respective districts. This is very obvious to me, from a com-

parison of the language of the judiciary act of 1789, which first provides for the appointment of these officers, with the act of 1799, which settles their compensation. Indeed, in several States of the Union it would be utterly impracticable for a district attorney to discharge the duties of his office, if these duties comprehended the care of all the cases which might be contemporaneously depending in the very numerous courts of the State in which the United States might be interested. While the cause, therefore, was depending before the court of the State, I consider Mr. McIlvaine as not being connected with it in his character of district attorney, but as holding the same ground, with regard to the cause, as any other gentleman of the profession who might chance to have been engaged in the defence. As to the specific items for services while the cause was in the State court, I cannot decide on them, because I do not know whether they comport with the practice of the State. If they do, (which I cannot doubt,) they ought to be allowed; for, if an individual situated as Mr. Babcock was would have been bound by the practice of the State to have paid those charges, the United States ought neither to expect nor wish to occupy different ground.

3. When the cause was removed into the circuit court of the United States, I consider the district attorney as bound, *ex officio*, to attend to it for the compensation allowed by the acts of Congress. I found this opinion on the language of the act of 1789, which prescribes the duties of this officer, and which expressly requires him, *inter alia*, to attend professionally to "all civil actions *in which the United States shall be concerned*, except before the Supreme Court [of the United States] in the district in which that court shall be holden." The duty of the Attorney General, as to suits in the Supreme Court, is defined in the same language precisely: "whose duty it shall be to prosecute and conduct all suits in the Supreme Court, *in which the United States shall be concerned*." Yet I believe it has never been doubted by either of my predecessors, and certainly is not by myself, that, whether the United States are named as parties or not, the Attorney General is bound to attend to every case in the Supreme Court in which their interests are

District Attorney of New Jersey.

concerned. Such, indeed, is the clear and unambiguous language of the law; so that there is no room for construction.

Now, the case of Gale and Babcock being a case depending before a court of the United States, in the district of New Jersey, in which *the United States were alone concerned*, I do not see how it is possible, consistently either with the words or the spirit of the act of 1789, to avoid the conclusion that the district attorney was officially bound to attend to the suit. His compensation is prescribed by the 4th section of the act of 28th February, 1799, entitled "An act for providing compensation for the marshals," &c.

The case of Johnson and Gelston, collector of New York, in which Mr. McIlvaine defended the collector, and yet was paid as in ordinary cases between individuals, although the defence was at the expense of the United States, is not in conflict with this opinion, but in strict conformity with it; because, as Mr. McIlvaine states, that case was not a case before a court of the United States, but before the supreme *State* court of New Jersey; and I have already expressed the opinion, that in all the courts of the State he is not to be considered as the district attorney of the United States, because, by a just construction of the acts of Congress, his duties extend no further than to the courts of the United States. But another case of Mr. Gelston (the case of Gelston and Hoyt) illustrates the truth of my opinion, so far as a concurrence can illustrate it. When that case came to the Supreme Court, the Attorney General, acting on the very same words which prescribe the duties of the district attorney, considered it his duty to appear in the case, although the United States were nowhere named as parties. He deemed it his duty to appear, because, in the language of the act, it was a case in which the United States *were concerned*—the collector in this case, also, having acted under the instructions of the Executive; and I believe there was no member either of the bar or the bench, nor any member of the executive branch of the government, who did not concur in the correctness of that opinion.

Mr. McIlvaine suggests that if the case (after its removal to the court of the United States, I presume) comes under the act of the 28th February, 1799, he is entitled to a *per diem* allow-

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ance and mileage for attending to this cause. He is certainly entitled to mileage and a *per diem* allowance for attending on every court of the United States in his district, which it is necessary for him to attend on business of the United States, or, in other words, before which they have business depending. But this is not an allowance which is to be taxed in any particular cause in the court, much less in every cause which may be at issue, at the same term. It is an allowance for travelling, and for attending on the court; it belongs to the general expenses of the court, and is, I believe, generally (certainly in Virginia) paid by the marshal at the end of the term, and entered in his abstract of the expenses of the court. If Mr. McIlvaine has not had this allowance made him for his attendance on the term or terms of the court of the United States at which this cause was at issue, the allowance ought yet to be made him, although this might have been the only cause in which the United States were concerned. But if the allowance has been once made, it cannot be repeated, although there may have been a thousand causes of the United States depending or tried at the same term; because the law contemplates only one allowance for one attendance. But whether the allowance has been made or not, it forms no charge against the War Department; because it is not a charge which belongs either to this or any other particular cause, but is a general charge for mileage and attendance, which is to be paid by the marshal, and settled by him with the Treasury Department.

What does constitute a proper charge against the War Department, after the cause got into the court of the United States, is the highest fees which are allowed by the laws of the State of New Jersey in the supreme court of that State for similar services.

4. The charges for attending to take depositions are proper charges. There is no act of Congress which devolves this duty on the district attorney. The act of 1789, which prescribes these duties, imposes no such duty either by general or specific terms; and, indeed, for the salary of this office, I believe that no man, worthy of such an appointment, would accept it, clogged with a liability of traversing a whole State, to and fro, on the business of taking depositions. The imposition of such

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a duty could never have been designed by Congress, because, among other reasons, it would be utterly impracticable; for simultaneous notices might and would be given for the same day in fifty different parts of the State; and if by law it is the duty of the district attorney to attend, no authority is given him to delegate another. This single consideration renders it clear that Congress could never have intended to burden the district attorneys with this impracticable duty, uncompensated as it would be, even if it were practicable.

I believe that the heads under which I have considered Mr. McIlvaine's account embrace all the items; if not, you will please specify any remaining doubt. The papers are returned.

I have the honor, &c., &c., &c.,

WM. WIRT.

To the SECRETARY OF WAR.

CONTRACTS FOR ARMY SUPPLIES.

Contracts for rations which provide that supplies for certain posts shall be furnished *six months in advance*, require a supply of six months' rations not in advance of a perpetually advancing point of time, but only in advance of the point of time at which the supply is required to be placed at the post.

The distinction made in the department between rations in deposit and rations for daily issues, has no warrant in the army contracts; nor can any military order create it in such a way as to affect the bearing of such contracts. A quantity of provisions only, called a supply of rations for a specified time, is required, and those are to be issued by the contractor; and in case the commandant of the post where they are to be furnished makes an order for more rations, or for a different disposition of them than the contract provides, it is inoperative upon the question of the contractor's legal obligations under the contract, but does not exonerate the government from payment.

If the contractor for supplies for daily issues shall be required to place at a given post a specified number of rations for a specified time, the government must either consume them or pay for them; for the requisition is an assurance on the part of the government that the rations are necessary and will be consumed and paid for.

This opinion decides various questions arising out of the peculiar circumstances of the case upon which they arise.

OFFICE OF THE ATTORNEY GENERAL,

August 8, 1820.

SIR: The case of Colonel William Morrison, which you have done me the honor to refer for my opinion, is understood to be

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this: On the 3d of April, 1816, Colonel M. entered into a contract with the Department of War, by which he agreed to supply the troops of the United States within the Territories of Indiana, Illinois, and Missouri, with provisions, from the 1st of June of the same year, to the 31st of May, 1817. By the 3d stipulation of this contract it is, among other things, provided, that at all posts that may be established on the Mississippi, or its waters above Rock river, supplies shall be furnished for six months in advance, on the requisition of the commandant of the post or army. On the 29th of August, 1816, a requisition was made on the contractor, by General Smith, by which he was required, *inter alia*, to deposite at Fort Crawford 120,000 rations, and at Fort Armstrong 30,000. "These deposites," says the order, "will constitute a supply of six months for the troops stationed at those posts, and will be placed in store by the 1st of November next." The same order further states: "The deposites are to be kept at all times complete, and independent of a supply sufficient for the daily issue of the troops." Under this requisition, the contractor placed at each post the precise number of rations called for: he did not, however, place a further number there for daily issue, in conformity with the order, but made his daily issue out of those which he had been required to place in deposite. Notwithstanding this circumstance, however, the provisions were not one half of them consumed at the expiration of the six months—owing, probably, to the fact stated by Colonel Leavenworth and others, that, shortly after the deposite, the greater part of the troops for whose use those rations were designed had been detached to other posts. In this posture of things, while there yet remained on hand at Forts Crawford and Armstrong an aggregate of more than 80,000 rations of the former supply, General Smith issued an order to the contractor, on the 17th April, 1817, in which he says: "The deposites at the outposts not having been completed agreeably to repeated requisitions made on you for that purpose, it becomes my duty to require of you to have in deposite at the several posts on the 1st of July:" proceeding, then, with a list of the rations required; and calling, among the rest, for an aggregate of 80,000 at the Forts Crawford and Armstrong.

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The contractor hereupon offered the 80,000 rations at those forts; but these, in addition to the remainder of the former supply, were double the quantity which was necessary; and the questions arose which remain still to be settled, viz: whose property were the rations on hand of the supply of the 1st of November to be considered—the property of the United States, or the property of the contractor? and how is the requisition of the 17th April, 1817, to be construed? Is it to be construed as calling for 80,000 fresh rations in addition to those on hand; or, as requiring the contractor to place in deposit at those posts 80,000 rations, and no more? In the settlement of Colonel Morrison's accounts as contractor, you state that the Second Auditor has allowed him for all the abstracts exhibited by Colonel Morrison, under the first requisition; (that is, for so much of the first requisition as was actually consumed by the troops, of which consumption the abstracts are the evidence;) and has also allowed him for the 80,000 rations supplied under the requisition of 17th April, 1817. With this allowance Colonel Morrison is dissatisfied, and claims the following credits:

1. For the whole number of rations called for and furnished under the requisition of the 29th of August, 1816, and of which the greater part remained on hand when he offered the 80,000 under the requisition of the 17th April, 1817.

2. For the 80,000 rations supplied under the requisition of the 17th April, 1817.

3. For certain abstracts of provisions for May, 1817, under an allegation that they were not made out of either of the above parcels; which fact I understand to be controverted by the accounting officer of the department. With regard to this last claim, my opinion, I presume, is not expected, until the fact shall be settled the one way or the other; it being the office of the Attorney General to answer to questions of law, and not to questions of fact.

On this claim, therefore, I must, with deference, await your further instructions. With respect to the other two points, I understand that in the exposition of these contracts, the following principles are considered as being finally settled by the practice of the War Department, viz:

1. That under such a contract as this, General Smith was

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authorized to issue his order of the 29th August, 1816: that is to say, to call, by the same requisition, for six months' rations in advance; and, also, for a supply beyond this, for daily issues, for the same six months.

2. That between a requisition to place in deposit, and a requisition to place in store, for daily issues, there are these fundamental points of difference: that the rations required to be placed in deposit become, so soon as they are deposited, the property of the government, and are under the sole control of the commandant of the post; the contractor being entitled at once to full pay for the entire deposits, but having nothing further to do with the rations so deposited. Whereas, on a requisition to place in store for daily issues, the rations remain the property of the contractor, the government being bound to pay for such part of them only as shall be actually issued—of which actual issues the abstracts are the evidence; but that whatsoever part remains unissued, continues to be the property of the contractor; and, as a consequence of this principle, if it spoil on his hands for want of consumption, either because the number of rations originally ordered was too great, or because it has become too great by the government's subsequent withdrawal of a portion of the troops for whose use it was designed, the loss is the contractor's.

If these principles are to be considered as the law of the contract, there remains nothing for me to decide; for the Second Auditor has adjusted his allowance of credits by those principles exactly, and the claims of the contractor must be disallowed.

As, however, I presume that my opinion is desired clear of any influence from the practice of the War Department, I shall proceed to give it in the same spirit of equal and impartial justice with which I should give it from the bench. And, first, as to the practical construction of these contracts by the Department of War: I do not think that a court of law, called on to expound this contract, would regard that practice, unless it should appear to have been known to both parties at the time of making the contract, or unless that practice is a matter of such open and general notoriety as to constitute a species of common law; in which case, a knowledge of it on the part

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of the contractor would be presumed. In the absence of all proof of any such positive presumptive knowledge of the practice of the War Department, a court taking up the case on the contract alone would, I think, decide:

1st. That General Smith's requisition of the 29th August, 1816, was unauthorized by the contract, so far as it called for any number of rations beyond a supply for six months in advance. The third article of the contract gives the rule on this head; it is in the following words: "That supplies shall be furnished by the said Mr. Morrison, &c., &c., &c., upon the requisition of the commandant of the army, or a post, in such quantities as shall not exceed what is sufficient for the troops to be there stationed for three months in advance, &c., &c. It is, however, understood, that at Fort Clark, &c., &c., &c., supplies shall be furnished for six months in advance, on the requisition of the commandant of the post or army." Combining the two members of this stipulation, and reading them together, as a court of law would read them, the stipulation with regard to Forts Crawford and Armstrong is, "that the contractor will, on the requisition of the commandant of the army, or of those posts, furnish supplies in such quantities as shall not exceed what is sufficient for the troops to be there stationed, for the space of six months in advance." In advance of what? In advance of a perpetually advancing point of time? in advance of every coming day, week, or month? I think not; but in advance of the point of time at which the supply is required to be placed at the post. To illustrate it by the particular case: the General was authorized to require the contractor to place at these posts, on the 1st day of the following November, a sufficient quantity of provision to subsist the troops to be there stationed *for the next six months*. Such a quantity there deposited on the 1st of November was certainly a supply for six months *in advance*, and was all that General Smith was authorized by the contract to require. Whereas, according to his own construction of his requisition, it called for an advance of *twelve months*, or nearly so: for, in his letter to the Secretary of War of the 13th of January, 1818, of which an extract has been furnished me, he says: "*In obedience to this requisition of the 29th August, 1816, Mr. Morrison, on*

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the 1st of November, should, in this climate, at posts situated as Armstrong and Crawford were, have had nearly *double the amount demanded for the deposits.*"

The amount demanded for the deposits was a six months' supply; consequently, nearly double that amount was nearly a twelvemonth's supply, which he says was necessary to satisfy his requisition of the 29th August, 1816.

2d. That the contract does not authorize the distinction which is made between the *deposits* and the *supply for daily issues*. General Smith does, indeed, in his letter of requisition of the 29th August, 1816, set up the distinction; but the question is, whether the contract authorized him to do so? for this is not one of those military orders in which it is enough for a general to say "*sic volo, sic jubeo; stat voluntas pro ratione.*" It is a matter of contract, in which the terms of the contract are equally obligatory on both parties; and before any inference can be drawn to the prejudice of either party from an alleged disobedience of the orders of the other, it must be shown that those orders are themselves authorized by the terms of the contract. I have examined the contract again and again, for the purpose of ascertaining on which of its articles this distinction between rations ordered on deposit, and rations ordered for daily issues, arises; and I can find no such article. On the contrary, the third article, already quoted, clearly contemplates that the whole supply called for by any one requisition for six months, shall be consumed within those six months; for in no other sense can I understand the words which limit the power of requisitions, to wit: "*in such quantities as shall not exceed what is sufficient for the troops to be there stationed for the space of three (or six) months in advance.*" Hence it is, to my mind, very manifest that the contract contemplates only one kind of supply, (by whatever name called,) and *that* a supply for daily issues; and that the principle that rations deposited become at once the property of the government, with which the contractor has nothing more to do, while a supply for daily issues remains his property till exhausted, has no countenance in any one stipulation of the contract. This whole distinction, with all its consequences, is plainly an ideal affair so far as the contract speaks. The contract contemplates only *one homogeneous*

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ous mass of provisions, which it denominates by one name—a *supply of rations*. Thus the first article provides that the contractor *shall supply and issue all the rations, &c.*, that shall be required of him for the use of the United States, at the specified posts, &c. This article covers *all the rations to be furnished under the contract*. The contractor is to **SUPPLY and ISSUE THEM ALL**; and yet it is thought there is or may be a part of them consecrated by the name of a deposite, which, having once deposited, he is no more to touch; but which are to be under the sole control of the commanding officer of the post, who is there to have the issuing of them. This notion, I think, is in direct violation of the first article of the contract.

The second article merely specifies the component parts of the ration.

The third article, which gives the law or the subject of requisition, authorizes, as I think manifestly, no other sort of rations but those for daily issues—rations to be consumed within the time for which they were ordered in advance.

The last clause of this article has a provision which, it seems to me, directly negatives the idea of a separate fund of rations designated as a deposite, with which the contractor has nothing more to do; it is in these words: "It is understood, that if the contractor shall be required to deposite provisions at one place or post, and shall afterwards be required to move them, to be delivered at another post or place, the expenses of transportation to such other post or place shall be borne by the United States." Now, if this word *deposite* has the limited technical sense which is attributed to it, with what propriety could an order be issued to a contractor requiring him to move provisions with which he had ceased to have any connexion? and, stronger still, where the necessity of stipulating that if he *should* be required to move provisions which were no longer his, but which were the exclusive property of the United States, the United States should bear the cost of the transportation? Again: it is understood to be admitted, that if the contractor should be required to move provisions *ordered for daily issues* from the original post of requisition to some other, the United States were expressly bound by this contract to bear the expenses of the transportation. But where is the article which

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thus binds the government? If we are to affix to this word *deposit* the restricted sense under consideration, it is very certain that this article does not reach the case of daily issues required to be transported; and it is not less certain that no other article in the contract does reach it. If the article *does* provide for the case of transportation of daily issues, then the supposed limited sense of the word *deposit* is annihilated, and it becomes clear that the contract uses this term in reference to the rations mentioned in the previous part of this third article, which, as I have shown, are those intended for daily issues through the period for which they were ordered in advance. Again: the eighth article stipulates "that at all stationary posts proper storehouses shall be provided, on behalf of the public, for the reception and safe-keeping of the provisions *deposited* from time to time at such posts, respectively; and the contractor shall suffer no loss for want of such stores." Now, if *deposits* are to have the peculiar and limited sense affixed to them by General Smith, and recognised by your department; and if, according to the principles practically adopted by the department, the *deposit*, from the moment of its delivery, becomes the exclusive property of the United States, the contractor having nothing more to do with it, this article is wholly useless; since, without it, it would be impossible that *he* should suffer loss because of the neglect of the United States to take care of its own goods. The introduction of the article proves that this was not the sense in which the word *deposit* was understood by the contracting parties. Again: suppose that the contractor places at a post a supply of provisions confessedly intended for *daily issues*, and these should be injured for the want of storehouses: whose would be the loss? If the answer is (as it must be) the loss of the United States, I ask where is the article which thus subjects them? Not the eighth article, for this relates solely to *deposits*; and yet this is the only article which contains any provision on the subject. Upon the whole, I am of the opinion that the contract nowhere contemplates a *deposit* as distinct from *daily issues*; that it contemplates only an advance for six months, which advance is to be used *during those months* in daily issues; and that the term *deposit*, as used in this contract, has no other than its

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common meaning, of *lodging or placing* at the posts the rations authorized to be required by the third article.

3d. I think it would be decided by a court of law, under this contract, that if the contractor shall be required to place at a given post a given number of rations as a supply for three or six months, (as the case may be,) and he shall so place the required number of good rations, the government must either consume them or pay for them. This, I think, is clearly to be inferred from the restriction on the commandant in the third article, to order no more than shall be sufficient for the troops at the post during the time for which the rations are required. The contractor is not supposed to know what troops are already at the post, or are intended to be there. The requisition of the commandant is his only guide as to the number of rations; and this he is bound to obey, provided the requisition be such a one as is authorized by the contract. Suppose, then, the commandant, under the name of a six months' supply, (which he is authorized to make,) should call for twice as many rations as could be consumed in that time; or suppose that, although not too many at the time of the call, they become too many by half, by the government's withdrawing one-half of the troops for whose use they were designed—and, in either event, the supplies, from being kept on hand longer than was expected, should spoil: is there any principle, either of equity or of law, which could throw this loss on the contractor? I think not. The requisition is an assurance on the part of the government that the rations are necessary, and an engagement in law that, if furnished, they will be consumed or paid for. It is only on this principle that, when more rations have been ordered from a contractor than can be issued by him during the continuance of his contract, the government feel themselves bound to take the surplus off his hands, and take care to indemnify themselves by a stipulation of transfer with the succeeding contractor. It seems to me that any other conclusion would be most oppressive and ruinous. A contractor is bound under heavy penalties to fulfil the requisitions of the commandant of the army or post. He is required to place at a frontier post, hundreds of miles beyond the reach of any other market, \$50,000 or \$60,000 worth of provisions; this he does at a great

additional expense for transportation; and when he has done so, he is told he can be paid for only one-half of them, because half the troops for whose use they were intended have been ordered away by the government to another post.

I am of opinion that the contractor is entitled to credit, not only for his abstracts founded on this supply of the 1st November, 1816, but also for the residue of that supply which remained on hand at the expiration of his contract.

4th. The requisition of the 17th April, 1817, must be considered as having been issued by the general with a full knowledge of the rations already on hand at the posts for which he is ordering supplies. That he did know the state of those provisions, is justly to be inferred from the sentence with which he introduces the requisition: "The deposits at the outposts not having been *completed* agreeably to repeated requisitions made on you for that purpose, it becomes my duty to require of you, &c., &c." It seems to me that the only fair construction of this sentence is, that *something* had been done by the contractor *towards completing* the deposits; but that they were not yet *completed*, and that this order had become necessary for *completing* them. How could General Smith affirm that the deposits *were not complete*, without knowing their existing state? The sentence manifestly implies a knowledge of the existing state of the provisions on the part of General Smith; it implies, too, most clearly, that a part of the rations which would be wanted was already on hand, and that the number now ordered was an *additional* number for the purpose of making the deposite *complete*.

But whether the general did in fact know the existing state of the provisions, or not, when he made this new requisition, the law will presume that he knew it, because it was his duty to know it; and to suppose the general ignorant of the state of supplies at posts situated like those of Crawford and Armstrong, when the reports of his officers ought to have kept him constantly informed on so interesting a subject, would be to impute to them a degree of negligence, and to him a degree of ignorance, which it would not be easy to exculpate in a military point of view.

With this knowledge of the rations that were on hand, the

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general, stating that the rations were not yet *complete*, calls upon the contractor to make a deposite of eighty thousand rations. Who could have supposed that he meant otherwise than he said? and that when he called for rations *to be deposited*, he meant them to be in part composed of those which *had been already deposited under a former order*?

Should it still be said that the provisions on hand were the property of the contractor, that he carried the key of the storehouse, and that he alone knew the amount which was actually on hand; that the general had no concern with this subject; and that when he made a requisition for eighty thousand rations, it was immaterial to the general whether the contractor made up the eighty thousand rations out of those on hand, or whether he should choose to buy fresh rations;—the answer is, that the premises on which this argument is founded are not true; the rations deposited on the 1st November, 1816, under the orders of General Smith, were not the property of the contractor—at least, not his sole property.

To try the truth of this principle. Suppose that a party of Indians, or of white men, on a private expedition up the river in the month of December, after the deposite, had offered to buy these provisions from the contractor at an advanced price: if they were his property, he would have had the legal right to accept the offer, and to sell them; but this the general or commandant of the post would rightly have resisted, and, if necessary, by force too; and any court, administering justice according to law, would have justified the resistance. Why? Because the provisions were no longer the sole property of the contractor after their delivery on the 1st of November; they had been delivered into a public storehouse of the United States, *under a contract*; and the United States, by the fact of the delivery, were bound to pay for them, whether they used them or not: after that point of time, the contractor had no right or title *to the provisions themselves*. A court of chancery would unquestionably have granted an injunction against him, had he attempted any disposition of them inconsistent with the purpose for which they had been required and deposited under the contract; but this such a court could never have done, except on the ground that the provisions belonged to the United States. It is true that

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the contractor was, by the contract, constituted the agent to parcel out these provisions in rations, (for the trouble of which he is paid,) and, with this view, he necessarily had the custody of them; and for this reason, also, (because the right of custody gives the power of abuse,) the rations *actually delivered*, evidenced by his abstracts, and the rations *actually on hand* at the expiration of the contract, give the standard of his compensation. But, as to the *provisions themselves*, he was no more the owner of them than the barkeeper of a tavern, the clerk of a counting-house, the agent of a foreign merchant, or the overseer of a farmer, are the owners of the goods intrusted to their care, because they have the measuring and distribution of them, and are paid for what they measure and deliver only.

As to the one hundred and fifty thousand rations, then: they had been deposited, and belonged to the United States, and were not to be deposited over again. When General Smith was drawing his requisition of the 17th April, 1817, he knew that he had, by a former and separate order, called for those one hundred and fifty thousand rations, and that they had been stored for the use of the troops; when, therefore, by his last order, he calls *de novo* for eighty thousand rations, it is inconceivable, by a plain man, that he meant to be understood as including in this last order part of the rations which he had before called for, and which had been deposited under that former call. This is certainly not the natural construction of such a call; and its natural construction is all that can be required of the contractor.

It is said that the eighty thousand rations last called for were for a six-months' supply; that they were a full supply for the troops then at those posts for six months; and that the contractor, knowing these facts, ought to have understood that eighty thousand rations, *in all*, were what were required, and not eighty thousand rations in addition to those on hand.

This ground is not tenable, in my opinion: for,

1st. The eighty thousand rations are not, in the requisition, called a six-months' supply for the troops.

2d. Although the contractor might have known that the troops *then* at the posts would not require more than eighty thousand rations for the next six months, he would not know,

Tax Sales and Redemptions.

nor could he presume to inquire, what troops were intended for the posts during the six months following the expiration of his contract, and for which the eighty thousand rations were required.

3d. It was his duty to obey the requisition, without asking the reasons on which it was founded. This he did obey in its obvious sense; and I am of opinion that he is further entitled to a credit for the eighty thousand rations delivered under the requisition of the 17th April, 1817.

I would not have troubled you with this copious exposition of the grounds of my opinion on these several points, but that I understand I am deciding in opposition to the practice of the department; and I thought it due to the just respect which I feel for the department to show that I am not differing from it lightly and inconsiderately, but for reasons that have at least been deliberately weighed, and have given to my own mind the fullest conviction.

I have the honor, &c., &c.,

WM. WIRT.

To the SECRETARY OF WAR.

TAX SALES AND REDEMPTIONS.

Where lands liable for a direct tax are not divisible, the whole must be sold. Lands sold for taxes may be redeemed within two years, upon payment of the amount paid by the purchaser, with 20 per cent. interest.

OFFICE OF THE ATTORNEY GENERAL,

August 10, 1820.

SIR: In answer to the question propounded by you for my opinion yesterday, in the absence of the Secretary of the Treasury, I have the honor to state, that by the 27th section of the act of Congress of 9th January, 1815, laying a direct tax, it is expressly provided—

1. That where the land liable for the direct tax is not divisible, the whole shall be sold.

2. That the former owners shall have liberty to redeem within two years, upon payment “*of the amount paid by such purchaser, with interest for the same at the rate of twenty per centum per annum.*”

 Distribution of Prize Money.

This language is too clear to admit of two interpretations. The twenty per cent. must be calculated *on the whole amount paid by the purchaser* for the indivisible tract, without regard to the amount of tax for which the land was sold.

I have the honor, &c., &c.,

WM. WIRT.

SAMUEL PLEASANTON, Esq.,

Fifth Auditor's Office, Treasury Department.

OBLIGATIONS OF SURETIES OF AN ASSIGNEE.

Where an assignee of a government contract to build a fortification executes a bond to the government, with sureties, conditioned that he fulfil the original contract, he and his sureties are as much bound to the performance of the original contract, as they would be in the case of a contract wholly original.

OFFICE OF THE ATTORNEY GENERAL,

October 17, 1820.

SIR: B. W. Hopkins, the contractor to build the fortifications at Mobile, having died before the completion of the work, Roswell Hopkins, his administrator, made an assignment of that contract to Samuel Hawkins; in consequence of which, a bond was executed by Samuel Hawkins to the government, with security, referring to the original contract with Hopkins, and to the transfer of that contract to Hawkins, and binding Hawkins to the fulfilment of the original contract, according to its various stipulations. The question is, whether this bond is good and sufficient in law to bind the sureties? The proceeding is certainly not so regular as it might have been; yet I am of the opinion that a court would consider this as a new contract between the government and Hawkins; and that the bond is consequently as obligatory on him and his sureties, as it would be in the case of a contract wholly original.

I have the honor to be, &c., &c.,

W. WIRT.

To the SECRETARY OF WAR.

DISTRIBUTION OF PRIZE MONEY.

Where a captured fleet was condemned as a prize of war, and afterwards purchased by the President for \$255,000, under an act of Congress directing such

Distribution of Prize Money.

purchase, and the distribution of that amount between the captors and their heirs, it was not intended to alter the mode of distribution, nor to deprive the widow of a seaman slain in the struggle from claiming and receiving the same share that she would have received had the prize been sold under a decree of court.

OFFICE OF THE ATTORNEY GENERAL,

October 17, 1820.

SIR: The following case has been stated from the Navy Department for my opinion. Isaac Hardy, a seaman in the navy of the United States, was killed in the victory of Lake Erie, in September, 1813. He left a wife, who has administered on his estate at Philadelphia, where the deceased resided in his lifetime; he left no heirs or other known kindred, or representative, except his wife. She has applied for his share of the prize money; and the question is, whether she be entitled.

By the 48th article of the rules and regulations for the government of the navy of the United States, passed the 23d April, 1800, it is provided that "the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall, when of equal or superior force to the vessel or vessels making the capture, be the sole property of the captors; and when of inferior force, shall be divided equally between the United States and the officers and men making the capture."

The next article, in making the distribution of prize money, assigns "to seamen, marines, and all other persons doing duty on board, seven-twentieths." By the practical construction of this act at the Navy Department, I learn that persons doing duty on board, and killed in the action, come into the distribution, and have a fair claim for their proportion of the prize money to their legal representatives or heirs.

When, then, the fleet captured on Lake Erie was condemned a prize of war, there was a vested right in the legal representatives or heirs of Isaac Hardy for his proportion of seven-twentieths of the prize money; and it could not have been withheld from his *administratrix, his legal representative*.

But, on the 18th April, 1814, Congress passed an act authorizing the President to purchase the captured fleet at the price

Removal of Prisoners.

of \$255,000; which sum it directed to be distributed as prize money between the captors and *their heirs*.

In my opinion, Congress intended nothing more by this act than to substitute the \$255,000 in lieu of the proceeds of the sale of the prize vessels, had they been sold under the decree of court, without the most distant intention of affecting in any manner the mode of distribution, either as to the *quantum* or the persons authorized to take; indeed, they could not, if they had intended it, have produced such an effect, because that would have been to divest a vested right. Inasmuch, therefore, as Diana, the widow and administratrix of Isaac Hardy, would have been authorized to take his distributive share of the proceeds of sales, had the prizes been sold under a decree of court; so, in like manner, will she be authorized to take his distributive share of the proceeds of the sale to the President, which are merely substituted in the place of the former.

Even in the character of *heir*, under the existing laws of Pennsylvania, she is the only person who is authorized to take. But my opinion is, that her receipt as administratrix will be a sufficient discharge for the prize agent; though he may, from abundant caution, require her to superadd the description of "sole heir."

W. WIRT.

To the SECRETARY OF THE NAVY.

REMOVAL OF PRISONERS.

Offenders committed to prison in a district other than that in which the offence is to be tried, may be removed to the latter to be tried, by a warrant of the judge of the district where they are imprisoned.

OFFICE OF THE ATTORNEY GENERAL,

November 10, 1820.

SIR: I apprehend that there is no difficulty in the case of Chamberlayne, which was submitted for my opinion last evening. He has been arrested and committed to prison in the district of Maryland, for an offence committed in this district; and the *desideratum* is to have him brought back for trial here. The 33d section of the judiciary act provides expressly for the

Executive Interference with Private Litigation.

case, by directing that, "if the commitment of the offender 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 in which the delinquent is imprisoned, seasonally to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender to the district in which the trial is to be had."

I have the honor to be, &c., &c.,

WM. WIRT.

To the SECRETARY OF STATE.

POWER OF THE SECRETARY OF THE TREASURY.

The Secretary of the Treasury has no power to correct an alleged error of a court of the United States, and to refund a sum of money said to have been improperly paid in consequence of such alleged error. Redress in such a case can be made only by Congress.

ATTORNEY GENERAL'S OFFICE,

November 15, 1820.

SIR: I cannot discover that the laws of the United States have invested the Secretary of the Treasury with any power to grant such a request as that of Mr. James Homer, of Boston; that is to say, to correct an alleged error in the judgment of a court of the United States, and to refund a sum stated to have been improperly paid in consequence of such alleged error. If Mr. Homer has sustained an injury in this instance, the only power that can redress him is the power of Congress.

I have the honor, &c., &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

EXECUTIVE INTERFERENCE WITH PRIVATE LITIGATION.

The President will not interfere in a matter of private and individual litigation. If the petitioner has been injured, the laws of the country afford him redress.

ATTORNEY GENERAL'S OFFICE,

November 28, 1820.

SIR: On the subject of William Pancoast's petition, referred to me on yesterday, it is sufficient to say that he calls on the

Foreign Ministers, Consuls, &c.

President of the United States for his official interference in a matter of private and individual litigation.

If Mr. Pancoast has been injured by the proceedings of which he complains, the laws of the country afford him redress; nor is his alleged poverty any bar to this redress, because, if he has a real matter of grievance, the same laws authorize him to appear *in forma pauperis*. His petition is returned.

I am, &c., &c.,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

FOREIGN MINISTERS, CONSULS, &c.

Foreign consuls and vice-consuls are not public ministers within the law of nations, or the acts of Congress, but are amenable to the civil jurisdiction of our courts; and in the case of the Genoese consul (3 Dallas, 297) it was held that they were not privileged from prosecutions for misdemeanors.

But consuls are bound to appear only in the federal courts; the constitution and laws, contemplating the responsibility of consuls, having provided these tribunals, in exclusion of the State courts, in which they shall answer.

OFFICE OF THE ATTORNEY GENERAL,

December 1, 1820.

SIR: I have examined, with the respect and attention to which it is justly entitled, the letter of General Vives, the minister of his Catholic Majesty, which you have done me the honor to submit for my official opinion; and now proceed to give you the result of this examination.

The complaint is, that Mr. Villavaso, the Spanish vice-consul at New Orleans, has been arrested and held to bail at the suit of Mr. Seré, of that place, for an alleged injury to the property or commercial pursuits of the latter; and General Vives calls on the President of the United States to suspend the proceeding in this case, on the ground that Mr. Villavaso, being a public functionary of his Catholic Majesty, is protected from arrest by the law of nations, is not subject to the jurisdiction of our tribunals, and can be made to answer for this alleged injury only to the sovereign from whom he derives his commission.

The President possesses no powers but those which he de-

Foreign Ministers, Consuls, &c.

rives from the constitution and laws of the United States; and these give him no authority to interfere in this case. It is not a criminal proceeding, in the name of the United States: if it were, the President might, if he thought it proper, arrest the proceeding by a *nolle prosequi*. But this is a civil suit, in the name of an individual, brought before the courts of our country, for the redress of a private commercial injury. Mr. Villavaso may plead to the jurisdiction of the court, and bring the question, if he chooses, before the supreme tribunal of the nation; and his plea, if it be well founded, will protect him against the suit. But the subject being a civil individual suit, of which the judiciary has possession, the President has no authority to interpose in the case, either by arresting the proceedings, by punishing the plaintiff, or even ordering a prosecution against him, unless the step which he has taken be in violation of some law of the United States.

The only law which we have, that looks to the protection of foreign functionaries against civil suits, is the act of Congress of the 30th April, 1790, "for the punishment of certain crimes against the United States;" the 25th and 26th sections of which are exact transcripts of the enacting clauses of the British statute of the 7th Anne, c. 10, entitled "An act for preserving the privileges of ambassadors and other public ministers of foreign princes and states."

It will not be thought foreign to a question which involves the efficacy of our government to protect its intercourse with foreign nations, to observe, that until the statute of Anne, to which I have just referred, the British Crown possessed no power to punish the violation of the person of an ambassador. The preamble of that statute recites the occasion of its enactment: it was, that "several turbulent and disorderly persons had, in a most outrageous manner, insulted the person of his excellency Andrew Artemononitz Mattireof, ambassador extraordinary of his Czarish Majesty, Emperor of Great Russia, her majesty's good friend and ally, by arresting him and taking him by violence out of his coach in the public street, and detaining him in custody for several hours, in contempt of the protection granted by her Majesty, contrary to the law of nations," &c. The sequel of the transaction we have from

Blackstone's Commentaries, (vol. 1, p. 385.) The Czar insisted that the sheriff of Middlesex and his accomplices should be put to instant death; and was much surprised to receive for answer, "that the Queen could inflict no punishment upon any, the meanest, of her subjects, unless warranted by the law of the land; and, therefore, she was persuaded that he would not insist on impossibilities." The sheriff and his accomplices were, it is true, tried and found guilty of the facts; but the question how far these facts were criminal, was reserved to be argued before the judges, but was never determined, the Czar having been appeased by the statute which was presented to him, under very humiliating circumstances, on the part of the Queen, with a repetition of the apology for her want of power as to the past, and a pledge of the act as a law for the future; whereupon the offenders were, at his request, discharged from all further prosecution. This statute of Anne is the first and last which has been passed by the British Parliament, for the protection of foreign functionaries. Our act of Congress is precisely commensurate with it; and the power which the British monarchy wanted to so late a period of its history, was conferred on our government in the first year of its formation.

If a consul be an ambassador or a minister, within the meaning of this act, the process is by the act declared null and void to all intents, constructions, and purposes whatsoever; and the plaintiff, and all others, concerned in the suing forth, prosecution, and execution of the writ, are, upon conviction, subject to imprisonment not exceeding three years, and to fine at the discretion of a court.

The functionaries protected by the act are "*ambassadors and other public ministers* of any foreign prince or state authorized, and received as such by the President of the United States." Are consuls within this description? Under the statute of Anne, (in which the descriptive words are precisely the same,) it has been determined that they are not. The question was raised by one Barbuitt, a commercial agent of the King of Prussia, and was decided by the Lord Chancellor Talbot, in the 10th year of George II. The Chancellor, after hearing counsel on the point, having proceeded to examine the nature of Barbuitt's functions, for the purpose of ascertaining whether he came

within the description of a *public minister* used in the statute, and having observed on his wanting that essential feature of this character—"the being intrusted to transact affairs between the two crowns"—concludes thus: "At most, he is *only a consul*. It is the opinion of Barbeyrac, Wicquefort, and others, that a consul is not entitled to the *jus gentium* belonging to ambassadors; and as there is no authority to consider the defendant in any other view than as a consul, unless I can be satisfied that those acting in that capacity are entitled to the *jus gentium* I cannot discharge him." (Talbot's Cases, p. 281 *et seq.*) It is scarcely necessary to remark to you, sir, that our courts, in construing an act borrowed from the British statute-book, constantly adopt the settled construction of the British courts, unless it be most palpably wrong; which can scarcely be predicated of any decision made by the Lord Chancellor Talbot.

But that consuls are not public ministers in the sense of the law of nations, (which is that of our act,) does not depend on the authority of Lord Talbot alone; for to his own, and authorities cited by him, may be added those of Vattel, lib. 2, ch. 2, § 34; Bynkershock, *Traité du Juge Compet.* ch. 10, § 5; Calliere, *De la Manière de Negocier avec les Souverains*, 1st part, p. 94, of the London edition of 1750; Bouchard, *Théorie de Traités de Commerce*, ch. 6, § 1; St. Real, *Science du Gouvernement*, t. 5, *Droit de Gens*, ch. 1, § 4 and 11; to which may be added the authority of Valin, *Ordonnance de la Marine*, tom. 1, lib. 1, tit. 9, *De Consuls*; and Brown's *Civil Law*, vol. 2, ch. 14. Supported by such authorities, I think it may be safely assumed that a consul is not a public minister within the meaning of our act, which is that of the general law of nations.

I am aware that some modern authors have treated the question "whether a consul be a public minister," as a mere dispute about words. Such are Mr. De Stöck and Mr. Borel. And so it may be, in the abstract light in which they have taken up the question; but in relation to our act of Congress, the question becomes a material question of things, and not merely of words; and on the grounds I have stated, I have no doubt that our Supreme Court would concur with the Lord

Foreign Ministers, Consuls, &c.

Chancellor Talbot in the opinion "that a consul is not a public minister, within the spirit and meaning of the statute;" and if so, there is no law within the United States which exempts the consuls of friendly powers, residing among us, from the jurisdiction of our courts; and none which authorizes the President to prosecute those who call them before those courts to answer civilly.

Is our condition, as a nation, singular, in this particular? If I understand General Vives correctly, it is; for I understand him to state it as a doctrine, "sanctioned by the most distinguished publicists," that those who consider themselves aggrieved by the acts of a consul of a friendly power residing among them, have no right to appeal to the courts of the country, and have no redress, except by applying to the government from which such consul derives his authority: in other words, that a consul is not responsible to the courts of the country in which he resides, either civilly or criminally, and can be called to answer to that sovereign alone under whom he holds his appointment.

With great respect for the opinion thus advanced, the authorities, whom it is usual to consult on such occasions, appear to me to hold a different language; and, so far as the civil responsibility of the consul is concerned, to concur, unanimously, in the opposite doctrine.

There are not wanting highly respectable authorities who maintain that a consul is subject to the whole extent of the criminal jurisdiction of the country in which he resides. Such are Wicquefort, *De l'Ambassadeur et de ses Fonctions*, lib. 1, § 5; Bynkershoek, *Tr. du Juge Comp. des Ambassadeurs* ch. 10, § 6; and Brown, *Civil Law*, vol. 2, ch. 14. There are others who dispute this point, and who are not at present interested in settling it. The question with which alone we have now to deal, is the responsibility of the consul to the *civil jurisdiction* of the country; and I think it may be safely affirmed that there is no author of general notoriety in this country, who maintains the exemption of the consul from this branch of jurisdiction; and no one, who descends to the particular question at all, that does not, on the contrary, admit it.

Vattel, in the passage before cited, claims only an exemption from the *criminal* jurisdiction of the place, (except in the case

of enormous crimes;) and even this exemption is so far from being considered by him as an established principle, that he recommends it as the safer course to settle it by treaty.

Valin, (*quâ supra*,) having spoken of consuls as the mere creatures of commercial arrangement between sovereigns, and as not belonging at all to the law of nations, gives us a history of their establishment in the Levant and elsewhere, and then proceeds to treat of their privileges thus: "The privileges of consuls depend either on treaties made between the respective States, or on custom, so far as the latter has not been controlled by particular treaties; *which custom, according to all appearance, is derived from the capitulations concluded between our kings, those of France, and the Turkish emperors.*"

It might be fairly objected to any consular claim of privilege derived from such a custom as this: 1st. That we are not parties to the treaties from whence the custom avowedly proceeds. 2d. That the privileges of consuls in the Levant (*dans les Echelles du Levant*) have always been greater than those of consuls who reside in more civilized countries; insomuch that Mr. Calliere, while he admits it as a general truth that consuls are not public ministers within the contemplation of the law of nations, yet says that *those who reside dans les Echelles du Levant* are regarded as ministers. (*Manière de Négociier avec les Souverains*, part 1, pages 94-95. London edition of 1750.) It is placing the doctrine on which I insist on the highest ground, therefore, to appeal to the privileges of consuls in the Levant as the standard. As to these privileges, Mr. Valin says the principal are these: 1st, that of not paying any taxes or imposts; 2d, not to be imprisoned for any cause whatever, *except to demand justice against them at the port*—"sans à demander justice contr'eux à la Porte;" an exception which (to say the least of it) covers the whole ground for which I contend, of their subjection to the tribunals of the country for civil injuries. Mr. De Stéck, a most strenuous advocate for the rights of consuls, has, in his essay, given us an elaborate synopsis of all the stipulations as to consular privileges which are to be found in the commercial treaties of the world since the year 1604, and has there given us the results of this collation; which, so far as the present question is concerned, are:

Foreign Ministers, Consuls, &c.

1st. "That consuls are regularly exempt from the criminal jurisdiction of the sovereign and the magistrates of the country where they reside; at least, that they cannot be arrested or put in prison on such charges." 2d. "*Quant aux affaires et aux matières civiles, les consuls sont généralement soumis à la juridiction des tribunaux du pays et du lieu de leur établissement et de leur résidence. S'ils exercent de negoces, ils sont traités de la même façon et sur le même pied que les autres negocians.*"

It does not appear, by the statement of the case, whether Mr. Villavaso does or does not carry on trade. If he do, he is, according to this and all the other authorities, to be treated as other merchants are; but if he do not, he is still, according to Mr. De Stéck, subject, in civil matters, to the jurisdiction of the courts of the country. And it is in point to the particular case before us to observe, that the writer founds this result, among other authorities, on a treaty between Spain, herself, and France—Convention entre la France et l'Espagne, conclue au Paris, le 13ème Mars, 1769, art. 2. (De Stéck, *Essai sur les Consuls*, sec. 7, p. 62-3: Berlin ed., 1790. De l'Origine et des Fonctions des Consuls, chap. 4, p. 40: St. Petersburg, 1807.)

Messrs. Galliere and Borel do not descend to the particular question. The former merely says that, although not ministers, consuls enjoy *some* of the privileges of ministers. What they are, he does not specify. Mr. Borel satisfies himself with referring to the treaties between the European princes and the Porte, as well as those with the regencies of Barbary, as giving the detail of consular privileges; and (waiving the exceptions already made to this source of information) it appears by Valin and De Stéck, that even in those countries consuls are subject to the civil jurisdiction of the place of their residence.

Our constitution and laws, contemplating the responsibility of consuls to the jurisdiction of our courts, have provided the tribunals before which they may sue and be sued or prosecuted: these are the tribunals of the nation, before which, alone, in exclusion of the State courts, consuls are bound to answer.

I am not aware that the question of the liability of consuls to the jurisdiction of the courts of the country has been brought

Pensions to Aids-de-Camp.

before any of our national courts, except in the case of the Genoese consul, reported 2 Dallas, 297. In this case, the circuit court of the United States, consisting of Judges Wilson, Iredell, and Peters, determined that the defendant, a consul of Genoa, was not privileged from prosecution *for a misdemeanor*, in virtue of his consular privileges.

The result of this examination is, that the President cannot interfere in the suit instituted by Mr. Seré against Mr. Villavaso; that if the process has been issued from a court of the State, the consul may abate the suit by pleading to the jurisdiction; that if it be before a national court, the consul may, if he choose it, bring the question before the Supreme Court of the nation, for final decision; and in the meantime, that, in my opinion, consuls residing among us are subject to the civil jurisdiction of our courts; in which respect, so far as we may rely on the authors who have treated of this subject, they are on the same footing here as in other countries.

I have the honor to be, most respectfully, your obedient servant,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

PENSIONS TO AIDS-DE-CAMP.

The act of 11th January, 1812, does not provide pensions for aids-de-camp, as such, regulated by their pay as such; and therefore, until further legislation, they can receive only the pensions to which their commissions entitle them.

OFFICE OF THE ATTORNEY GENERAL,

December 5, 1820.

SIR: The 14th section of the act of Congress of the 11th January, 1812, "to raise an additional military force," appears to me to look only to commissioned and non-commissioned officers; musicians; and privates, in fixing the rate of allowance for pensions. There is no rate of pension there given to aids-de-camp, who, you inform me, are not commissioned as such, and therefore do not come within either of the denominations given by the act. The case of Captain White, therefore, is a *casus omissus*, so far as his claim for a pension, graduated by

 Priority of the United States.

his pay as aid-de-camp, goes. It would be an unwarrantable enlargement of the express terms of the act to extend it to such a case. It would be legislation, not construction; since it would be a substantive and distinct enactment providing for a new class of cases not contemplated by the act. The spirit of the section can leave no doubt that, if the case had occurred to Congress, they would have provided for it by adapting the pension to the pay of the aid-de-camp. Congress may, and most probably would, by a special law for the particular case, order a pension adjusted by the scale of the pay. But as the law now stands, I do not see that you can, with propriety, do more than to allow a pension regulated by the pay belonging to his commission as captain.

I have the honor to be, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF WAR.

 PRIORITY OF THE UNITED STATES.

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 the United States shall be first satisfied, (act of 3d March, 1797;) but whether the United States have priority over mortgages executed on land of the debtor, whilst a debtor to the United States, *quere*.

OFFICE OF THE ATTORNEY GENERAL,

December 8, 1820.

SIR: I have examined the documents touching the claim of the United States against the estate of Oliver Bidwell, with reference to the particular question which you propounded to me—to wit, whether this was a case to which the priority given by the acts of Congress to the United States attached.

The act of Congress of the 3d of March, 1797, “to provide more effectually for the settlement of accounts between the United States and receivers of public money,” provides, among other things, that “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.” This being the precise predicament of Bidwell’s estate, there can be no doubt that

Priority of the United States.

the priority given by the law applies to the case; and that it operates on all the effects left by Bidwell which were properly his own estate. What were properly his effects; and whether property mortgaged by him during his life, but after he becomes a debtor, by bond, to the United States, can be considered as subject to the operation of this priority,—are nicer questions, into which I am not required, by the general question propounded to me, to enter. The court, however, before which the question is brought, will make the proper discrimination; and if they commit an error to the prejudice of the United States, I do not perceive why it may not be rectified by the courts of the nation. I am not in possession of the local laws of Connecticut; and therefore know not how far the settlement, which it seems the administrator has had with the court of probate, is made *conclusive* against all the world by those laws. In general, such a settlement is regarded as an *ex parte* proceeding, and open to be impeached in a distinct suit by any one interested to impeach it. I do not at present perceive why the administrator, (and, if necessary, the sureties in his bond of administration,) together with the sureties to Bidwell's bond to the United States, should not be all convoked before the circuit court of the United States for the district of Connecticut, by a bill in chancery, charging misapplication and fraud (as it is alleged to exist in the case of the mortgage) in the administration of assets; seeking a discovery of farther assets; stating the alleged deficiency of assets; stating, also, (as it is hinted,) a fraudulent conveyance on the part of one of Bidwell's sureties to avoid the payment of this debt; and praying for a decree against those who ought, in equity, to pay the debt. Such a suit would be well grounded on the general jurisdiction of courts of chancery, and would decide the whole controversy at once.

There may be obstacles in the way of this proceeding, of which I am not aware; but at present, it strikes me as the best, both for the United States and the sureties of Bidwell.

I have the honor to be, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF WAR.

STREETS IN THE CITY OF WASHINGTON.

The act of July 16, 1790, for establishing the seat of government of the United States, authorized commissioners, who were to be appointed by the President, to purchase or accept such quantity of land on the eastern side of the Potomac, within the District of Columbia, as the President should deem proper for the use of the United States; and by a liberal construction of that provision, only, has it been claimed that the President had power to establish a plan of the city; but the deeds of the original proprietors require the trustees, appointed by them, to convey to the commissioners such streets, squares, parcels, and lots, as the *President should deem proper*. In pursuance of the power thus conferred, President Washington, in 1797, executed an instrument of writing, in which he directed the trustees to convey to the commissioners all the streets delineated in a plan intended to be, but not, annexed. President Washington having previously ratified Ellicott's engraved plan of the city, it must now be presumed that Ellicott's plan was what he intended to annex; and that, as it indicated streets through the mall, it was originally intended that streets might be opened through it.

And although President Adams subsequently gave his sanction to another plan, said by the commissioners to have been annexed, which did not indicate streets through the mall, the promulgation, publication, and exhibition of Ellicott's plan on the day of sale of lots, amount to a pledge of the public faith that the streets thus indicated should be opened.

OFFICE OF THE ATTORNEY GENERAL,

December 16, 1820.

SIR: On the subject of the application made to you by the corporation, to permit streets to be opened through the mall, I take the liberty to enclose an official opinion from the Attorney General (Mr. Breckenridge) to President Jefferson in 1806, for the purpose of showing that, from an apparently elaborate and careful examination of the official acts and communications of President Washington, Mr. Breckenridge came to the conclusion that the engraved and published plan of Mr. Ellicott is the only legitimate and authentic plan of the city of Washington; that of Mr. L'Enfant being of no authority at all. I am not in possession of these acts and communications of President Washington, and have therefore no opportunity of passing an opinion on the accuracy of Mr. Breckenridge's conclusion. *Prima facie*, there is no reason to distrust it. On the contrary, it is entitled to entire respect until its accuracy shall be disproved.

If Ellicott's plan be the true one, then there are two provisions in the new charter of incorporation passed at the last

Streets in the City of Washington.

session, which have an important, and, indeed, a decisive bearing on the case. The first is the specific power given to the corporation by the 7th section of that act, "to *open* and keep in repair streets, avenues, lanes, alleys, drains, and sewers, *agreeably to the plan of the city.*" The second is the provision of the 15th section: "that the Commissioner of Public Buildings, or other person appointed to superintend the United States disbursements in the city of Washington, shall reimburse to said corporation a just proportion of any expense which may be hereafter incurred in *laying open*, or otherwise improving, any of the streets or avenues in front of, or adjoining to, or *which may pass through* or between *any* of the public squares or reservations," &c.

Here Congress recognise the existence of a plan, and give authority to the corporation to open streets according to that plan. They do more; for, by the second provision, they recognise a plan indicating streets which pass through the public squares and reservations, and require the Commissioner to pay a proportion of the expense incurred by opening them. If the plan thus pointed at be the plan of Mr. Ellicott, (and this must be the case if Ellicott's be the only authentic plan,) you will observe that *this* does indicate streets passing through what is called the mall, in several directions; and, according to the clauses of the charter just quoted, the corporation is expressly authorized to open these streets.

Has the President any control over this power? and, if he have, what is it?

There is no act of Congress which gave to the President the express power of establishing the plan of the city of Washington. The act of July 16, 1790, for establishing the temporary and permanent seat of government of the United States, authorizes the commissioners (who were to be appointed by the President) to purchase or accept *such quantity of land* on the eastern side of the Potomac, within the District, (Columbia,) as the President shall deem proper, for the use of the United States. It is only by the most liberal construction of this provision that it can be made to confer on the President the power of establishing the plan of the city. Mr. Breckenridge is therefore, perhaps, strictly correct in deriving this power from the deeds

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of the original proprietors, which require the trustees appointed by them to convey to the commissioners such *streets, squares, parcels, and lots*, as the President shall deem proper for the use of the United States. It appears by Mr. Breckenridge's statement of facts, that in 1797 President Washington, in pursuance of the power thus given him, executed an instrument of writing, in which he directs the trustees to convey to the commissioners *all the streets* as delineated in a plan said to be annexed.

This plan, it is further stated, was by accident not annexed by President Washington; but a plan is said by the commissioners to have been annexed, and sanctioned by President Adams in 1798; which plan is represented as not indicating streets passing through the mall, and in this respect differs from Ellicott's plan.

If, however, President Washington has, as Mr. Breckenridge states, previously ratified Ellicott's engraved plan, this must be considered as the plan which he intended to annex; and it was not competent for President Adams to give that instrument of writing a different direction, by annexing it to a different plan. The promulgation of Ellicott's engraved plan through the United States, with the explanatory notes annexed to it, holding up, among other inducements to purchasers, the convenient arrangement of the streets as thereby indicated, and the publication and exhibition of this plan on the day of sale, amount, in my opinion, to a pledge of the public faith that the streets thus indicated should be opened. The permanent occlusion of them would be an injury to the purchasers of lots adjoining the mall, (particularly to those on the south side of it, who would be thereby put to the inconvenience of making a circuit by the Capitol to reach the business part of the town,) of which they would have a just right to complain, and which, in the case of a contract between individuals, would not be tolerated by a court of chancery. Congress, however, to whom belongs the exclusive power of legislation in the District, did, in the year 1812, pass an act by which the President was authorized "to take possession of the whole of the reservations of public grounds in the city of Washington, and lease them out for a term not exceeding ten years, on such terms and

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conditions as in his judgment may best effect the improvement of the said grounds for public walks, botanic gardens, or other public purposes." (See 4th vol. Laws U. S , page 462.) This act remains yet unrepealed; for I do not consider the provision in the charter of the last session, which authorizes the corporation "to occupy and improve for public purposes, *by and with the consent of the President of the United States*, any of the public and open squares," &c., as amounting to a repeal of the act of 1812; but, on the contrary, as recognising and confirming the President's authority and control over the public grounds.

The President may still act under the law of 1812, by taking possession and making leases of the reservations for the purposes therein mentioned; and, under the full power given by this act, he may lease out the whole mall for purposes which would require the occlusion of the streets indicated by Ellicott's plan; or, if he has it in contemplation to devote this property to purposes within the act, which would render it improper that streets should be opened through it, he has the authority and power to refuse his assent to the resolutions of the corporation.

There is another act of Congress to which it is proper to advert on this occasion; it is the act of the last session, "for the benefit of the Columbian Institute, established for the promotion of arts and sciences in the city of Washington," whereby there is granted to that body the use of a tract of public land in the city, not exceeding five acres, to be located under the direction of the President of the United States, and to be held by that body till it shall cease to exist. If it be the purpose of the President to have these five acres located together on the mall, it would be improper, I presume, to have them cut up by the intersection of streets; and the President may place his negative on any plan which will produce this effect.

Yet I cannot but suggest that the powers thus conferred on the President ought, I think, to be so exercised as to derogate as little as possible from that pledge of the public faith which was given by the promulgation of Ellicott's plan, and the sales made under it.

You will observe that I have taken Mr. Breckenridge's deduction of the history of this plan as correct. If it be more

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agreeable to you that I should examine the facts in regard to it, I presume that the Commissioner's office (from which the copy of the opinion has been furnished) contains all the documents which will be necessary for the purpose, and your instruction to the Commissioner will place them immediately before me. I will merely remark, in concluding, that as President Jefferson must have placed the opinion on file in the Commissioner's office, it seems fair to infer that he coincided with Mr. Breckenridge in his conclusions.

I have the honor to be, &c., &c., &c.,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

SALINE SPRINGS IN ILLINOIS.

The grant of salt springs contained in the act admitting Illinois into the Union, includes all salt springs discovered and undiscovered to which the President of the United States has thought, or shall think it necessary to annex lands for the purpose of working them, and none other.

The discretion theretofore exercised by the President, in declining to withhold from sale such springs as were supposed to be of little value, is neither impaired nor taken away by the act admitting Illinois into the Union.

The effect of the grant is merely to place the State of Illinois, in regard to these springs and reservations of land, exactly on the ground which had been previously occupied by the United States.

OFFICE OF THE ATTORNEY GENERAL,

December 28, 1820.

SIR: There appears to have been some want of uniformity in the legislation of Congress on the subject of salt springs; to which it will be proper to advert, for the purpose of gaining a clearer view of the specific questions on which you ask my opinion.

By the original act of May 18, 1796, "providing for the sale of the lands of the United States in the territory northwest of the river Ohio, and above the mouth of Kentucky river," it was enacted "that a salt spring lying upon a creek which empties into the Scioto river, on the east side, together with as many contiguous sections as shall be equal to one township, and every other salt spring which may be discovered, together with the section of one mile square which includes it, shall be

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reserved for the future disposal of the United States." By the act of the 30th April, 1802, for the admission of the present State of Ohio into the Union, "the six-miles reservation, including the salt springs commonly called the Scioto salt springs, the salt springs near the Muskingum river, and the military tract, with the sections of land which include the same," were granted to that State for the use of the people thereof. This, it is clear, was a limited grant of certain springs, with the lands reserved for their use under the first law, and not a general grant of all the springs in the State. The provision of the act of the 18th May, 1796, above quoted, remained still in force as to all other salt springs in that State and in the remaining part of the territory, until that provision, as to the Territory of Indiana, (then including the present State of Illinois,) was altered by the act of the 26th March, 1804, "making provision for the disposal of the public lands in the Indiana Territory, and for other purposes." By the first regulation, (that of 1796,) a section of one mile square was reserved, *absolutely*, for the use of *all salt springs* thereafter discovered; but, by the law last referred to, it was provided that "the several salt springs in the said Territory, together with as many contiguous sections to each *as shall be deemed necessary by the President of the United States*, shall be reserved for the future disposal of the United States." By the act of the 19th April, 1816, for the admission of the State of Indiana into the Union, it is provided, "that *all salt springs within the said Territory*, and the land reserved for the use of the same, *together with such other lands as may, by the President of the United States, be deemed necessary and proper for working the said salt springs*, not exceeding in the whole the quantity contained in thirty-six entire sections, shall be granted to the said State, for the use of the people." Here the grant is no longer of particular springs by description, but of *all salt springs* within the Territory; and the discretion of the President as to the *quantum* of the reservation is *expressly* continued, and was to operate even after the Territory was to become an independent State. With respect to the remaining part of the Territory, (Illinois,) the provision of the act of the 26th March, 1804, continued still in force: the several salt springs within that Territory, together with as

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many contiguous sections to each *as should be deemed necessary by the President*, being reserved for the future disposal of the United States. You state that under this act the President exercised the discretion confided to him by the law, by declining to withhold from sale such springs as did not promise to be extensively useful; and under this notorious and practical construction of the act, the State of Illinois entered the Union. One of the terms of her admission was, "that all salt springs within such State, and the land reserved for the use of the same, shall be granted to the said State, for the use of the said State," &c.

Your first question is, whether this grant includes those springs only which were then discovered, and the lands already reserved; or those, also, which might thereafter be discovered, and such lands as the President may think proper to reserve for their use.

The grant is, 1st, of "*all salt springs within the State*:" terms broad enough to comprehend the undiscovered as well as the discovered springs within the State, and too broad to admit of the exclusion of any. The doubt, I presume, arises from the next member of the sentence: 2d. "*And the land reserved for the use of the same*;" because *reserved*, being a participle of the past time, could embrace only reservations which had theretofore been made; and the grant of the land being coupled with the springs by the words "*the same*," the doubt, I presume, *hence* arises whether any other springs were granted except those to which the President had previously annexed reservations of land. But this, I think, would be too rigid a construction of the covenant; for, in this particular, the act is to be considered as a covenant. The words are those of the grantor, and are, in a doubtful case, to be expounded most beneficially for the grantor. Besides, I consider the word *reserved* as referring not to the act of the President, but to the previous act of the law. The act of the 26th March, 1804, had, together with the springs, reserved the contiguous sections for their use, leaving to the discretion of the President the *quantum* of the reservation necessary; and, by just consequence, leaving to his discretion whether any reservation at all was necessary, as in the case of springs so slightly impregnated

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with salt as to promise no utility worth the reservation. I construe the grant, then, as if it ran thus: "That all salt springs within the said State, and the land reserved for the use of the same, by the act of the 26th March, 1804, entitled 'An act,' &c., shall be granted to the said State," &c. Then the question immediately arises, What lands were reserved by that act? to which the answer is, in the words of the act, "As many of the contiguous sections to each as should be deemed necessary by the President of the United States;" which words, I think, are to be taken in connexion with the public practical exposition of the power which had been made by the President, of reserving no lands where he thought the springs not worth the reservation: the intention being, that the State of Illinois should thereafter hold the springs, and the lands reserved for their use, exactly as the United States had previously held them. I think that all salt springs, discovered and undiscovered, pass by the grant to which the President of the United States has thought and shall think it necessary to annex lands for the purpose of working them; and that all lands which have been or shall be annexed by him for that purpose, also pass; and that no other springs or lands do pass by the words which have been quoted from the act admitting the State of Illinois into the Union.

Your other question is, "Whether the discretion heretofore exercised by the President, in declining to withhold from sale such springs as were supposed to be of little value, is impaired or taken away by the grant to Illinois?"

To which I answer, that I think it is neither taken away nor impaired. In my opinion, the effect of the grant is merely to place the State of Illinois, in regard to these springs and reservations of land, exactly on the ground which had been previously occupied by the United States; that is to say, subject to the same discretion of the President which he had theretofore exercised in behalf of the United States. I think that, by *unavoidable implication*, he is clothed with the same power over the future, with relation to this subject in regard to Illinois, with which he is *expressly* clothed by the act introducing Indiana into the Union; nor do I perceive that the exercise of this power over the unsold domain of the United States is at

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all impugned by the limited grant in question. The property belonged to the United States, and it is theirs to say on what conditions they will grant it, or any portion of it. In relation to these springs and reservations, I think they have said this with entire clearness, by the terms of the grant itself, taken, as these must of necessity be, in connexion with the act of the 26th March, 1804, and to the public and practical exposition of this latter act made by the President of the United States.

I have the honor to be, &c., &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

THE CANADIAN VOLUNTEERS.

The Canadian volunteers may locate lands for which warrants have been issued to them, by attorney, the same as others similarly entitled have been accustomed to do.

ATTORNEY GENERAL'S OFFICE,

December 29, 1820.

SIR: In reference to the question propounded to me from your department on the 26th, I can see no reason why Canadian volunteers should be excluded from the common privilege of acting by attorney in locating land warrants, nor why patents should not issue on such locations *in the name of the volunteers*. The opinion which I gave to the Secretary of War on the 26th December, 1819, related merely to the assignable quality of those warrants, and had nothing to do with the right of the volunteer to act by attorney in fact, properly constituted as such. The course you propose, therefore, is, in my opinion, perfectly proper.

I have the honor, &c., &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

FEES OF IMPRISONED WITNESSES.

Opinion of March 31, 1820, [*ante*, p. 344,] reconsidered, commented upon at length, and reaffirmed.

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Witnesses imprisoned on account of their inability to give security for their appearance at court, are not entitled to any compensation beyond the one dollar and twenty-five cents per day for attending court, and five cents per mile for travelling expenses, as provided by act of 28th February, 1799.

The act provides only for witnesses "summoned in court, attending in court;" and unless it be in session, there is no court in which or upon which they can attend. Witnesses detained in order that they may be in attendance when the time for a session of court shall arrive, cannot be considered in attendance in or upon the court. They earn their compensation only by attending where they shall be in the power of the court whensoever it shall be necessary to call for their testimony.

In a public prosecution the law regards the time of a witness as not lost to himself, but bestowed upon the interests of the community of which he is a member, and therefore he may be considered as being, in some degree, employed for himself. If paid by the marshal all the compensation which Congress has seen fit to make, he cannot obtain anything more. Payment for detention for want of bail has not been provided; and until it shall be, no marshal can legally make any allowance therefor; nor can any allowance therefor be passed by the officer who shall settle his official accounts.

The "reasonable contingent expenses" that may accrue in holding courts, which marshals are allowed to pay, are only those that arise and accrue in the holding of court; not on account of the criminal jurisdiction of the court, or the necessity of the attendance thereon of particular witnesses, but of the "*holding of court*," according to appointment, at the specified time and place.

ATTORNEY GENERAL'S OFFICE.

SIR: A letter from the First Comptroller of the Treasury Department requests my reconsideration of an opinion which I had the honor to give you on the 31st March, 1820, on the two following questions:

1. "Is a person detained in prison as a witness in a criminal case, from his inability to give security for his appearance in the recognizance required by law, entitled to the compensation of a witness for the time he is detained?"

2. "If he is so entitled, must not the expense of his subsistence be deducted from the compensation to which he would be entitled?"

In answer to which, I expressed the opinion, that as the only act of Congress which provided for the compensation of witnesses had merely given to each witness one dollar and twenty-five cents "*for every day he should attend in court*," a witness would not be entitled to such compensation for the time he should be so detained previous to the session of the court to which he would have been recognised; or, in other

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words, that the act of Congress did not extend the compensation to the time of his detention in the recess of the court. My impression was, and still is, that under the act of Congress, a witness so circumstanced is entitled to the same compensation precisely as if he had given the recognizance required by the committing magistrate, and had attended the court in conformity with such recognizance.

I have reconsidered this opinion with all the deference and respect so justly due to the court of the United States for the District of Columbia, who, it seems, have expressed a different opinion in the case of Edward McIntire, a copy of which has been furnished me; and it is matter of unaffected regret to me that their reasoning has produced no change in my opinion.

I beg leave to observe, in the first place, that the court has entirely misconceived my opinion. I considered the first question as relating solely to the period of the witness's detention in the recess of the court, and I therefore answered it with a general negative. But it was by no means my intention to authorize the inference which the court seems to have drawn from this general negative, to wit: that, in order to entitle a witness to his *per diem* allowance under the act of Congress, it was necessary that he should be every day *corporeally present* within the walls of the court-room, and that the court must be every day in actual session. Such a puerility never entered my mind. My opinion simply was, and is, that before compensation could begin to run, the court must have commenced its session; the session must be legally subsisting, and the witness attending on the court—not necessarily in the court-room, but within its power, whenever it may require his attendance. The opinion of the court seems to have confounded, or to suppose me to have confounded, *attendance on the court* with *attendance in the court-room*, and *the session in legal contemplation* with the *actual session* of the court. I consider a witness as attending on court to the purpose of earning his compensation, so long as he is in the power of the court whenever it may become necessary to call for his evidence, although he may not have entered the court-room until such call shall have been made; and I consider the court in session from the moment of its commencement until its adjournment

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sine die, notwithstanding its intermediate adjournments *de die in diem*. The whole session is, in law, but one session, and, to many purposes, but one day. I consider a witness as entitled to his *per diem* allowance from the day to which he is summoned to attend, until his discharge by the court; or, if the cause in which he shall have been summoned should not be reached by the court, until the adjournment of the court *sine die*—and this, notwithstanding the intermediate adjournments of the court from day to day; with this modification, that if the intermediate adjournment shall be for so long a time as to enable the witness to return home and resume his usual occupations during the recess, he would have no title to his daily compensation as a witness in attendance on the court, during his engagement in such occupations at home. I do not consider such an interval as *terminating* the session of the court, but merely as *suspending* it. When the interval has passed, and the session is actually resumed, it is, in legal contemplation, a mere continuance of the antecedent session, and, with it, forms but one session; but although the session thus subsists, the witness in the case just supposed (of an interval sufficiently long to allow him to return home and resume his occupations) is not attending on the court, and therefore is not entitled to the compensation the law annexes to such attendance.

There is no court, except it be a court in session. There are judges; but they do not constitute a court, except when they assemble to administer the law. When the term has closed, and the judges are in recess, there is no court. There are judges; there is a court-house and a court-room; but there is no court. Now I cannot conceive with what propriety a witness can be said to be *attending in court* when there is *no court*, and will be *no court* for several months.

To consider a witness who has been committed to jail because he cannot give security to attend a future court, to be actually *attending the court* from the time of his commitment, and this for five months before there is any court in existence, would seem to me to be rather a forced and unnatural construction. It would, indeed, be to make the law, and not to construe it; it would be *jus dare*, not *jus dicere*.

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The words of the act of Congress are, "that the compensation to jurors and witnesses 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."

"To the witnesses summoned in any court of the United States, *the same allowance as is above provided for jurors.*"

After quoting these provisions, the court observes: "When the legislature were contemplating and providing for the case of jurors, they must have considered the period of a juror's detention as commensurate with his attending in court; and that so long as he should be detained by the court in the necessary discharge of his duty as a juror, so long would he be considered as attending in court; and it is reasonable to suppose that they intended that he should receive compensation for the time he should be so detained." All this is sound and unexceptionable. I consider the words used in the act, "attending in court," as meaning nothing more nor less than being "in attendance on court;" but then, to place them in this situation, there must be *a court* in session, in legal consideration, on which the jury must be in attendance for the discharge of their duties; and the same is, in my opinion, the construction of the law as to witnesses. The court provides: "A jury, charged with a cause, sent out of court and confined to their room, may be unable to agree, and may not be brought into court again for several days: can any one suppose that the legislature intended to deprive them of their pay for the days they were so detained out of court?" Certainly not. For they are not only within the spirit of the law, but within the fair and liberal interpretation of its terms. They are indeed out of the court-room, but they can scarcely be said to be out of court; they are within its verge—within its power; they are in the custody of an officer of the court, and may be considered as being *themselves* a part of the organization of the court; they are certainly "*in attendance on the court*," which, in my opinion, is a fair paraphrase of the language of the act,—not a new and substantive enactment, flowing from its supposed spirit, but from a fair paraphrase of its words. In the case, therefore, hypothetically put, I consider the jury as entitled to their com-

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pensation, not only by the spirit, but the letter of the law, *because they are in attendance on the court*. The court, in pursuing the subject still further, put another case of a jury. They say: "When a jury is charged with a cause and cannot agree, and are confined to their room, if the court should adjourn for two or three days, leaving the jury in custody of an officer of the court, it was never doubted that they would be entitled to a compensation for those days." Certainly not; it ought never to be doubted; for the session is not terminated by an adjournment for two or three days: the court is, in legal contemplation, a subsisting court; and the jury, in the case put, is in attendance on the court. They are, therefore, manifestly, in the spirit and fair interpretation of the language of the law, "attending in court" and "attending on court, ready to come in when called;" being, according to my conception, essentially the same. But to place a juror in either predicament, there must be a court in session, actually or potentially; for otherwise I cannot conceive how a jury can with any propriety be said to be either "*attending in court*" or "*attending on court*."

It seems to me that the circumstance of the jury and witness being placed together by the law, and the act to be done by both in order to give title to the compensation being identically the same, gives additional force to my construction. In relation to them both; it is the attendance in court which is the ground of the allowance; but with regard to the juror, it is indisputably clear that *attendance in court* means attendance *on a court in session*, since it is only in a court in session that a juror has any functions to perform; and as it is precisely for the same attendance with the juror that the witness is compensated, the attendance in court of the witness must also mean attendance on a court in session. But there are other words in regard to the witness, which make the construction still stronger with respect to him. The only provision of the law in behalf of witnesses, is, "to the witnesses *summoned* in any court of the United States, the same allowance as is above provided for jurors;" which was, "one dollar and twenty-five cents *for each day he shall attend in court*; and for travelling, at the rate of five cents per mile." The law, then, looks only to

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witnesses who have been *summoned*, and who render the *attendance required by such summons*. It is for such attendance only that provision is made. And what is the attendance which the summons requires? Unquestionably, *attendance on a court in session, and on such a court only*. A summoned witness may, if he pleases, loiter for months on his way to the court. His allowance for attendance never begins till the session of the court has commenced, and the particular day of the session to which he has been summoned has arrived.

If this law were strictly construed, summoned witnesses only could claim the allowance, because the provision is in terms confined to *summoned* witnesses: it is only by the equitable interpretation of the statute that the provisions of the act can be extended to *recognised* witnesses, or to witnesses *imprisoned* because unable or unwilling to give the recognizance. This equitable interpretation I am willing to give the act. I am willing that the *recognised* and *imprisoned* witnesses shall take the whole benefit of the provision which the law has made for the *summoned* witnesses; that is, one dollar and twenty-five cents for every day he shall attend in court, and five cents per mile for travelling to and from court. But this, it seems, is not enough: the *imprisoned witness* must have not only the benefit of the provision which the law has made, and which it has in terms *confined to summoned witnesses*, and which is the only provision that it makes in relation to witnesses at all; but he must have another allowance peculiar to himself, to wit: one dollar and twenty-five cents for every day that he shall be detained in prison prior to the session of the court. Thus, not only must other characters than those named in the law have the benefit of the provision; but the provision itself must be altered and enlarged. It may be *reasonable* that he (the imprisoned witness) should have such an allowance as is claimed for him; but where is the law that gives it? It is very manifest to me that this is not the language nor the meaning of the only law which does exist upon the subject; that the law contemplates no such case; and hence, that, if the allowance shall be made, its justification is to be found rather in the humanity which dictates it, than in the enactments of any existing law.

The court seem to imagine that their construction of this

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act is sanctioned by the decision of the circuit court of Virginia in the case of Aaron Burr; for they say that, "in the case of Colonel Burr, witnesses were summoned from a great distance—from New Orleans—and then the court adjourned to a distant day, but not so distant as to allow the witnesses to go home and return in the intermediate time; and it was decided that they should receive their compensation during the time they were thus obliged to remain, although the court did not continue to sit from day to day." And it was rightly decided. The witnesses were *summoned* witnesses: they had attended the court in obedience to their summons, and were attending court when a temporary adjournment of the court took place—an adjournment, it is true, to a distant day; but still a temporary adjournment, and one which did not terminate the legal session of the court. On the contrary, when the court, at the day of adjournment, resumed its sittings, it was not a new session, but a mere continuance of the former session; and was so entered, of necessity, on the journal of their proceedings. Notwithstanding, therefore, the suspension of the actual sittings of the court, the session of the court was, in legal contemplation, a continually subsisting session of the court, and these summoned witnesses were in necessary attendance on the court; for, according to the case stated, it was necessary that they should remain, in order to be ready at the call of the court, when its actual sittings should be resumed. They were, therefore, summoned witnesses, necessarily attending on the court in session. In order to justify the allowance of the claim to the witnesses, these two things must, in my opinion, occur: there must be a court in session, actual or potential; and the witnesses must be necessarily in attendance on the court. The case just mentioned will show the necessity of the concurrence of both these circumstances to entitle the witness to his *per diem* allowance for his attendance on the court. There were, in the case of Aaron Burr, witnesses summoned from Wood county, in Virginia, as well as from New Orleans and other distant parts. The long adjournment which has been alluded to, although not long enough to allow the New Orleans witnesses to return home, was long enough to allow the Wood county witnesses to return home; and they did return home.

Now, one of the circumstances necessary to found the claim of a witness for his allowance, occurred to all the witnesses equally, to wit: there was all the time a court in session, in contemplation of law. But the other circumstance, to wit: that the witness should be in necessary attendance on the court, did not occur equally as to all the witnesses: it occurred as to the New Orleans witnesses, and they received the allowance; but it did not occur as to the Wood county witnesses, and they did not receive the allowance. The very reason why, as it is admitted, the allowance was made to the New Orleans witnesses, (to wit: that the adjournment was not long enough to permit them to return home,) proves that it must have been refused to the Wood county witnesses, because the adjournment was long enough to permit them to return home.

Again: let us suppose that the New Orleans witnesses, by way of assuring their attendance, had availed themselves of some conveyance which had brought them to Richmond ten days or a fortnight before the commencement of the court to which they had been summoned;—they would be then upon expenses, for the single purpose of paying obedience to their summons in attending the court. They were there, it is true, too early for the court; but even this circumstance had resulted from a laudable desire to secure, with certainty, their own power of attendance. They were in attendance; but there was no court. One of the circumstances on which their claim would arise had occurred, but the other had failed; and there can, I think, be no question that their claim would be refused.

In the cases already put, of juries divided in opinion and confined in the jury room for two or three days together, while the court might be adjourned, during that time it is conceded that the jurors would be entitled to the allowance made by law; because they are attending on the court in the discharge of their duties; and are, therefore, as I conceive, not only within the equity, but within the fair interpretation of the words of the law. The court, however, draw their inferences from this concession, which they rightly anticipated would be made to them. "The words *attend in court* cannot, therefore, in all cases, be confined to their literal meaning. In what cases, then, may the court depart from the letter of the law? We answer, in

all those cases which are clearly within the mischief intended to be remedied by the statute." Let us pause a moment to examine the correctness of this position. It is true, that where the words of the statute are obscure or doubtful, we may resort to the intention of the legislature in order to find the meaning of the words. "Where the words of a statute are doubtful and uncertain," says Lord Chief Justice Willis, "it is proper to inquire what was the intent of the legislator;" "but it is very dangerous," he adds, "for judges to launch out too far in searching into the intent of the legislature, when they have expressed themselves in plain and clear words." (Willis's Reports, 397, and the opinion of Judge Chase, in 4 Dal., 30, *note*.) So that it is only where the words of the statute are doubtful and uncertain that recourse can be safely or properly had to the intention of the legislature to expound the words, which I humbly apprehend is not the case with relation to the words of the statute under consideration. Besides, how are we to come at the meaning of the legislature but through their words? and with what propriety can we go into a conjectural speculation as to their meaning, when they have told us explicitly what they do mean? "Where a law is plain and unambiguous," (say the Supreme Court, in *United States vs. Fisher*, 2 Cranch, 399,) "whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and no room is left for construction." Now, here the legislature have, in plain and unambiguous terms, declared that their intention is to make an allowance to *summoned witnesses* for every day *they shall attend in court*. There is nothing in these terms which to me appears obscure or uncertain. I should not be at all surprised at the construction which, following the clear expression of such a law, should limit the allowance to *summoned witnesses*. It is, I think, making sufficiently free with language so clear as this, to extend the provisions, by equitable construction, to recognised and imprisoned witnesses, and to place them on the same footing with summoned witnesses. But to add to this liberty the further one of altering the provision itself, and reading the words "*for every day he shall attend in court*," as if they were "*for every day he shall be confined in jail previous to the session of the*

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court," seems to me to be abolishing the use of language, and performing an act of legislation under color of an act of mere construction. Let it be admitted that the imprisonment of a witness who cannot give the recognizance required by the law, in order to compel his attendance on court, is a mischief: it is not likely to occur often; on the contrary, it is one which is likely to occur very rarely; and it must be manifest to every one that the words of the law do not reach it. Now, what is the rule of construction in such a case? It is this: "If the words of a statute do not extend to a mischief which rarely happens, they shall not be extended by an equitable construction to that mischief; but the case is to be considered as a *casus omissus*: for the objects of the statute are mischiefs *que frequentius accident*." (*Bole vs. Harton*, Vaughan's Rep., 373.) The intention of the legislature is here too plainly expressed to admit of any conjectural speculation as to the mischief which they intended to remedy; and I deny that there is any case in which a court, employed on the construction of a statute, is at liberty to assume a speculative mischief (larger than that declared by the statute) as being the mischief which the legislature intended to remedy; and then to strain the words of the statute not only beyond their natural sense, but beyond any possible sense of which they are capable, in order to cover the speculative mischief thus assumed.

We have seen the Supreme Court giving the rule, in the case of the *United States vs. Fisher*, that where a law is plain and unambiguous, the legislature should be intended to mean what they have plainly expressed, and that in such a case there is no room for construction. They have annexed to this rule this single qualification only: "But if, from a view of the whole law, or from other laws *in pari materia*, the evident intention is different from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail; for that, in fact, is the will of the legislature." So that, where even the letter of the law is to be controlled by the intention of the legislature, that intention is not to be drawn merely from speculations on what is right and just in the abstract, but it is to be gathered from the face of the law itself; and that intention so to be gathered is to be not obscure

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and doubtful, but it is to be the *evident intention* of the legislature. When such *evident* intention is *manifest* upon the *face of the whole law*, then I admit that it does rightly control the letter of the law in any particular part. Let us apply this principle to the case under consideration. The letter of the law in the particular part under consideration is confined to witnesses attending in court; but it is supposed that the intention of the legislature was to embrace within their terms a witness confined in jail, and to compensate him also, for every day he should be so confined before the commencement of the session of the court. But where is the proof that this was the intention of the legislature? In what part of the law is this intention evident? There is no other part of the law which touches the subject, except the very passage which is to be construed and controlled by this supposed intention. These words, then, express no such intention, but a very different one; and there being no other part of the law which touches the subject, that intention which is expressed must stand, and stand alone; and the court is not at liberty to travel out of the law to assume a hypothetic intention, in order to control the intention which is expressed.

Let us follow the court a little further in their reasoning on this subject. Assuming their right to extend the language of the law to the mischief which the legislature intended to remedy, they say that this mischief was the loss of the witness's time. But the loss of what time? The law answers: the time which he loses by *attending in court*. Then, with this declaration of the legislature before us, what authority is there for saying that it was anything else? more especially a thing so different as the time which was lost to him because he either would not or could not give security that he would attend court. Suppose the natural justice of the latter claim to be quite as strong as the former; yet the language of the legislature being perfectly clear, and embracing the one without embracing the other, it is beyond the power of mere construction to say that it embraces both. If every case which a court may conceive to be equally strong upon the principles of natural justice is to be considered as embraced by a law, although it is manifest that its terms do not embrace it, the sphere of con-

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struction is infinitely larger than it has been supposed to be. There will be no such thing as a *casus omissus*. Nor will there be any such thing as a certainty in the law; because the opinion of courts as to what is natural justice in any given case, may be as various as the courts themselves; and we shall have, over again, the notion of the length of the judge's foot as to the standard of natural justice objected to the science of the law.

On this subject of what is naturally just with regard to witnesses, there is but little doubt that we should have a variety of opinions from different tribunals. The common law is thought to be in a great degree founded on reason and justice; yet the common law makes no provision whatever for witnesses who are called to give evidence for the community of which they are members. In giving their attendance and their testimony in such cases, they are thought to be doing only their duty to the State—a duty devolved upon them by the fundamental laws of the social compact, to which each individual is a party. Yet the same common law has provided ample remuneration to a witness who attends in a civil case, at the call of an individual suitor—as in the case of *Sturdy vs. Andrews*, 4 Taunton, p. 699, cited by the court. Whence this difference in the provisions of the common law, with regard to these two different classes of witnesses? It could have arisen only from the circumstance that the common law regards the loss of the witness's time in a civil case, as giving him a claim, in natural justice, on the suitor at whose call he has attended; while it regards the time of a witness who attends to give evidence in a public prosecution, as not lost to himself, but as bestowed upon the interests of the community to which he belongs, and as, therefore, employed for himself.

In England, this right of summoning, recognizing, and imprisoning witnesses who were unwilling or unable to give security for their attendance in a criminal case, is at least as old as the reign of Philip and Mary. (See 1 Chitty's Criminal Law, pp. 90, 91; and see also the forms of commitment, 4 Chitty's Criminal Law, from 47 to 52, inclusive.) The precedents of commitment, it will be observed, include the case of a witness unable, as well as a witness unwilling, to give the

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recognizance; and the proceeding seems warranted by the reasoning of the Court of King's Bench, in a case in 3 Man. and Selw., p. 1. Yet neither the common law, with regard to witnesses summoned to support a criminal charge, nor the statutes of Philip and Mary, with regard to witnesses recognised or imprisoned for want of recognizance, make any provision for their compensation. Sir Matthew Hale (vol. ii, p. 282) lamented it as a great defect "that there is no power to allow witnesses *their charges*, whereby many times *poor persons* grow weary of attendance, or bear *their own charges* therein, to their great hinderance and loss." Yet this alleged grievance continued to exist until the twenty-seventh year of George II, when the first statute was passed, which provides that "when *any poor person* shall appear *on recognizance* in any court to give evidence against another accused of any grand or petit larceny, or other felony, it shall and may be in the power of the court, at the prayer and on the oath of such person, and on consideration of his circumstances, in open court to order the treasurer of the county or place in which the offence shall have been committed, to pay such person such sum of money as to the said court shall seem reasonable *for his time, trouble, and expense*," &c. Here it is to be observed that the compensation is, 1st, confined to *poor persons*; 2d, to poor persons *appearing on recognizance*; 3d, to persons appearing as witnesses *in cases of felony only*; and, 4th, it is left discretionary with the court to allow it, or not, *in consideration of the circumstances of the witness*.

Here let us pause a moment to consider the construction which, according to the principles adopted by the circuit court of Columbia, would be placed upon this statute. They might say that the mischief which the Parliament intended to remedy was the loss of the witness's time, trouble, and expense; and, consequently, that the statute extended to all the witnesses alike, rich and poor; that whether they attended upon summons, recognizance, or imprisonment, the mischief was equally great, and the claim equally just; and that it authorized the allowance not merely during the actual attendance on court, but also (*a fortiori*,) during the imprisonment of the witness, who should be unable to give the security for his attendance required

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by the magistrate. But how did the courts of Great Britain interpret the statute? So far from going the length of the circuit court, they did not exercise even the liberality which I have been willing to apply to the construction of our act of Congress: they confined it not only to persons *appearing in court*, but they applied it to such persons as they should deem *poor*; they confined it, too, to persons *recognized* to appear in court, because such was the language of the statute; and refused to extend it even to poor persons who should appear *on summons*, though the merits and claims of the latter persons were at least equal to the former in every particular—the only difference between them being that the statute expressly included one, and did not include the other.

A subsequent statute was therefore passed, (18 Geo. III, c. 19,) which in the 7th section recites the provisions of the statute just quoted, (27 Geo. II;) and then proceeds with the recital thus: "But, nevertheless, it has been *found by experience* that the said hereinbefore recited statute of the 27th year of his late Majesty, with regard to persons appearing on recognizance in any court to give evidence as aforesaid, extends only to poor persons, such court also considering their circumstances; and, also, does not extend to persons on subpœna to give evidence." "And whereas it is just and reasonable, and may tend in future to the prevention of crimes, or to the due prosecution of all offenders against the laws, that *every person so appearing on recognizance or subpœna* to give evidence should be allowed his *reasonable expenses*, and also, *in case he be poor, a reasonable satisfaction for his trouble and loss of time* " For these reasons, it is in the 8th section enacted: "It shall and may be *in the power of the court*, where any person shall *appear on recognizance or subpœna* to give evidence in *any grand or petit larceny, or other felony*, whether a bill of indictment be preferred or not to any grand jury, *provided the said person shall, in the opinion of the court, bona fide have attended the said court in obedience to such recognizance or subpœna*, to order the treasurer, &c., to pay unto such person such sum of money as to the said court shall seem reasonable, *not exceeding the expenses which it shall appear to the said court the said person was bona fide put to by reason of the said recog-*

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nizance and subpoena; making, in case the said person shall appear to the court to be in poor circumstances, a reasonable allowance to such person for trouble and loss of time," &c.: so that in England, to this day, the allowance is confined to persons *appearing in court on recognizance or subpoena in the case of felony*, and the allowance is only of the parties' *reasonable expenses*; except in the case of *poor persons*, with relation to whom a discretion is given to the court to make a further allowance for *trouble and loss of time*. In England, therefore, to this moment, there is no provision, either by the common or statute law, for a witness imprisoned because he cannot or will not give a recognizance for his appearance, and attending the court only because of such imprisonment; the provisions being restricted to persons, there is not only no provision for his compensation while detained in prison previous to the court, but not even for his actual attendance on the court by force of the imprisonment; the provisions being restricted to persons attending on recognizance or subpoena, and under such circumstances, and with such expressions, as to render it impossible for the court of that country to extend the provisions, upon any notions of equity, to persons appearing in court under any other species of constraint. The strict construction put by the court upon the statute 27 Geo. II, whereby the provision was limited to persons appearing on recognizance, can leave no doubt of the construction which is put on the amendatory statute. Blackstone expressly treats its provisions as confined to "persons appearing upon recognizance or subpoena to give evidence."—(4 Black., p. 362.) Now, if the loss of a witness's time, trouble, and expense, in attending to give evidence for the public, were considered in England as a mischief which called for redress, then, whether he were rich or poor, or whether the charge under prosecution were felony or misdemeanor, he would be equally entitled to be compensated for the loss of that time, trouble, and expense. But, in all prosecutions for misdemeanor, whether the witness be rich or poor, he is without any manner of compensation. In cases of felony, he is equally uncompensated for his loss of time, *unless he be poor*; and even if he be poor, he remains uncompensated not only for his loss of time, but even for his expenses, unless his attendance has

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been the consequence of a summons or a recognizance. If it has been procured by his imprisonment, although such imprisonment has proceeded not from his contumacious refusal, but his inability to give security for his attendance, he is nevertheless entitled to no compensation; not only no compensation for the time during which he shall have been imprisoned, but not even for the time of his attendance on court in consequence of such imprisonment. In England, therefore, such an imprisonment for such a purpose is not considered as a *mischief* which calls for legislative interference; it is considered merely as a necessary means of securing the attendance of a witness for the public good. The witness, while in prison, is not at his own expense; he is supported by the public. Nor is it likely that any serious practical mischief can follow from such a course of proceeding. It is very improbable that any man of good character should be unable to give security for his attendance in court. It will be more generally on accomplices, or persons of otherwise bad character, that the restraint will fall. An obscure or unknown stranger may be placed in the predicament of having a recognizance required of him. But it is in the discretion of the magistrate to require security on the recognizance or not; and it is not probable that it will be required but from suspicious or doubtful characters. Or, say that this doubt and suspicion should sometimes light on an innocent man; it is not in the nature of things that it should happen often, and the law acts only upon those mischiefs *quæ frequentius accident*; it being considered better that an individual should sometimes suffer an inconvenience, than that the public should sustain a serious injury.

Let us turn from the English law upon this subject to the law of Maryland. In the case of McIntyre, the court advert to this law thus: "By the law of Maryland, (1797, c. 94, sec. 5,) which was in force at the time of the separation of this part of the District of Columbia from that State, every witness was allowed one dollar and fifty cents for each and every day the witness shall *attend* for the discharge of his duty. This act does not use the words 'in court.' It seems to us, however, that both statutes should receive the same construction, and that both were intended to give the witness a compensation

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for the time necessarily lost in consequence of his obligation to attend the court as a witness. It is unnecessary, therefore, to decide which is the permanent law."

The words of the clause are, "that there shall be allowed to each witness attending the general court on the western and eastern shores of this State, the sum of one dollar and fifty cents for each and every day such witness shall attend for the discharge of his duty, besides itinerant charges." I concur with the court in thinking that this act ought to have the same construction with the act of Congress; but the practical construction of this act is precisely that which I have given to the act of Congress—it is extended to those only who attend court. But let us look at this matter a little more closely. The court of Columbia seems to be under the impression that this act of Maryland governs the compensation to witnesses in criminal cases; but it is not so. The State of Maryland pays no compensation to witnesses for their loss of time. In this respect, the old common law of England is still the law of Maryland. Witnesses in this State receive no compensation in any criminal case whatever, except in cases of conviction, where the costs are paid out of the estate of the prisoner; or in the case of acquittal, where the charge is found to be frivolous and unfounded, when they are paid by the prosecutor. But how stands the law of Maryland on the very case under consideration—the case of a witness imprisoned because unable to give security for his attendance? Does he receive a *per diem* allowance during his imprisonment? So far from it, that until 1752 he was obliged to bear his own expenses while in prison; and, if unable to pay them, was sold as a servant for so long time as would be sufficient to pay those expenses. The Maryland statute of June, 1752, ch. 13, was meant to redress the whole mischief which the legislature supposed to exist in the case; the preamble of which is, "Whereas many indigent persons or strangers have been necessarily, for want of sureties to appear as witnesses, committed to prison; by means whereof, such persons have been *sold as servants for the prison fees arising upon such commitment*, or otherwise detained in prison *for such fees*, to their great damage and loss to the public in the labor of such persons." Here we have the very case under con-

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sideration, with all its circumstances of grievance directly looked at: and what is the remedy? Nothing more than a provision for the payment of *such prison fees*—not a cent being allowed for *loss of time*; and, by the statute of 1792, this law is made the permanent law of the land. So that in Maryland all that a witness so circumstanced receives is his support in prison; and he receives the same from the United States.

Again: let us look at the consequences of a construction, which, besides supporting such a witness, should pay him one dollar and twenty-five cents per day during the time of his confinement. When, in consequence of the new reference of this question to me, I inquired whether, by the laws and usages of Maryland, such witness received both the support and the *per diem* allowance? the answer was, No; and that if such were the laws and usages of Maryland, all the prisons of the State would not be sufficient to contain those who would contrive to get themselves committed on such terms. And, when we consider the class of character on whom such a provision would be most likely to fall, the suggestion appears by no means extravagant.

Upon the whole, I retain the opinion which I formerly expressed: my only doubt upon the subject, growing out of the reconsideration of the case, being, whether the law ought not to be confined in practice, as it is in terms, to *summoned witnesses*. On this last point, as the witness is, from the commencement of the session of the court, placed in their hands, and under their power to be brought into court whenever he shall be called, I think that he ought to be regarded as a summoned witness from the time that he is placed in this predicament. The court of Columbia are understood to consider such a witness as under the power of the court from the time of his commitment, and the time which he spends in jail as lost "in obeying the orders of the court." But it is not so: the witness is not committed to jail by order of the court, nor is he held by "obeying the order of the court;" he is committed by a single magistrate, and detained by the order of that magistrate. The court has no cognizance of the fact until the commencement of their session; *then* it is brought to their knowledge; and thenceforth the witness is detained by the power and authority

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of the court, and is, I think, to be regarded as a *summoned witness*.

One further question arises in this case. By the 4th section of the act of Congress of the 8th May, 1792, entitled "An act for regulating processes in the courts of the United States; and providing compensation for the officers of said courts, and for jurors and *witnesses*," it is enacted, "that there shall be paid to the marshal the amount of the expenses 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 clerk, &c., 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." It seems that the marshal did not include in his account the *per diem* allowance in question to the imprisoned witness during the time of his confinement previous to the session of the court; but the court, on motion, decided that the marshal was bound to have included it in his account, and that the same ought to be passed by the accounting officers of the treasury, and paid out of the treasury to the marshal, &c. And it is supposed that the account so passed becomes imperatively binding on the treasury, and that they have nothing to do but to pay it.

I am not of this opinion. The power given to the court is not to examine and certify any account that the marshal may present; if it were so, there would be some color for the opinion which has been expressed. But it is not so. The law has specifically enumerated the items of which the account shall consist; and it becomes the duty of the officers of the treasury to see that the account consists of these items, and no other; for, however imperative the language of the section may be, it is only in relation to an account composed of those specified items that it is thus imperative. The language of the section

which is deemed so imperative is, that the account which the act describes, having been examined and certified by the court, *shall be passed* at the Treasury Department *in the usual way*. What is the *usual way* of passing accounts at the Treasury Department, to which that act has allusion? The act of 1789, chapter 12, answers the question. The 5th section of that act makes it "the duty of the Auditor to receive all public accounts; and, *after examination*, to certify the balance, and transmit the accounts with the vouchers to the Comptroller, for his decision thereon. The 2d section makes it the duty of the Comptroller *to examine* all accounts settled by the Auditor, and to certify the balance arising thereon to the Register. The 6th section makes it the duty of the Register "to transmit to the Secretary of the Treasury copies of the certificates of balances of accounts adjusted as herein directed: on which the Secretary, if he also approve, is to give the warrant for the payment of the money. This is *the usual manner* in which the law commands that the marshal's accounts shall be passed at the treasury. The account, then, is to be first submitted to the Auditor, and he is to *examine it*; not to control, in the slightest degree, the discretion with which the law has invested the court, but to see that that discretion has been exercised upon the subjects pointed out by the law; or, in other words, to see that the account contains no item but those which are authorized by the law. If it contain no other item, the Auditor is, I think, bound to pass it, however extravagant he may think the allowance, unless the extravagance be so monstrous as to argue corruption; in which case, his authority and duty, as one of the sentinels over the treasury of the United States, would extend to the disallowance of the account. But short of this, I am of opinion that the officers of the treasury would have no power to disallow a marshal's account, which should have been examined and testified by the court, *provided it contain no item beyond the enumeration prescribed by the law*; but if it contain any such item, then I am very clear that there is nothing so imperative in the law as to require them to pass it, but, on the contrary, that it is their duty to reject it.

In the present case, the objection to the item is, that it is not within the enumeration made by the law. It is supposed

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to be within the first class of subjects enumerated in the law: the words are:

"There shall be made to the marshal the expense for fuel, candles, and other reasonable contingencies that may accrue *in holding the courts in his district.*" It is understood as conceded, that if the *per diem* allowance of the imprisoned witness be not within this enumeration, it is within no other contained in the act; and that it is not, is, to my mind, very manifest. The contingencies provided for are those that may accrue in holding the courts in his district; not from the circumstances of there being a court of criminal jurisdiction held in his district, but such contingent expenses as may arise in the course of the court; or, in the very words of the law, such as may accrue *in holding the court*; of which, *fuel* and *candles* are put as examples. Now, by what process of candid inquiry can the *per diem* allowance of an imprisoned witness, *for three or four months before the commencement of the session of the court*, be brought within the description of contingent expenses which accrue *in holding the court*, in the same manner as the expense of fuel and candles accrues *in holding the courts*?

The fact is, that the compensation of witnesses summoned on the part of the United States is not a *contingency* under this law at all: it is, on the contrary, one of the specific objects to which it looks. The title of the law directly contemplates it as one of the objects for which it proposes to provide, and the very section under consideration expressly provides for it; for among the subjects which the marshal is directed to include in his account, is "the compensation" aforesaid "to the grand and petit jurors, to the witnesses summoned on the part of the United States," &c. What is the compensation aforesaid to the witnesses which the law directs the marshal to include in his accounts? It is found in the 3d section of the law; and is—"to witnesses summoned in any of the courts of the United States, the same compensation in each State respectively as is allowed in the supreme court of the same." Had this provision of the law stood, and had the law of Maryland been considered as governing the case of McIntyre, we have seen that he would have received nothing but his subsistence while confined in jail. But this provision has been repealed, and

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substituted by that which is now in force, and on which I have already commented at large; that is, to the witnesses summoned in the courts of the United States, one dollar and twenty-five cents for each day they shall attend in court. Thus the law having made all the provision for the compensation of witnesses which it seemed good to the legislature to make for them, and the marshal being expressly directed to include this specific compensation in his account, I am of opinion that no other and additional compensation can be introduced into that account under the name of a *contingency*, much less of a contingency accruing in *the holding court*.

I am sorry that this discussion has run into so great length; but I wished it to be seen, both by the court and yourself, that I had not ventured to differ from that respectable tribunal without great deliberation. If the court should think proper to reconsider their opinion and retain it, I think it would be very desirable to have the case put in such a form, if possible, as to receive the opinion of the Supreme Court. If this cannot be done, it will be for you, sir, to decide whether it would not be safer and wiser to submit to the judgment of the court, than to produce a collision between the judicial and executive departments of the government on a point in which, however confident of our own correctness, we may be wrong. It is probable that Congress would, upon your suggestion, interfere, and quiet the question by an explanatory law.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

IMPORTATION OF SLAVES.

By the act of Congress of 2d March, 1807, the importation of slaves from Africa or elsewhere into the United States, or any place within their jurisdiction, is prohibited under severe penalties; and the importer and all persons claiming under him are therein declared to have no title to the negroes imported, nor to their services.

And by the same act, it is left to the legislatures of the States to regulate the manner in which the negroes thus imported shall be disposed of.

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It is the duty of every good citizen who may be apprized of a breach of this law, to take prompt and immediate steps for the seizure of the negroes, and to inform the governor of the State, that he may give directions for the disposal of them.

The statute of Georgia, making the regulations contemplated by the law of Congress, passed 19th December, 1817, is not unconstitutional.

OFFICE OF THE ATTORNEY GENERAL,

January 20, 1821.

SIR: I proceeded on the 1st instant, according to appointment, to take up the case of General David B. Mitchell, the agent of the United States for Indian affairs at the Creek agency, under a charge from Governor Clarke, of Georgia, that he was concerned in the unlawful importation of Africans, in breach of our laws, in the winter of 1817-'18; and have now the honor of reporting to you, according to your direction, my opinion both of the law and the facts of the case.

The only law of the United States which has any bearing on the conduct of General Mitchell, is the act of Congress of the 2d March, 1807, entitled "An act to prohibit the importation of slaves into any port or *place within the jurisdiction of the United States*, from and after the 1st January, 1808." This act, after inflicting severe penalties on any who shall, after that day, import, or aid in importing, any negro, &c., to any port or place within the jurisdiction of the United States, with the view of selling them or holding them to service or labor, proceeds to declare, among other things, in the 4th section, that "neither the importer, nor any person or persons claiming from or under him, shall hold any right or title whatsoever to any negro, mulatto, or person of color, nor to the service or labor thereof, who may be brought within the United States, or Territories thereof, in violation of this law: but the same shall remain subject to any regulations not contravening the provisions of this act, which the legislatures of the several *States or Territories* at any time *hereafter* may make for disposing of any such negro, mulatto, or person of color." This section of the act does not provide what shall be done with the persons thus imported, in case the legislatures of the several States shall not *thereafter* have made any regulation for disposing of them; but the 7th section of the same act, after authorizing

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seizures to be made by the armed vessels of the United States, of any vessels with slaves on board that may be found hovering on the coast, and giving a moiety of the forfeiture to those who make the seizure, provides that, in order to entitle them to such moiety, the officers, &c., shall safekeep every negro, &c., found on board, &c., and shall deliver every such negro, &c., to such person or persons as shall be appointed by the respective States to receive the same; and if no such person or persons shall be appointed by the respective States, they shall deliver any such negro, &c., to the overseers of the poor of the port or place where such ship or vessel may be brought or found, and shall immediately transmit to the governor, or chief magistrate of the State, an account of their proceedings, together with the number of such negroes, &c., and a descriptive list of the same, that he may give directions respecting such negroes, &c.” It is true, this directing provision is confined in terms to *the officers and men of the armed vessels of the United States* making seizures of slave-vessels on the coast; yet, as it forms a part of the same act with the section before in part quoted, and contains the only direction in the act as to what shall be done with negroes, &c., seized, where the State shall not by its laws have appointed a person to receive them, it may be well considered as incorporated with the 4th section, as supplying its defects, and giving the rule of action in an analogous case of a seizure on land, so far as the direction could be carried into effect under the circumstances of such a case. For example: in the case of a seizure made in the Indian country, where no counties were yet organized, and where there were no overseers of the poor, that part of the direction which orders a delivery of the negroes to the overseers of the poor could not be carried into effect; but that part which requires an immediate report to the governor of the State could have been carried into effect, and the direction ought *to be respected* as an expression of the purpose of Congress where the State had omitted to provide persons for the function in question. Yet this construction of the act is not so obvious or necessary as to attach guilt to any man who, having made a seizure by land, shall have omitted to adopt and act upon it. But the 4th section, taken by itself, and without any reference to the 7th, in divesting the

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importer of all title to the negroes, &c., subjecting them to be disposed of *according to the legal regulations of the State*, would seem very naturally to *advertise the seizor* that the governor of the State, officially charged with the execution of the laws of the State, ought to be forthwith apprized of the seizure and its circumstances, that he might give directions respecting such negroes. The act of Congress thus referring the disposal of slaves illicitly imported to the regulations which should *thereafter* be made by the legislatures of the several States, leads us to inquire in the next place whether the legislature of the State of Georgia (the theatre of the transactions under consideration) had made the regulations contemplated by the act of Congress.

The constitution of the State of Georgia, of the year 1798, forbade the future importation of slaves from Africa, or any foreign place, after the 1st day of October following. There have been several prohibitory acts of the legislature of that State, both before and since the act of Congress, under very severe penalties; some of them, enacted just before the occurrence under review, made the importation a penitentiary offence. But all these acts stopped at the infliction of the penalty, leaving the importer still in possession of the slaves. I can find no act of the legislature of Georgia, in the volumes furnished from the Department of State, which connected itself with the act of Congress of 1807, by providing the regulations therein contemplated for the disposal of the negroes, &c., unlawfully introduced, prior to the 19th December, 1817. On that day an act was passed "for disposing of any such negro, mulatto, or person of color, who *has been*, or may hereafter be, imported or brought into this State, in violation of an act of the United States, entitled 'An act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States from and after the 1st day of January, 1808.'" The first section of this act authorizes the governor of the State "to appoint some fit and proper person to proceed to all such ports and places within this State as have, or may have, or may hereafter hold, any such negroes, &c., as may have been, or hereafter may be, seized or condemned under the above-recited act of Congress, and who may be subject to the control

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of this State; and the person so appointed shall have full power and authority to ask, demand, &c., all such negroes, &c., and to convey the same to Milledgeville, and leave them under the immediate control of the Executive of this State."

The 2d section of the act authorizes the governor to make sale of such negroes, &c., in such manner as he may think best calculated for the interest of the State. The 3d section authorizes the society for colonization, &c., to anticipate the sale by a demand for the negroes, &c., to be transported to Africa, or any foreign place, on certain conditions; and requires the governor to aid in promoting their benevolent views in such manner as he may deem expedient.

This act of the legislature of Georgia has been objected to, in its application to this case, on several grounds—

First. That the negroes in the case under consideration had been imported before the passage of the act. The answer is, that the act expressly embraces previous importations.

Second. This feature of the act is objected to as *ex post facto*.

Answer. If the act inflicted any new penalty on the importer in a past case, or divested a previously vested right, the objection would be valid; but it inflicts no new penalty, and indeed no penalty whatever; it divests no previously vested right, because the act of Congress of 1807 had already declared that neither the importer, nor any one claiming under him, should hold any right or title whatsoever to negroes thus imported, nor to the service of them. It is further objected, that the act of Georgia is inconsistent with the *policy* of the act of Congress.

The first answer to the objection is, that Congress, by the act of 1807, left it to the legislatures of the States to make *any* regulations for disposing of such negroes, &c., not contravening the provisions of the act of Congress. Now, the act of Congress makes no provision as to the state or condition, whether of freedom or slavery, in which such negro should be left. It stops with divesting the importer, and those claiming under him, of all title; but the mode of disposing of the negroes, &c., is left, and properly left, to the absolute control of the State into whose bosom they have been illicitly imported; for it must have been considered that the State immediately affected by the importation was most capable of judging in what

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way the mischief could be best counteracted. Nor do I perceive that the act of Georgia can be justly charged with being inconsistent with the policy, any more than with the express provisions, of the act of Congress. The policy of the latter act was to prohibit the future importation of slaves. The means which it adopts for this purpose are the infliction of heavy penalties on the importer, and stripping him, and all claiming under him, of all title to the persons thus imported as slaves. If the State law were in conflict with either of these provisions, or instituted others calculated to encourage the importation, it would certainly be inconsistent both with the policy and provisions of the act of Congress. But the question as to the manner in which the negroes are to be disposed of, after they have been actually imported in violation of the law of Congress, is a question of self defence—of self preservation—which Congress submits entirely to the discretion of the State to be directly affected by it.

In further reply to the objections, it may be asked, what could the State do better than it has done? Should it have provided by law for exporting the persons thus introduced out of the United States, and the territories thereof? Whither were they to be exported? There was then no place provided to which the State could send them. Should they have been turned loose as freemen in the State? The impolicy of such a course is too palpable to find an advocate in any one who is acquainted with the condition of the slave-holding States. Should they have been redelivered to the persons who had brought them in, under a bond to carry them out of the United States, and out of the territories thereof? The inefficacy of such a measure has been set in a strong light by the several communications of General Mitchell which are now before me; and I find myself unable to add a single illustration of the imbecility of such a course in relation to the object of the act of Congress. I will barely suggest, that, so far from aiding that object, it is among the happiest courses which could be devised to frustrate and defeat it.

I do not perceive that the act of Georgia is fairly liable to either of the objections which have been taken to it; nor do I perceive that the State could have adopted a better or a more

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liberal course in relation to the slaves themselves, than the alternative regulations proposed by this act. If the colonization society would undertake to carry them out of the country to Africa, or any foreign place, the negroes were to be delivered to them for that purpose, and the governor was required to aid in the execution of this benevolent purpose;—if that society should not apply, it remained for the State to look to its own safety, by placing them in that condition in which they would be the least *likely* to do mischief; and the State has done so *according to their judgment*, to which alone they are remitted by the act of Congress of 1807.

Before I leave the laws which bear upon this subject, it is proper to advert to an act of the legislature of Georgia, which was passed before Congress was authorized by the constitution to prohibit the importation of slaves; and to which I advert, not because it has, in my opinion, any fair relation to the question, according to the date or the terms of the act, but because it has been assumed as an auxiliary guide in directing the conduct of General Mitchell in this case. I allude to the act of the legislature of Georgia, of the year 1796, entitled “An act to organize the militia in the several new counties of this State;” by the third section of which, it is enacted, “That the *officers of the militia in the first brigade, in the first division*, shall be authorized and empowered, in their respective patrol districts, to apprehend any negro, mustee, or mulatto, freeman or freemen, slave or slaves, who shall hereafter arrive in any port of this State *from any of the West India or Bahama islands*, and to keep such mustees, negroes, or mulattoes, in close and safe custody, until they can be examined *before the corporation of Savannah, or any three justices of the peace for any of the counties lying in the said division*, who are hereby authorized to cause such freeman or freemen, slave or slaves, to be exported at the expense of the importer or owner; which such importer or owner is hereby made liable for, as well as for the expense of apprehending or keeping such persons.” I learn from the statements of General Mitchell, which are before me, that the officers of the first brigade, in the first division of the militia of Georgia, covered, in local residence, the whole extent of the seacoast of Georgia; and that this law, as its date and

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terms sufficiently indicate, was levelled at the brigands whom the convulsions of St. Domingo had rendered objects of terror, not only in that island, but in all the neighboring countries. That this act had no connexion with the act of Congress of 1807, is manifest from the following considerations—which, indeed, are so palpable that they scarcely require suggestion.

1st. That the act of Congress was certainly regarded by that body as the basis of a new system to be reared under the federal constitution, for the prohibition of the whole slave trade, with which it was anticipated that the States would co-operate. Congress acted as soon as it was at liberty to act on this subject; leaving much, however, to the future co-operation of the States, to forward the grand object which they had in view. Hence the language of the 4th section of the act of Congress of 1807, subjecting negroes imported in violation of it to such regulations as should be *thereafter* made by the several States. The State act under consideration was not *thereafter* made, but had passed more than ten years before the era of the prohibitory system under the constitution of the United States.

2d. The act of Congress of 1807 is an act universal in its operation against the importation of *all persons of color from Africa or elsewhere*; the State regulations, therefore, which it contemplated, were to be regulations of commensurate extent; whereas, the act of Georgia under consideration grew out of a particular occasion, is confined in its terms to that occasion, to persons of color imported or coming *from the West India and Bahama islands*, exclusively; and this act expired so completely with the transient events which produced it, that I understand it has been considered as obsolete for twenty years.

3d. It is to be further observed, that the *power to apprehend*, under this act of Georgia, *is confined to the militia officers who covered the seacoast*; and

4th. That the *power to export is confined to the corporation of Savannah, or any three justices of the peace for the counties lying in the first division*;

5th. That the exportation was to be, not out of the United States nor the territories thereof, but an exportation simply *out of the State of Georgia*; which, however, was to be at the expense of the importer or owner, which such importer or owner

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was thereby expressly made liable for, as well as for the expense of apprehending and keeping such persons.

I think it perfectly clear that this act has no bearing on the case.

The results of this view of the law are:

1. That, by the act of Congress of 1807, the importation of slaves from Africa or elsewhere into the United States, or any place within their jurisdiction, is prohibited under severe pecuniary penalties.

2. That, by the same act, the importer, and all claiming under him, are declared to have no manner of title to the negroes imported, nor to their services.

3. That, by the same act, it is left to the legislature of the States to regulate the manner in which the negroes thus imported are to be disposed of.

4. That, by these two last provisions, it became the duty of every good citizen who should be apprized of a breach of the law, to take prompt and immediate steps for the seizure of the negroes, and the information of the governor of the State within which the seizure should be made, that he might give directions for disposing of the negroes.

5. That the legislature of Georgia had passed no act making the regulations contemplated by the law of Congress of 1807, until the act of the 19th December, 1817, before mentioned; to which act there is not, I conceive, any valid constitutional objection.

I come now to a much more difficult part of the subject—the facts of the case. The vast mass of documents composed of affidavits, sometimes on notice, sometimes *ex parte*, of letters, hearsay statements, &c., &c., the irreconcilable contradictions among the witnesses, the host of certificates and of affidavits, reciprocally assailing and supporting the character of those witnesses, render it next to an impossibility for me to come to an accurate conclusion on all the facts of the case. The great advantage of the trial of facts by a jury of the vicinage, arises from their personal knowledge of the parties and their witnesses, and the opportunity they enjoy of observing the countenances and manners of those witnesses while delivering in their testimony *viva voce*. I have none of these advantages. I have

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no personal knowledge either of the accuser or the accused, or any one of the witnesses on the one side or the other; and have nothing to guide me but contradictory statements, or the statements made by the parties themselves.

Since, however, it is your wish that I should proceed, by the best lights I have, to express my opinion of the facts, I shall do so, with this consolation under this ungrateful duty,—that if I shall, unwittingly, do injustice to the parties, or either of them, by the opinion I may form, the whole case will pass again under your own review, and the error can be corrected before it shall have inflicted a wound.

I will premise, however, that copies of the evidence originally sent on to the Departments of State and War, composed in part of *ex parte* affidavits, letters, certificates, hearsay statements, &c., have been mutually furnished to the parties, with information that the evidence was not regular; this was done with the view to enable them to retake it more formally, if they should think proper to do so, and to give them an opportunity mutually to make such strictures as they pleased on the adversary proof. General Mitchell declines taking the proof over again, on the two grounds—

1. On account of the difficulty, if not impracticability, of taking it in better form; because of the dispersion of the witnesses, and the impossibility of commanding their attendance in this extra judicial proceeding, in which no process can issue to coerce them; and

2. Because, if Governor Clarke, his accuser, wishes it, he can himself take the depositions of those witnesses (General Mitchell's) anew; and thus have all the benefit which he could have derived from an original cross-examination.

These considerations appear to me to be just, and I believe it would be in vain to wait in the hope of getting the testimony in better form. Taking the remarks of General Mitchell, therefore, as just, and giving them a reciprocal action, I shall consider the evidence, on both sides, as if all objections in regard to form were waived as to the original affidavits; noting as *ex parte* those only which have been since offered, so far as I can make the discrimination; and noting, also, as I state the documents, (through the whole of which we must necessarily travel,)

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any other legal objections which strike me to any reliance on them as proof.

It is proper to state, before I open these documents to you, that the questions which they seem to me to suggest for your consideration are these:

First. Has the conduct of General Mitchell, throughout this transaction, been consistent with our laws?

Second. If inconsistent, is that inconsistency to be fairly and reasonably imputed to an innocent mistake of the laws, or to a wilful and conscious violation of them?

Third. If the latter, what is the extent and character of his offence?

1. Was he concerned as a partner in the original purchase and introduction of the Africans, either by the advance of money to aid in the purchase, or by an engagement to be responsible for a proportion of the capital to be advanced by the other partners; or by an engagement, in lieu of money, to render services, by protecting the Africans at the agency, and facilitating their transfer to Alabama; or their sale, for a proportion of the negroes, or any other part of the profits of the speculation?

2. If there was no previous and specific arrangement as to time or terms, was there a previous general understanding between him and Bowen, or others, that if negroes were brought to the agency, he would, for a reward, protect and give them a passport to the Alabama Territory, or place them in a situation to be sold?

3. If there was no previous general understanding on the subject, did he, from improper motives, when the negroes were actually brought to the agency, connive at and aid in a breach of our laws, by protecting those negroes, and giving them a passport to Alabama?

I proceed now to the documents; and I shall first present those which appear to me to operate in support of the charge, and then those which go to repel it; interweaving in the course of these statements the remarks suggested by the parties, as well as those which occur to me as arising from them, and the objections to the documents themselves as proof.

Duties of Secretary of War.

[Here follows an elaborate and very long examination of the matters of *fact*, which it is not deemed necessary to insert.]

I have the honor to remain, sir, most respectfully, your obedient servant,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

NAVY PENSIONS.

Navy pensioners are included in the act of March 3, 1819, regulating payments to invalids entitled to pensions under the several laws of Congress granting them.

OFFICE OF THE ATTORNEY GENERAL,

January 23, 1821.

SIR: The act of Congress of the 3d March, 1819, entitled "An act regulating the payments to invalid pensioners," being universal in its language, applying to "*all cases* of application for the payment of pensions to invalids under the several laws of Congress granting pensions to invalids," and the policy of the provision of the act also applying to all cases equally, I can discern no reason for excepting navy pensioners from its operation; and am, therefore, of opinion that they are not excepted.

I remain, &c., &c.,

WM. WIRT.

To the SECRETARY OF THE NAVY.

DUTIES OF SECRETARY OF WAR.

The Secretary of War is not required to perform duties in the field. He does not compose any part of the army, and has no service to perform that may not be done at the seat of government. If he leaves the seat of government for the seat of war, by order of the President, for military purposes, he may be paid the expenses of the tour; otherwise not.

OFFICE OF THE ATTORNEY GENERAL,

January 25, 1821.

SIR: It appears to me that the law which organizes the Department of War contemplates no duties for the head of that department but such as may be performed at the seat of government and in the War Office. He does not compose a part

 Process to Repeal Patents for Lands.

of the army of the United States, and has no duties to perform in the field. If, therefore, General Armstrong, while Secretary of War, was required by the President of the United States to perform the tour to the Canadian frontier, during the last war, with the retinue of a general, for military purposes, I think he has a fair claim on the government for the expenses of that tour; but if the excursion, and the style of it, were voluntary, and sought for on the part of General Armstrong, and merely acquiesced in by the President, I think that he has no such claim.

I have, &c., &c.,

WM. WIRT.

To the SECRETARY OF WAR.

PROCESS TO REPEAL PATENTS FOR LAND.

Land patents issued by mistake for lands to which other persons have pre-emption rights may be returned and cancelled, or may be repealed by *scire facias* or bill in chancery, at the instance of the United States, or of the pre-emptioners in the name of the United States.

OFFICE OF THE ATTORNEY GENERAL,

January 27, 1921.

SIR: I understand the question from the Land Office to arise on the improvident emanation of several patents to the New Madrid sufferers, to which there was at the time a right of pre-emption in other persons; and that to these latter persons final certificates have since issued for the same lands. On this state of facts, the patents, having issued from a mistake of the rights of the United States to the lands granted, are void; and if the parties who hold those patents will not, on this discovery, voluntarily return them to the office to be cancelled, they can be repealed by a *scire facias* or bill on the chancery side of the court of the United States within whose jurisdiction the lands lie; which proceeding may be instituted by the United States in their own name, or the pre-emptioners may be authorized to use the name of the United States for this purpose.

I have the honor, &c., &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

Tenure of Office of Inspectors of Customs.

TENURE OF OFFICE OF INSPECTORS OF CUSTOMS.

Collectors of customs can neither appoint nor dismiss inspectors, weighers, gaugers, and measurers, without the approbation of the Secretary of the Treasury.

OFFICE OF THE ATTORNEY GENERAL,

January 27, 1821.

SIR: The act of Congress which regulates the collection of duties authorizes the collector, "with the approbation of the principal officer of the Treasury Department, to employ proper persons as weighers, gaugers, measurers, and *inspectors*, at the several ports within his district." (See the 21st section of the collection law, Laws United States, vol. 3, p. 155.) The act recognises inspectors thus appointed as permanent officers of the customs, devolves important duties on them, requires them to keep regular books of their official acts, and declares for what offences they shall be fined, and for what removed from office. As the approbation of the Secretary of the Treasury is necessary to put them into office, I presume they cannot be put out of it without the like approbation, and consequently that they do not hold their appointments at the mere pleasure of the collector. The clause of the act above quoted is, indeed, susceptible of two constructions: the approbation of the Secretary of the Treasury (which it requires) may mean simply an approbation, generally, that weighers, gaugers, &c., be employed at such and such ports, leaving the selection of the individuals to the collectors alone; or it may mean that the names of the individuals proposed to be appointed shall be submitted to him, and that no one shall be appointed who shall not be approved by him. I do not know how this clause has been practically expounded at the Treasury Department; if according to the first-mentioned construction, the collector is made the sole judge of the fitness of the individual either to receive or to retain his employment; if according to the last construction, (which I think is the true construction of the law,) then the collector cannot remove but with the approbation of the Secretary of the Treasury.

I have the honor, &c., &c.,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

Navigation Laws.

NAVIGATION LAWS.

Where a foreign vessel was driven into an American port, with a cargo of Jamaica rum, for safety, and a portion of the cargo sold to pay seamen's wages and other expenses, and application was made to the President for permission to sell the remainder—**HOLD**, that he has not the power to give such permission.

OFFICE OF THE ATTORNEY GENERAL,

February 24, 1821.

SIR: The case stated by Mr. King is, shortly, this: A British vessel, going from Jamaica to Quebec with a cargo of rum, was compelled to put into Charleston for relief; here she was repaired, and was allowed to sell as much of her cargo as was sufficient to pay her expenses in Charleston; in her voyage from Charleston she was again obliged to put into Rhode Island for safety, where, on examination, she was condemned as not seaworthy, and the cargo was landed; permission was again given to sell so much of the cargo as was sufficient to pay the seamen's wages and the expenses incurred at Rhode Island. This reduced the cargo of rum from 500 to 170 or 180 hogsheads. Application was made for permission to sell the whole; but it was refused by the Comptroller, who, under our navigation laws respecting the British West India islands, ordered the rum to be exported. Mr. King now brings the case before you, under the impression that you have authority, under these circumstances, to order the sale of the residue of the cargo. Your first question is, whether you have such authority?

I can discover no authority on the subject, save that which is found in the 60th section of our act of 1799 to regulate the collection of duties on imports and tonnage, which, in the case of vessels putting into our ports in distress, authorizes, *inter alia*, the collector and naval officer of the port to grant permission to dispose of such part of the cargo as may be of a perishable nature, (if any there be,) *or as may be necessary to defray the expenses attending such ship and her cargo*. I can scarcely suppose that the application is addressed to your power of remitting forfeitures, because this is to be exercised only in circumstances and on evidence which do not accompany this case. I answer the first question in the negative.

Navy Pensioners.

It is admitted that the importation in this instance is an involuntary breach of our navigation laws, and, consequently, that the forfeiture prescribed by those laws does not attach; but while we forbear to insist on the forfeiture, we have a right to exact as near a compliance with those laws as the nature of the case shall admit. It is in the spirit of those laws that the party who is excused only by distress for having entered our ports temporarily, in violation of those laws, should make his stay as short as the emergency requires, and should carry out again the article which he has thus brought in. It is in this spirit that the Treasury Department has acted, and, I think, rightfully acted—which is an answer to your second question.

If any difficulty shall attend the exportation, it cannot be fairly charged to the laws of the United States, which are merely retaliatory on the restrictive system of the nation to whose subjects this property belongs.

But if the rum, in this instance, be not of the growth, produce, or manufacture of the United States, (as I presume it is not,) Mr. King, I apprehend, is mistaken in the opinion that it cannot be carried out to its original port of destination, in a British vessel, without a violation of our navigation laws; for, both by the act of April 18, 1818, and that of the 15th May, 1820, the restriction on British vessels about to clear out from our ports is expressly confined to such as “shall have been there laden for exportation with any article or articles *of the growth, produce, or manufacture of the United States*, other than provisions and sea-stores necessary for the voyage.”

I have the honor to remain, sir, &c., &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

NAVY PENSIONERS.

A seaman disabled by punishment inflicted by an enemy for endeavoring to escape from him after having been taken prisoner, is within the spirit of the act of 23d April, 1800, granting pensions to seamen disabled whilst in the line of their duty.

OFFICE OF THE ATTORNEY GENERAL,

April 17, 1821.

SIR: The case stated by you, for my opinion, is as follows:
“One of our seamen, captured by the Tripolitans in 1803,

Navy Pensioners.

on board the frigate Philadelphia, after fifteen months' rigorous captivity, made an attempt, with five of his messmates, to recover liberty and rejoin the American squadron, then outside the harbor of Tripoli. The attempt proved abortive; he and his companions in his suffering were retaken, brought back, and punished by bastinado in the most cruel manner, the effects of which were so severe as to render one of the party ever afterwards incapable of performing duty as a seaman. This disabled seaman now applies for a pension:"—and you request my opinion "whether he be, under the circumstances of the case as stated, and by the act of Congress on the subject, entitled to relief from the navy pension fund?"

The act of Congress of the 23d April, 1800, which creates this fund, provides "that every seaman or marine *disabled in the line of his duty* shall be entitled to receive, for life or during his disability, a pension from the United States, according to the nature and degree of his disability, not exceeding one-half of his monthly pay."

By the same act, the navy pension fund is constituted "forever a fund for the payment of pensions and half pay, should the same be hereafter granted to the officers and seamen who may be entitled to receive the same: and if the said fund shall be insufficient for the purpose, the public faith is hereby pledged to make up the deficiency; but if it should be more than sufficient, the surplus shall be applied to the making of further provision for the comfort of the disabled officers, seamen, and marines, and for such as, though not disabled, may merit by their bravery or long and faithful services the gratitude of their country."

The navy fund, thus devoted to these broad and liberal purposes, was, by the same act, placed "under the management and direction of the Secretary of the Navy, the Secretary of the Treasury, and the Secretary of War, for the time being;" who were thereby authorized to receive the moneys appropriated to that fund, "and to employ and invest the same, and the interest arising therefrom, *in any manner which a majority of them may deem most advantageous.*" By a subsequent act, (that of the 26th March, 1804,) it was provided "that the commissioners of the navy pension fund be, and are hereby, authorized

Capture without a Commission.

and directed to make such regulations as may to them appear expedient *for the admission of persons on the roll of navy pensioners, and for the payment of the pensions.*"

The authority thus given to the commissioners has not, so far as I can discover, been taken away or abridged by any subsequent act. The question, therefore, whether the seaman, in this case, be entitled to the pension which he asks, belongs exclusively to them.

Subject to this paramount authority, I have no hesitation in expressing the opinion, that the case of the seaman now under consideration is not only within the spirit and reason of the act of the 23d April, 1800, but, by a fair and liberal construction, within its letter too. He was, I think, as much within *the line of his duty* when the disability occurred, as if he had been disabled in the original capture of the Philadelphia, or in a recent attempt, immediately thereafter, to escape from captivity and return to his duty. A different construction would, I think, be too narrow—would be inconsistent with the policy as well as the liberality of the provision, and wholly incompatible with the more expanded purposes to which this fund is expressly devoted.

I have the honor to be, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE NAVY.

CAPTURE WITHOUT A COMMISSION.

The profits of a capture made by individuals acting without a commission inure to the government, but it has not been the practice to exact them. It has been their practice to recompense gratuitous enterprise, courage, and patriotism, by assigning the captors a part, and sometimes the whole of the prize.

ATTORNEY GENERAL'S OFFICE,

April 24, 1821.

SIR: You ask my opinion as to the legal rights of the United States in the proceeds of the prize the Dos Hermanos, accord-

ing to the facts of that case as reported in 2 Wheaton, 77, with the supplemental facts stated by Judge Hall and Mr. Francis S. Key. The case, as thus made, is that of a capture by individuals acting without commission: and there is no principle better settled than that individuals so circumstanced cannot make a capture to their own benefit; the whole profits of such a capture inure to the government to which they belong. As a question, then, of *strict law*, (in which light alone you present the case,) the United States are entitled to the whole proceeds of this prize; the proceeds, however, are only what shall remain after deducting the expenses actually incurred in making and securing the capture, and prosecuting the suit to final condemnation. But, although such be the legal rights of the United States, it is not the practice of governments to exact them. It is their constant practice to recompense the gratuitous enterprise, courage, and patriotism of their citizens, in such cases, by assigning them a part, and sometimes the whole of the prize. The authorities on this subject are collected by Mr. Wheaton in the second volume of his reports, appendix, pp. 7 (note c) and 71. Such, it is to be fairly inferred, was the intention of the government of the United States in this instance. The libel filed by Mr. Shields in this case claimed *the whole prize* to himself and his comrades in the adventure; the United States never appeared as a party to the admiralty proceedings, in any stage of them. The decree of condemnation in the court below forfeited the proceeds *to the libellants*, who were *Shields and his comrades* only. This decree has been affirmed in the Supreme Court. Whilst the cause was before this latter court, the Attorney General, the legally authorized representative of the United States, withdrew from the argument, on the avowed ground that the United States had no *interest* in the subject. And under these circumstances it might have been very fairly inferred that, at one stage of the proceedings at least, it was the intention of the government to have relinquished all claim to the prize in behalf of the captors: had it been the intention of the government to have claimed any part of the proceeds, the prosecution should have been conducted by the officers and at the expense of the government. The government not only failed, however, to

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indicate this intention by pursuing this course, but threw the whole expense on the uncommissioned captors, (who were carrying on the claim for their own benefit,) and also, by their highest law officer, (who was to this effect their duly authorized agent,) explicitly disavowed all interest in the case. My opinion is, that if these facts had been fully and regularly before Judge Hall, he would have been authorized to consider the government as relinquishing its legal rights wholly to the captors, and to have adjudged the whole proceeds to them. *This* decree, however, has given the case a different attitude; and on the grounds on which you desire me to take up the subject, I consider the whole proceeds as belonging, in strict law, to the United States, if they think it proper to assert their claim in such a case as this.

I have the honor to be, &c., &c.,

WM. WIRT.

To the SECRETARY OF THE NAVY.

THE SENECA LANDS.

The Seneca Indians must be protected in the enjoyment of exclusive possession of their lands, as defined and bounded in the treaty of Canandaigua, until they have voluntarily relinquished it.

A right of occupancy during pleasure has always been conceded by Europeans to the North American Indians, (6 Cranch, 121; 8 Wheaton, 548;) wherefore, the question whether purchasers from the State of Massachusetts may enter upon the Seneca lands, depends altogether on the character of the title which the latter retain in them.

So long as they remain in possession of the lands defined in the treaty, neither the government of the United States nor individuals can lawfully enter upon them, but by consent freely rendered on a full understanding of the case.

ATTORNEY GENERAL'S OFFICE,

April 26, 1821.

SIR: By the treaty of Canandaigua of the 11th November, 1794, between the United States and the tribe of Indians called the Six Nations, the land of the Seneca nation is designated by boundaries: "the United States acknowledge all the lands within the aforementioned boundaries *to be the property of the Seneca nation;*" and stipulate that they, "the United States,

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will never claim the same *nor disturb* the Seneca nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, *in the free use and enjoyment thereof*; but it shall remain theirs until they choose to sell the same to the people of the United States who may have the right to purchase." It is understood to be in relation to this land that Mr. Ogden's question arises. It appears that a question once existed between the States of Massachusetts and New York as to the eminent domain over these lands; which was compromised by assigning the right of soil to the former, and the jurisdiction to the latter. Massachusetts having granted her right of soil in these lands to a company of individuals, and these individuals being desirous of making partition among themselves, Mr. Ogden, acting in their behalf, proposes to have a survey of the lands for the purpose of this partition, and has requested your department to facilitate this measure by giving the necessary instructions to the United States agent. Hereupon you request my opinion as to the right of the individuals claiming under Massachusetts to enter upon these lands for the purpose of making this survey.

The answer to this question depends on the character of the title which the Indians retain in these lands. The practical admission of the European conquerors of this country renders it unnecessary for us to speculate on the extent of that right which they might have asserted from conquest, and from the migratory habits and hunter state of its aboriginal occupants.— (See the authorities cited in Fletcher and Peck, 6 Cranch, 121.) The conquerors have never claimed more than the exclusive right of purchase from the Indians, and the right of succession to a tribe which shall have removed voluntarily, or become extinguished by death. So long as a tribe exists and remains in possession of its lands, its title and possession are sovereign and exclusive; and there exists no authority to enter upon their lands, for any purpose whatever, without their consent. Of the admission of this principle, the treaty above referred to furnishes a proof. The United States stood in need of a road through the lands of the Senecas from Fort Schlosser to Lake Erie; yet, inasmuch as they had no authority to enter upon

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the lands of the Senecas, even for the purpose of passing through them, without their consent, their right of way became the subject of compact. Although the Indian title continues only during their possession, yet that possession has been always held sacred, and can never be disturbed but by their consent. They do not hold under the States, nor under the United States; their title is original, sovereign, and exclusive. We treat with them as separate sovereignties; and while an Indian nation continues to exist within its acknowledged limits, we have no more right to enter upon their territory, without their consent, than we have to enter upon the territory of a foreign prince.

It is said that the act of ownership proposed to be exercised by the grantees under the State of Massachusetts will not injure the Indians, nor disturb them in the usual enjoyment of these lands; but of this the Indians, whose title, while it continues, is sovereign and exclusive, are the proper and the only judges. Those who hold only a remainder, depending on a contingency which may be very remote, have an interest in rendering the Indian possession unquiet and troublesome. It must be manifest that such an operation as that which is proposed (more especially if it be done without their consent) is calculated to excite great inquietude in their minds, and to dispose them to yield the possession of their lands on terms to which they would not assent while their title is respected. We have acknowledged by treaty that these lands are theirs; and by the same treaty have bound ourselves not to disturb them *in the free use and enjoyment of these lands*. By the same treaty, also, we have disclaimed the right to pass through their lands, or to navigate their waters, without their consent.

I am of opinion that it is inconsistent, both with the character of the Indian title and the stipulations of their treaty, to enter upon these lands, for the purpose of making the proposed surveys, without the consent of the Indians, *freely rendered, and on a full understanding of the case*.

The papers are returned.

I have the honor to be, &c.;

WM. WIRT.

To the SECRETARY OF WAR.

Military Claims.

MILITARY CLAIMS.

The act of 24th April, 1816, authorizing certain charges for forage, for horses, servants, &c., for certain officers, is prospective in its operation, and refers only to the act of 3d March, 1813, for a standard to govern the subject in future.

OFFICE OF THE ATTORNEY GENERAL,

April 30, 1821.

SIR: General Jackson's account has, I think, been settled according to law. The act of the 3d of March, 1815, "fixing the military peace establishment of the United States," retains in service two major-generals; and expressly enacts that they shall be entitled to the same compensation as is provided by an act entitled "An act to raise an additional military force," passed eleventh January, one thousand eight hundred and twelve; and the act thus referred to as fixing the compensation, provides, expressly, "that the major-generals, respectively, shall be entitled to two hundred dollars monthly pay, with twenty dollars allowance for forage monthly, and fifteen rations per day." This allowance has been made to General Jackson. The same act of the 3d of March, 1815, first referred to, provides also that the officers, &c., retained in the peace establishment by that act should be entitled to the same benefits and allowances in every respect, not inconsistent with the provisions of that act, as were authorized by the act of March 16, 1802, entitled "An act fixing the military peace establishment of the United States;" by which latter act there was an allowance to every commissioned officer who shall keep *one* servant, of *one* additional ration. This also has been allowed to General Jackson; and thus the whole compensation authorized by the act of the 3d of March, 1815, fixing the peace establishment, has been allowed in the settlement of the accounts of that officer. The claim which General Jackson makes of forage for *seven* horses, at the rate of \$8 per month each, and of the pay, rations, and clothing of a private soldier of the line, for *four* servants each, is not sustained by law. These allowances, which were made during the war, did not grow out of the acts of the 11th of January, 1812, and of the 16th of March, 1802, which the act of the 3d of March, 1815, assumes as the standard

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of compensation; they grew out of subsequent and independent acts and regulations, the whole of which were suspended by the act of 1815 fixing the peace establishment, and, consequently, could no longer give the rate of compensation. The act of the 24th of April, 1816, authorized these charges to be restored, and to be thereafter made; since which period, I understand, they have, in conformity with this act, been allowed.

General Jackson is understood to rely on the 9th section of this last act as looking retrospectively to the intermediate period, and authorizing these charges to be allowed through the whole of that period. But I understand the operation of this clause as merely prospective; it does look back, indeed, to the 3d of March, 1813, and to the regulations in force at the reduction of the army; but it looks back to these merely as furnishing the standard which shall *in future* govern the subject, "so far as the same shall be found applicable to the service—subject, however, to such alterations as the Secretary of War may adopt with the approbation of the President." In short, the account could not have been settled otherwise than it has been, without a violation of the act of the 3d of March, 1815, from which the accounting officer had no authority to depart.

I have the honor to be, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF WAR.

THE MILITARY ACADEMY, PROFESSORS, &c.

The existing regulations for the government of the military academy may be altered by the Secretary of War, with the approbation of the President.

The professors and cadets at that academy, as such, are not commissioned officers within the meaning of the 64th article of the rules and articles of war, for the purpose of being detailed as members of a general regimental court-martial; nor can such court be formed of professors, for the trial of cadets.

Cadets may be tried by a regimental or garrison court-martial, according to the 66th and 67th articles of the rules and articles of war.

OFFICE OF THE ATTORNEY GENERAL,

May 19, 1821.

SIR: As the corps of engineers which constitutes the military academy is retained in service as part of the military peace estab-

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lishment of the United States, and as the ninth section of the act of the 24th April, 1816, (to which you refer,) after recognising the regulations for the army which were in force before its reduction in 1815, expressly subjects those regulations *to such alterations as the Secretary of War may adopt, with the approbation of the President*, I have no doubt that the Secretary of War may, with the approbation of the President, alter, at pleasure, the existing regulations for the government of the military academy, or any other portion of the army, even although such alteration should go to an entire change of the present system; provided that the regulations, *as proposed to be altered*, be consistent with the constitution and laws of the United States.

On the second question, I am of opinion that the professors of the military academy, as such, and the cadets attached to that academy, are not commissioned officers, within the meaning of the 64th article of the rules and articles of war, for the purpose of being detailed as members of a general regimental court-martial; nor can such court be formed of the professors for the trial of cadets, which I understand to be the precise question intended to be submitted. If the professors are commissioned officers at all, within the meaning of the 64th article, their qualifications to sit on courts-martial cannot be restricted to the trials of cadets; that article looks to the whole army, and those who are commissioned officers, within its meaning, are qualified as members of a general court-martial for the trial of any part of the army. The professors of the academy constitute a part of what is called in the second section of the act of the 29th April, 1812, the "academical staff;" like the other portion of the non-combatant or civil part of the staff of the army, they have no military command, nor rank, lineal or assimilated; and consequently have no portion of that military power or authority, of which the aggregate power of martial courts is composed. The President may, by his regulations of the civil police of the academy, invest them with authority adequate to all the purposes of their professorships; but he can invest them with no portion of judicial power to affect the life or liberty of others. With respect to cadets, they have still less pretensions to that character of commissioned officers which

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is contemplated by the sixth article. By adverting to the fourth article of the act of April 29, 1812, "making further provision for the corps of engineers and military academy," you will perceive that they are expressly contradistinguished, not only from commissioned officers, but even from brevetted officers of the lowest grade; for, according to this article, they are not considered even *as candidates for commissions* until they shall have received a regular degree from the academical staff; and the section further provides, that in case there be no vacancy for such graduate, he may be attached, "by *brevet of the lowest grade*, as a supernumerary officer."

On the third question, I am of opinion that cadets at the military academy may be tried by a regimental or garrison court-martial, according to the 66th and 67th articles of the rules and articles of war; because they are not commissioned officers, and belong to a separate and detached corps.

I have the honor to remain, sir, your very humble, obedient servant,

WM. WIRT.

To the SECRETARY OF WAR.

REMOVAL OF INTRUDERS ON PUBLIC LANDS.

Intruding settlers on the public lands may be removed by military force, under act of 3d March, 1807. The United States have, also, all the common law and chancery remedies enjoyed by individuals, under similar circumstances, for protection and redress.

OFFICE OF THE ATTORNEY GENERAL,

May 27, 1821.

SIR: It would seem from the Land Office endorsement in Mr. Beauchamp's letter of the 23d ultimo, which you have referred for my opinion, that the waste of timber of which he complains was committed by intruding *settlers* on the public lands in Illinois: if so, the intruders may be removed by military force, under the act of the 3d March, 1807, "to prevent settlements, &c.;" and, by the 4th section of that act, the intruders are subject to fine and imprisonment if they continue to remain on the land under the circumstances therein stated.

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Even if the intrusion be avowedly not for settlement, but for waste, I think that the intruder may be removed by the marshal, under the instructions of the President, under the 4th section aforesaid; that permanent instructions may be issued for this purpose; and that any and every intruder may be forthwith removed the moment that he indicates any intention of exercising an act of ownership over the land, (which the cutting of timber would be,) or if he refuse to withdraw on the order of the marshal: all lawless intrusions being within the mischief of the act, and it being impossible to infer with certainty from the mere act of intrusion whether it be with a view to settlement or not.

I find no act of Congress which provides for the waste of timber on the public lands, separately considered, except in relation to timber growing on land reserved for naval purposes, and live-oak or red cedar timber growing on any other public lands of the United States, in relation to which the act of 1st March, 1817, subjects the offender to fine and imprisonment.

But, independent of positive legislative provisions, I apprehend that in relation to all property, real or personal, which the United States are authorized by the constitution to hold, they have all the *civil* remedies, whether for the prevention or redress of injuries, which individuals possess. It was on this principle that the right of the United States to institute an action on a protested bill of exchange was sustained in the case of Dugan against the United States, reported in 3 Wheaton, 181. The United States being authorized by the constitution to contract, "must have a right to enforce the performance of such contract, or to recover damages for its violation, by actions in their own name, unless a different mode of suit be prescribed by law." "It would be strange," said the court, "to deny them a right which is secured to every citizen of the United States." So the United States, being authorized to accept and to hold these lands for the common good, must have all the legal means of protecting the property thus confided to them, that individuals enjoy in like cases; for it would be quite as strange in this case, as in bills of exchange, to deny them a right which is secured to every citizen of the United States. They are, therefore, in my opinion, entitled to the injunction of

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waste, by way of prevention, and to the action of trespass, by way of punishment, in like manner as individuals similarly situated are entitled to them. Of the applicability of both or either of these remedies to any given case, the district attorney must, of course, judge. It may not be improper, however, to remark, generally, that the injunction would apply properly to all coterminous or neighboring settlers, by whom any previous act of waste may have been committed, and who, from their position, have a facility in repeating the offence; to all who have been in the habit of committing this waste; and to all who menace it. And I should apprehend that this remedy, connected with the power which the courts of chancery have to enforce it, and with the other power before mentioned, of the immediate removal of intruders, would, under the superintendence of vigilant officers, be strong enough to prevent the habitual recurrence of the mischief; while the action of trespass, rigorously enforced, would be sufficient to punish those who might elude the means of prevention. It may not, however, be amiss to suggest that it would be advisable for Congress to extend to this case at least the remedy which they have provided against the spoliation of timber for naval purposes; if, indeed, the offence, from its greater frequency, and the greater secrecy and security with which it may be committed, does not demand a still severer reprehension.

I have the honor to be, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF WAR.

COURTS-MARTIAL—NEW YORK MILITIA.

Courts-martial did not have jurisdiction over cases of disobedience of the governor of New York, concerning the quota of ninety-three thousand men which he was invited to raise by the circular from the War Department of the 4th of July, 1814, for the reason that it was no violation of any existing law of the United States, nor of the orders of the President.

OFFICE OF THE ATTORNEY GENERAL,

June 19, 1821.

SIR: I am of the opinion that the court-martial which imposed the fine on Cyprian Elton had no jurisdiction of the

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case. The call was not made by the President on the militia of New York. The militiaman, therefore, disobeyed no order of the President, and, consequently, is not within the provisions of our act of Congress. By the circular from the War Department, of the 4th July, 1814, the executive of the State of New York was merely invited to organize and hold in readiness for immediate service that State's quota of ninety-three thousand men, under the laws of the 28th February, 1795, and the 18th April, 1814. The details of designating the portion of the State's militia which should be held in readiness, of appointing the place of rendezvous, and ordering them to this place, were all confided to the executive of New York; and the alleged offence of Elton was a disobedience, not of the orders of the President, but of the orders of the governor of the State, in refusing to march to the place of rendezvous. This was no violation of any existing law of the United States; and a court-martial of the United States had no jurisdiction over the offence, because our laws take cognizance of no other offence, in this respect, but a disobedience of the orders of the President of the United States issued to the officers of the militia. I am of the opinion, therefore, that the United States are not entitled to the fines imposed on the militia of New York by the court-martial which was convened under the authority of the United States. But the cause of Houston and Moore, (5 Wheaton, page 1,) leaves it very questionable whether the Supreme Court might not decide otherwise. For this reason, and with a view to the settlement of so delicate and important a question by a court of the last resort, I submit it to you whether it would not be advisable to have the avowry (which is confessedly defective) amended, and bring up the case to the Supreme Court of the United States. One case might, by consent, decide all the rest.

I have the honor to be, sir, most respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF WAR.

Surgeon General entitled to Fuel and Quarters.

REMOVAL OF INTRUDERS ON PUBLIC LANDS.

The President of the United States may direct the marshal to remove intruders from lands, the title to which has not passed out of the United States.

OFFICE OF THE ATTORNEY GENERAL,

June 25, 1821.

SIR: On the facts stated in your letter of the 19th instant, I have no doubt that the marshal, under the orders of the President, may remove the intruders on the lands set apart for the cultivation of the vine and olive in Mississippi—no title to those lands, either at law or in equity, having yet passed from the United States. The instructions to the marshal must proceed from the President. The details will, I presume, be found settled by precedent in the case of Livingston, in regard to the Batture at New Orleans.

WM. WIRT.

To the SECRETARY OF THE TREASURY.

SURGEON GENERAL ENTITLED TO FUEL AND QUARTERS.

The Surgeon General is entitled to an allowance for fuel and quarters, the same as other officers of the army.

ATTORNEY GENERAL'S OFFICE,

June 30, 1821.

SIR: On the question submitted for my opinion, whether the Surgeon General be entitled to fuel and quarters, I have collated all the regulations of the old Congress within my reach, with the acts of Congress under the present constitution, for the purpose of ascertaining upon what foundation this allowance of fuel and quarters, as to other officers and to the body of the army itself, rests; and I find that as to none of them has the claim any other foundation than it has as to the Surgeon General, to wit: a regulation of the Department of War, sanctioned by an appropriation by Congress. Much has always been left to the War Department. By the resolve of the old Congress of April, 1785, nothing was specified but the pay; everything else was submitted to the Secretary of War, on whose warrant the Commissioners of the Treasury were

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instructed to furnish the sums necessary for carrying the arrangements made by him into effect.—(Laws U. S., vol. 1., p. 669.) This arrangement was continued by the ordinance of 1787, (*id. ib.*) and by the act of 1789, under the present constitution, (vol. 2, p. 74.) Since that period, down to the present, no allowance has been at any time *specified*, except pay, clothing, rations, and forage, with a scale of commutation for the two latter; and all along, as well as at present, if no allowance be lawful, save only what Congress have specified in their act, then no part of the army, whether in the field or at their posts, has ever been, or now is, entitled to fuel and quarters.

I perceive, from the documents which you have placed in my hands in connexion with this subject, that the difficulty has arisen from these considerations: that although it is true that Congress has never specified quarters and fuel as an allowance to any part of the army, yet that in relation to all others it has used general phrases broad enough to cover this allowance—such, for example, as “pay and emoluments;” while to the Surgeon General it has given a *salary* (under the name of a *salary*) of \$2,500; and that the force of this term *salary* excludes all pretensions to further or other claims. If this reasoning be sound, the Surgeon General, even when ordered to join the army in the field, is not entitled to tent, fuel, rations, or forage; the quartermaster has no duties to perform with regard to him. The Surgeon General must desert his duties with regard to the sick, to go forward with the quartermaster, to fix his own quarters, to pitch his own tent, to purchase and collect his fuel, forage, and provisions, from the neighborhood, or to keep a sumpter wagon at his own expense attending on the army, with servants, also at his own expense, to cook his food and take care of his horses. But I do not understand it to be denied—on the contrary, I understand it to be admitted—that the Surgeon General, *when in the field*, is entitled to fuel and quarters. Then the reasoning founded on the term *salary* must be given up; for he is as much a salary officer *in the field* as he is *at headquarters*, and there exists no more law for the allowance in the one case than in the other; yet in the field,

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from the very nature of things, and from the necessity of the case, the allowance would be unavoidable.

It is to be further observed that this term *salary* is the same which was used with regard to the Physician and Surgeon General under the act of the 3d March, 1813, for the better organization of the staff; yet, by the regulations of the War Department, this officer received fuel and quarters as regularly as any other officer of the army, and these regulations were sanctioned and ratified by Congress by their act of April 24, 1816, for organizing the general staff; a practical refutation, under the authority of Congress itself, of the inference drawn from the use of the word *salary*.

In truth, this whole argument proceeds on the supposition that Congress have legislated with so much fulness, and at the same time with so much precision on this subject, as to leave nothing for construction, and nothing for the War Department to supply by regulation; than which nothing can be more erroneous, as it would be easy to demonstrate by citing the language of the acts over which I have just travelled. Nothing can be more various, or less settled and definite, than this language; and yet, with the manifest intent which Congress have always had in view, of leaving the details of military supplies to be regulated by the Secretary of War, under the direction of the President, the language which they do use is, in general, quite sufficient for the purpose; that is to say, whenever they mean to control the discretion of the War Department, their language becomes special and precise—as in fixing pay, clothing, rations, forage, bounty, pensions; with regard to all other allowances, although indispensable to an army, and therefore certainly contemplated by Congress, they use only general terms, or they are totally silent, or they use general terms with such an illustration of their meaning as would present extreme embarrassments to a rigid interpreter. As to the general terms, they are in their sense so broad, and used with so little uniformity, as to prove that the legislature attached no precise or definite ideas to them. Thus, from 1785 to 1798 the only general terms in use were “pay and allowances;” after that period, they were, occasionally, “pay and subsistence;” more frequently “pay and emoluments,” and sometimes “emolu-

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ment" in the singular number. Sometimes the expression "pay and allowances" was resumed; at others, "pay, emoluments, and allowances;" sometimes "pay, clothing, rations, forage, and all other emoluments;" at others, "pay, clothing, rations, forage, and all other allowances and emoluments allowed by law;" when, if "allowed by law" means "specified and allowed by law," there remained nothing, after the enumeration of pay, clothing, rations, and forage, on which the words "allowed by law" could operate.

Sometimes an act specifies the pay, rations, forage, and clothing, and is totally silent—not using even general terms—as to any other allowance; of this, there is an instance in the act of the 30th May, 1796, to ascertain and fix the military establishment of the United States. On what ground could those who insist that a law should be shown for every allowance, have made the allowance of fuel and quarters to any part of the army under this act? At other times the case becomes still more embarrassing to such an interpreter of the laws; the act is not merely silent and negative, but, after giving pay *and allowances*, it specifies what these allowances shall be; and on the maxim "*expressum facit cessare tacitum*," allowances of fuel and quarters must be denied to officers in relation to whom such a denial could never have been thought of. Thus by the act of the 3d March, 1791, for raising and adding another regiment, &c., it is provided, that in case a major general, &c., should be appointed, "*their pay and allowances shall be, respectively, as herein mentioned*;" "the major general shall be entitled to \$125 monthly pay; \$20 allowance for forage, monthly; and for daily subsistence, fifteen rations, or money in lieu thereof at the contract prices. The brigadier general," &c., proceeding, throughout, to give the pay, and, under the head of allowances, the *forage and rations*, without even a general expression looking to any further or other allowances. Can it be believed that Congress intended to deny fuel and quarters to these officers? And yet, since the act professes to set out the allowances to which they should be entitled, how could others be made them not mentioned in the act? How, but by that authority which seems always to be recognised, either expressly or tacitly, as residing in the Department of

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War, to regulate and arrange all the details not specified by Congress?

Those who reason on the postulate of this full and precise legislation by Congress, and deny any authority to pay what has not been expressly authorized by an act of that body, would find themselves not a little embarrassed in administering the duties of the Department of War; and their embarrassment would result from their exacting details which it was not within the scope and purpose of the act to furnish. The instances just mentioned illustrate this; and another is furnished by the act of 14th April, 1818, regulating the staff of the army. The second section of this act provides "that there shall be a surgeon general, *with a salary* of \$2,500 per annum; one assistant surgeon general, *with the emoluments of an hospital surgeon*; one judge advocate, *with the pay and emoluments* of a topographical engineer, to each division; and one chaplain, *with the pay and emoluments* allowed the professor of mathematics." Is the assistant surgeon general, under this act, entitled to *pay* and emoluments, or to emoluments only? Can it be doubted that it was the intention of Congress to place him fully on the footing of an hospital surgeon; and, consequently, with the pay as well as with the emoluments of this latter officer? Yet this cannot be done consistently with the call for a positive and explicit law, without giving to the word *emoluments* a sense broad enough to include pay—a sense which it has not in any other act, nor even in this act, and this very sentence, in regard to any other officer; since, in every other instance, it is strikingly contrasted with *pay*, and used in a sense which clearly excludes it. If it be said that this is a mere omission, which is to be supplied by construction, I concur in the principle; and it is but to carry the same liberality of spirit to the solution of the question under consideration, to perceive that the allowance to the Surgeon General of fuel and quarters is as well founded as any other allowance to any officer in the army. It is to be further observed, on the sentence just quoted, that it is the very sentence out of which the present question has grown; and while it must, on every hand, be admitted that the provision in regard to the assistant Surgeon General is very loosely and carelessly worded, it does not seem very reasonable to suppose that the

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provision with regard to the Surgeon General, separated from the other only by a comma, was worded with more care and design; nor does it seem to me very fair and equal to grant that the admitted negligence of the former is to be cured by construction, while the latter is to be subjected to the screw of a rigid interpretation, on the notion that Congress was more guarded in the one case than in the other.

No one can doubt that the language of the provision of this act of 1818, as to the Surgeon General, was copied by the draughtsman of this bill from the act of the 3d March, 1813. In relation to the Physician and Surgeon General, the language is the same, and the offices the same; the language is that of the same legislation on the same subject; and, therefore, whatever was the practical exposition of this language under the first act, must be considered as having been intended by Congress when they repeated this language. Was the word *salary*, under the first act, construed as excluding the claim for the allowances of fuel and quarters? If it was, it must now be so construed; if, on the contrary, it was construed as compatible with that claim, it must be so construed now. The latter is the fact. Fuel and quarters were allowed to the Physician and Surgeon General. They were allowed by the regulations of the War Department, it is true; but these regulations do not rest on the authority of that department only: they were known to Congress, and, being known, were ratified and sanctioned by that body. Congress, in their act of 24th April, 1816, for organizing the general staff, &c., expressly enact "that the regulations in force before the reduction of the army be recognised, as far as the same shall be found applicable to the service; subject, however, to such alterations as the Secretary of War may adopt, with the approbation of the President." It was among the regulations thus recognised and approved that the Physician and Surgeon General, *though a salary officer*, should have the allowance of fuel and quarters; and Congress thus not only admit this construction of the rights of this officer, but enact that the regulations (of which this was one) should continue in force, *as far as they shall be found applicable to the service*. Had there been nothing more in the case, I should have held that, so soon thereafter as Congress revived

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the same office under the name of Surgeon General, the regulation in question became applicable, and attached to the office, without any further regulation on the part of the War Department.

This, however, is not all: that department, under the power thus recognised by the act of 1816, to make and alter these regulations at pleasure, repeated the regulations as to the allowance of quarters and fuel to the Surgeon General. And the regulation thus made has been again sanctioned and confirmed by Congress in a different form; for, in the year 1819, Congress were furnished with an estimate in detail from this department, which, among other things, specified expressly this item of fuel and quarters for the Surgeon General. If the allowance had been improperly made, here was another opportunity to censure it; and Congress were bound to have withheld the appropriation, if they considered the allowance wrong in principle. They did not censure it; they did not withhold the appropriation; on the contrary, they appropriated for it, and thereby authorized it as effectually, in my opinion, as if they had passed a separate act for the express purpose of authorizing it.

By the documents accompanying your question, I discover, also, that a distinction has been attempted between the situations in which this allowance may or may not be proper; that is to say, it seems to be admitted that the allowance is proper when the Surgeon General is in active service, but not so when he is not in such service. But where is the authority to allow it when he is in active service? If the circumstance that his compensation, being distinguished from that of the other officers of the staff, or those of the line, by being denominated a *salary*, cuts him off from everything but his salary, this effect must be produced in one situation as well as in another. The moment it is admitted that the Surgeon General, when in active service, is entitled to fuel and quarters, the annihilating effect attributed to this word *salary* is gone, and he is no longer distinguishable, in respect to these allowances, from any other officer. I do not clearly comprehend what is meant in one of these documents by the following remark: "It is not understood how this liability to be ordered

 Conditional Pardons.

into active service could entitle him to compensation for them [fuel and quarters] before that liability attached." The fact is, that this *liability* is always attached—is inseparable from the office; he is liable to be ordered anywhere, at any moment, at the pleasure of the President; he has a fixed residence nowhere; he cannot say whither he will go, nor where, nor how long he will abide at any place, whether in peace or war. He may be ordered to-morrow to the lakes, to Louisville, to New Orleans, or the Council Bluffs. If we look to the reason of the thing, there is no reason for supplying quarters and fuel to the Major General, or any other officer, which does not apply with equal force to the Surgeon General. But it is wholly unnecessary to pursue this speculation further; because the detailed estimate presented to Congress in 1819, and which specified this allowance, among others, was made in a time of peace, was founded on the existing state of things, looked to this state, and provided for it; and in this aspect has received the sanction and authority of Congress in the act of appropriation founded on that estimate. After this, I confess I cannot discern on what fair ground of reason the claim can be questioned.

I have the honor to remain, sir, yours, most respectfully,

WM. WIRT.

To the SECRETARY OF WAR.

 CONDITIONAL PARDONS.

The President has power to grant a conditional pardon to a convict, provided the condition be compatible with the genius of our constitution and laws.

OFFICE OF THE ATTORNEY GENERAL,

August 16, 1821.

SIR: I have no doubt that it is competent to the President to confirm the sentence of death passed by the court martial against Bryant, for the attempted mutiny on board the *Lynx*, and to follow it with a *conditional* pardon, provided the *condition* be compatible with the genius of our constitution and laws—as, for example, his expulsion from the navy with disgrace, and a perpetual disqualification to serve again in the

Revenue Laws—The Floridas.

navy of the United States, &c., &c. The document is returned.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE NAVY.

REVENUE LAWS—THE FLORIDAS.

A *bona fide* importation of goods into the Floridas after their cession to the United States, but previous to the delivery of possession thereof, was an affair between the importer and the Spanish government, of which the government of the United States had no right to complain.

Yet goods carried into a port of Florida before the delivery of possession, which remained water-borne until after delivery, and then brought into the United States in the same vessel, or by transshipment into others, having never been entered in the Spanish custom-houses, nor landed, nor the duties paid, would be subject to our revenue laws.

OFFICE OF THE ATTORNEY GENERAL,

August 20, 1821.

SIR: I understand that possession of East Florida was not delivered to the United States until the 17th of last month: whereas the Olive Branch, as appears by her papers, cleared out from the port of St. Augustine on the 14th of the month. Now, according to the doctrine laid down in the case of the *Fama*, Butler master, and reported in 5 Robinson, 97, the jurisdiction and authority of the former sovereign continued in full force until possession of the ceded territory had actually passed. If I am right, then, as to the time of delivery, the cargo of the Olive Branch was imported into Philadelphia from a foreign port or place, and the case falls completely within the control of the act of the United States to regulate the collection of duties on imports and tonnage; subjecting the vessel, cargo, the master, and owners, to all the penalties and forfeitures prescribed by that act for a breach of its several regulations.

With regard to the general question, and the cases anticipated as likely to arise from the importation of goods into those Territories, in contemplation of their surrender under the treaty,

there is much delicacy, difficulty, and danger, both to individuals and to the public revenue, in an attempt to prejudge them by general rules. It would be safer, perhaps, to decide each case on its own circumstances as it shall arise. Yet, to prevent inconvenience and injury, as far as it can be safely done, and to meet what I understand to be your wishes, I will express the opinion I have formed on some of the cases that may arise, or may have arisen.

1. From the principle already cited from the case of the *Fama*, it results that a *bona fide* importation of goods into the Floridas, previous to the delivery of possession, was an affair between the importer and the Spanish government, of which the government of the United States had no right to complain. I mean a *bona fide* importation in the British sense; that is, an importation which looked to no ulterior destination; which terminated in the Floridas, or, in the language of Sir W. Scott, "an importation into the common stock of the country." Goods thus imported, according to the laws of Spain, during the continuance of the Spanish authority, and found in the country after the delivery of possession, would certainly not be liable to American duties, although the owner may have made the importation in avowed reference to that delivery, and on the calculation of the increased demand resulting from the influx of American population which the cession would bring in. This I understand to be the case put by the Supreme Court, by way of illustration, in deciding the custom case of the United States *versus* Rice, (4 Wheaton, 255.)

2. On the other hand, I apprehend that goods carried into a port of Florida before the delivery, remaining in port on ship-board until after the delivery, and then brought into the United States in the same vessel, or by transshipment into others, having been never entered in the Spanish custom-houses, nor landed, nor the duties thereon paid or secured, but having continued all the while water-borne, would be subject to our revenue laws; because the voyage ought, I think, to be considered as one entire voyage from the original foreign port or place of shipment into the United States; the mere stoppage *in transitu* at a port of Florida not being sufficient to break the continuity of the voyage.

3. There is another class of cases, novel in character in our courts, and, so far as I am informed, in those of Great Britain; and in relation to which it is impossible to predict, with certainty, what the decision of the Supreme Court would be. Goods are carried from Havana into Florida, before the delivery of possession; are regularly entered in the Spanish custom-house; the duties, which are understood to be very light, are paid; the goods are landed and stored; they are not blended with the common stock of the country, nor offered there for consumption; but remain separately stored, until after the provinces are delivered to the United States, when they are cleared out with our officers there, for a port of the United States. Are these goods within our duty laws?

Our laws impose duties only on goods imported into the United States from some foreign port or place; if, therefore, in the case put, the importation be, in contemplation of law, an importation from the Floridas, the case is not within our laws; because, at the time of the importation, the Floridas were not foreign ports or places. On the other hand, if the transactions at Florida were not sufficient to break the continuity of the voyage from the original port to the United States, then the importation is from a foreign port, and the case is within our duty laws. The question then is, whether the facts supposed would be sufficient to break the continuity of the voyage at the Floridas, and constitute the subsequent part of it a new and original voyage from the ports of those Territories to the United States.

So far as I am informed, this question would be perfectly *res integra* in the Supreme Court of the United States; nor am I aware that it has been decided in Great Britain, in regard to a revenue case. In prize cases, however, and particularly in the practical assertion of the belligerent claim to restrain neutrals from carrying on the colonial and coasting trade of an adversary shut against them in time of peace, they have adopted a criterion as to identity and continuity of voyage, which, if correct in itself, and applicable to the case of revenue, would decide the hypothetical circumstances, in the case put, to be insufficient to break the continuity of the voyage from the original place of shipment to the United States; and would,

consequently, bring that case completely within the operation of our revenue laws. That criterion is the *animus importandi*—what is the ultimate *terminus* of the voyage for which the goods were destined? If this be manifest, the voyage is a continuous one to this port, whatsoever may have been done at an intermediate port to give it a colorable termination there. “The Americans,” says Jacobsen in his *Sea Laws*, (American translation, page 455,) “misled by the precedent of the case of the *Polly*, Larky master, (2 Robinson, 361,) had conceived that the discharge of the cargo, and the payment of the duties, broke the continuity of a colonial voyage. But when Great Britain perceived that by the drawback they regained almost the whole of the original duties, (for instance, if they had run into America with a Spanish colonial cargo, and immediately transhipped it in the same or in another vessel to the mother country,) with the case of the *Essex*, Orme master, they commenced the condemnation of a number of vessels thus situated. Sir William Grant, master of the rolls, remarked, that the English courts had always supposed the *bona fides* of the importation, (i. e. into the intermediate port;) and attempted to show it by a close analysis of the earlier decisions.” ‘The case in which Sir William Grant made this attempt (and in which I think he succeeded) is the case of the *William*, (5 Rob., 349, Am. ed.) In this case the ship had taken a cargo of cocoa on board at Laguira. The ship and cargo at the time of capture were proceeding to Spain; but the ship had touched at an American port, where the cargo was landed and entered at the custom-house, and a bond was given for duties to the amount of \$1,239. The cargo was reshipped, and a debenture for \$1,211, by way of drawback, was obtained. On these facts the claimant contended that the voyage was to be considered as a voyage from America to Spain; the landing and payment of duties in America being, as he insisted, conclusive to establish the legal termination of the voyage from Laguira at that point, and the inception of a new voyage thence to Spain. The master of the rolls having dwelt on the circumstances separately, to refute the inference of a termination of the voyage in America, proceeds thus: “Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at

some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm that it was at such other place that the goods were taken on board: would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of shipment, notwithstanding the attempt to give it the appearance of having been begun from a different place? The truth may not be always discernible; but, when it is discovered, it is according to the truth, and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have ended. That those acts have been attended with trouble and expense, cannot alter their quality or their effect. The trouble and expense may weigh as circumstances of evidence to show the purpose for which the acts were done; *but, if the evasive purpose be admitted or proved, we can never be bound to accept, as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it.* Between the actual importation, by which a voyage is ended really, and the colorable importation, which is to give it the appearance of being ended, there must necessarily be a great resemblance. The acts, to be done, must be almost entirely the same; but there is this difference between them: the landing of the cargo, the entry at the custom-house, and the payment of such duties as the law of the place requires, *are necessary ingredients* in a genuine importation; the true purpose of the owner cannot be effected without them. But in a fictitious importation they *are mere voluntary ceremonies*, which have no natural connexion whatever with the purpose of sending on the cargo to another market, and which, therefore, would never be resorted to by a person entertaining that purpose, except with a view of giving to the voyage, which he has resolved to continue, the appearance of being broken by an importation which he has resolved not really to make." Again he proceeds: "Why should a cargo, which there was to be no attempt to sell in America, have been entered at an American custom-house, and voluntarily subjected to the payment of any, even the most trifling,

duty? Not because importation was, or in such a case could be, intended; but because it was thought expedient that something should be done which, in a British prize court, might pass for importation. Indeed, the claimants seem to have conceived that the inquiry was not whether the importation [into the intermediate port] was *real* or *pretended*, but *whether the pretence had assumed a particular form, and was accompanied with certain circumstances, which by some positive rule were in all cases to stand for importation, or to be conclusive evidence of it.*" He then proceeds to inquire whether the British court of admiralty had ever decided that proof of landing and payment of duties at the intermediate port would, in *every case*, be held absolutely decisive of the legality of the voyage; and proves, I think, very satisfactorily, that no such general rule had been established; but that each case had been decided on its own peculiar circumstances, but with reference to the same governing question, whether the "*animus importandi*" terminated at the intermediate, or looked to an ulterior port; and whether the transactions at the intermediate port were the attendants of a *bona fide* importation ending there, or mere contrivances to cover the original and true scheme of the voyage to an ulterior port, which, without such cover, would not have been tolerated.

I have quoted this reasoning of the British judge thus at length, because I think it bears with great fairness and force on the particular question before us. It is true that in the case of the *William* it was used to enforce a belligerent claim of restraint on the commerce of neutrals, which we deny; yet, so far as the separate question of a mere continuity of voyage was concerned, there is a direction, a comprehensiveness, and cogency of reasoning, which I think it would be much easier to censure in general terms than to elude or resist by open and candid argument. My opinion is, that, in its application to the supposed class of cases under consideration, our Supreme Court would, because I think they ought to, yield to its force. To this class of cases, therefore, I am of the opinion that our act to regulate the collection of duties extends.

Without attempting to anticipate further the minute and varied circumstances which may diversify these questions, I beg leave to repeat the suggestion of the propriety of decid-

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ing each case, as it may arise, on its own peculiar circumstances.

I remain, sir, &c., &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

BREVETS IN THE MARINE CORPS.

The act of 3d March, 1817, fixing the peace establishment of the marine corps, not having retained any majors in service, the brevets theretofore conferred were thereby made to cease with the termination of the lineal rank of majors by commission.

OFFICE OF THE ATTORNEY GENERAL.

SIR: I have, in compliance with your request of the 15th instant, reconsidered the question which you submitted to me on the 17th February, 1819, and on which I then gave an opinion adverse to the claims of the officers of the marine corps for brevet pay. With the most perfect willingness to retract that opinion if I should find it wrong, I have been the more confirmed in it, and can see nothing like legal plausibility even for the claim.

The act of the 16th April, 1814, "authorizing an augmentation of the marine corps and for other purposes," authorized the President, in the 3d section, to confer brevet rank on such officers as should distinguish themselves, &c., with this proviso: "that nothing herein contained shall be so construed as to entitle officers so brevetted to any additional pay or emoluments, except when commanding separate stations or detachments, when they shall be entitled to and receive the same pay and emoluments which officers of the same grade are now, or hereafter may be, allowed by law." The President, under the authority of this law, appointed several brevet majors. On the 3d March, 1817, the act to fix the peace establishment of the marine corps was passed, by which no majors were retained in service; the only officers that were retained being one lieutenant colonel commandant, nine captains, and subaltern officers. The *brevet majors* consider themselves as being retained in service still—at least to the purpose of receiving the pay of

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brevet major, under the proviso of the act of 1814 before quoted. But, if they are in service as brevet majors for one purpose, they are so for all purposes. If the act of 1814 be in force for one purpose, it is for all; and the President may still go on to appoint *brevet majors* to the marine corps, although the peace-establishment of that corps recognises no such grade. It seems to me a palpable solecism in military language to talk of the existence of brevet rank after the lineal rank by commission (of which the brevet is merely the shadow) has been destroyed; and not less so to talk of pay graduated by a rank which no longer exists, having been abolished by positive law.

On what ground of reason can the brevet major claim to stand on a better footing than the commissioned major, or on a better footing than he would himself have stood, if, instead of holding a brevet, he had held a commission? Is the brevet more stable or of higher grade than the commission? or is there more of contract in the one case than in the other? I cannot perceive even the shadow of a foundation for the claim. The act of 1814 was predicated on a state of things which no longer exists. We were then at war, and the commissioned rank of major then existed; the design of that act was to augment that corps, and to stimulate it to deeds of arms. We are now at peace; the corps has been reduced and adapted to the state of peace; the grade of major exists no longer, even though it had been conferred by commission, much less when conferred by brevet; and with the grade falls the claim to pay. There is no breach of contract in this. The contract is a contract for war. Congress might have disbanded the whole corps without any violation of the constitution of the United States, and without any breach of contract with the officers of the corps. If they might do the greater act, they might certainly do the less. If they might disband wholly, they may surely disband partially, without any imputation of their having transcended either their power or their duty. They have disbanded the majors. They retain the captains; and some of these captains still claim the pay of their disbanded and annihilated rank. To render the injustice of this claim still more manifest, let me put the case—that the President, under the act of 1814, had been desirous of promoting two of these captains to

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majorities. There was one vacant majority only in the line. He promotes the most worthy of them to this vacancy; he is commissioned, and his commission is confirmed by the Senate. The other, because there was no vacancy for him in the line, is, as the least worthy of the two, promoted merely to brevet. Shall we say that the act of 1817, to fix the peace establishment, which abolishes majorities in the corps, abolishes the commission, but not the brevet—falls with all its weight on the most worthy, and leaves the least worthy untouched? Could such have been the intention of Congress? It must be very manifest it could not; and the language which is to produce so irrational, so unequal, and so unjust an effect, must be insurmountable before it can be permitted to take such a construction. What is the language which is relied on as making this distinction in favor of brevet majors—as keeping them still in existence after the name of their office is extinguished—after the commission (the substance of which their brevet is merely the reflection) has departed; and of preserving this shadow of rank, without the substance, in being merely for the purpose of pay after it has been utterly abolished for every other purpose? The language relied on is that of the proviso of the act of 1814 before quoted. The argument seems to me to be worse, if possible, than the claim which it is adduced to support. This proviso, which is relied on as making a distinction in favor of brevet officers, is, upon its face, an enactment to abridge, not to enlarge their rights; it is to their prejudice, not to their advantage. But for this proviso, their brevets would have placed them on the same footing, as to pay, with commissioned officers of the same grade; they would have been entitled to the pay of their brevet rank (as the commissioned officers of that rank were entitled to it) at all times and in all situations. It was expressly with the view of narrowing this general right, which their brevets would have conferred, that this proviso was made; to distinguish them, indeed, from commissioned officers of the same rank—*not to their benefit, but to their prejudice*—by limiting their right to brevet pay to the particular cases enumerated in the proviso.

That this was the purpose of the proviso, is manifest from the cast of its language; as well as the substance of its enact-

Office of Attorney General.

ments: "Provided, *that nothing herein contained shall be so construed as to entitle officers so brevetted to any additional pay or emoluments, except,*" &c.; and the argument is, that this proviso, the obvious purpose and effect of which is merely to narrow the contract of pay, which their brevet would have otherwise implied, constitutes in itself a new, distinct, and substantive contract, far more durable than brevet or commission, capable of surviving the principal contract of which it is merely a qualification, of outliving the *substratum* on which it is founded, and of defying even the omnipotence of Congress in the modification of the armies of the United States. The commission (the higher and more solemn contract of pay) may perish, and the pay may perish with it. The brevet may also perish, and with it the general contract which it implies; but this proviso, whose only use and function is to narrow the latter contract, and which, in the ordinary course of things, is *functus officio* when the principal object to which it was a mere appendage is gone, shall still live and "flourish in immortal youth."

This is an argument, my inability to answer which is frankly confessed—unless, indeed, to have stated it be a sufficient answer.

I have the honor to remain, sir, most respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE NAVY.

OFFICE OF ATTORNEY GENERAL.

The acts creating the office and defining the duties of the Attorney General, limit his official opinions to questions of law propounded by the President and heads of departments.

In our government, neither the Attorney General nor any other officer should be permitted to stretch his authority and carry the influence of his office beyond the circle which the law of the land has drawn around him.

ATTORNEY GENERAL'S OFFICE,

September 14, 1821.

SIR: I should have much pleasure in answering the question put by your letter of the 5th, if I could do so without violating my own sense of propriety, founded on the act of Congress which prescribes my duties. This act limits me to ques-

Secretary of War.

tions of law propounded by the *President and heads of departments*; and to these limits I have made it a rule to confine myself, on the ground that in a government purely of laws, no officer should be permitted to stretch his authority and carry the influence of his office beyond the circle which the positive law of the land has drawn around him. This I hope you will admit is republican orthodoxy; and, consequently, that I shall stand excused for declining to answer your inquiry. I will merely add, that if you will reflect a moment on the population of this country, you must, I think, be convinced that even if there were no legal impediment in the way, there is at least a physical one, since the Attorney General who should undertake to answer all the questions of law growing out of the constitution and legislative acts of the United States, which the good people of all our States and Territories may and must continually have occasion to be propounding to the gentlemen of the profession, would himself have occasion for more heads, hands, and eyes, than ordinarily fall to the share of any one individual, at least in modern times; and it is not impossible that this consideration might have had some small weight in settling the limits of this officer's duties as they now stand. However, they are settled, as I have stated; and though it is always painful to me to refuse an answer to a question so respectfully put, yet I must trust to your just construction to excuse the refusal in this instance; and I beg you to believe me, nevertheless,

Very respectfully, your obedient servant,

WM. WIRT.

SAMUEL INGHAM, Esq.,

Saybrook, Connecticut.

SECRETARY OF WAR.

Where a Secretary of War, in time of war, goes from the seat of government to perform a service, the propriety of which had been previously discussed by the President and adopted by him as a measure that would be useful to the public, his claim for payment of the expenses of the journey is well founded. Opinion of 25th January, 1821, explained.

OFFICE OF THE ATTORNEY GENERAL,

October 16, 1821.

SIR: After the opinion I had the honor to express to you in the case of General Armstrong on the 25th January last, there

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can remain no question of law in the case; the only question which can remain is one of fact, to wit: "Was the General's excursion to Canada by the direction or order of the President?" I do not mean to state it as necessary to the claim that the President should have been the first to propose it: this would have been futile. It is immaterial who proposed it; *if the President adopted the measure, and it was done by his desire*, I should consider the expression of such desire as equivalent to a written order, and the claim as well founded. I understand General Armstrong to state that, before he undertook this journey, the measure was discussed between himself, Mr. Gallatin, and the President, and *adopted by the President as a measure useful to the public*. The President, therefore, as I understand it, did not merely acquiesce in the measure as one gratifying to General Armstrong, excusing his absence from the department, and accepting the offer of his *voluntary services*, but adopted it, and required it, as a measure, "*if not necessary, at least useful*" to the public service. Taking this construction of the statement as correct, and the statement itself as founded on accurate recollection, (as I presume you intend I shall,) the claim is, in my opinion, well founded.

I have the honor, &c., &c.,

WM. WIRT.

To the SECRETARY OF WAR.

 CLAIM OF CHARLOTTE THORNTON.

Mrs. Charlotte Thornton, of London, formerly of Northumberland, widow of Colonel Presley Thornton, and devisee under his will of an annuity charged upon his estate in Northumberland and Culpeper, which estate, subject thereto, was devised to the testator's two sons in moieties, is entitled to certain arrears of such annuity, although she left this country in 1775, from political hostility to the principles of the American Revolution, the estate have been partitioned among the heirs and one moiety conveyed to another person or persons, and by him or them to the United States, and even though it may have been for the time suspended or extinguished by the confiscating and sequestrating laws of Virginia.

Although the annuity is charged on the profits of the estate, it was clearly the testator's intent that it should be paid in any event, and be charged on the land; and as the deed of the moiety of one of the two sons to the person from whom the United States derived their title refers to the will creating such an-

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nuity, the latter must be considered as taking title with notice that they were charged therewith.

As to interest on arrears, it not appearing that the claimant had any known agent in this country to demand or receive payment prior to the time of the filing of her bill, there is nothing requiring its payment for time antecedent; yet, upon the filing of her bill, she became entitled to demand as well interest as the annuity withheld, until the period of her death. [See 1 Pr. Williams, 415; 2 do, 13; 3 do, 1; 1 Atk., 550; Moore, 753; 5 Brown's P. C., 66; Newman vs. Johnston, 1 Vern., 45; Sadd vs. Carter, Pre. in Ch. 27; Lumley vs. May, ib. 37; Trott vs. Vernon, ib. 436; Harris vs. Ingledew, 3 P. Williams, 91, Cox's ed., and cases cited, note (1;) Kidney vs. Coussmaker, 1 Ves. jr., 440; Williams vs. Chitty, 3 Ves. jr., 551; Quintine vs. Yard, 1 Eq. Ca. Ab. 74, pl. 19; Litton vs. Litton, 1 P. Wms., 541; Batten vs. Earnley, 2 P. Wms., 163; Ferrers vs. Ferrers, Ca. Temp. Tal. 2; Robinson vs. Cumming, 2 Atk., 411; Newman vs. Auling, 3 Atk., 579; Anon., 2 Ves., 661; Drapers' Co. vs. Davies, 2 Atk. 211; Tarr vs. Winterton, 1 Ves. jr., 451; Anderson vs. Dwyer, 1 Sch. and Lef. 301; Craze vs. Hunter, 2 Ves. jr., 157; and 4 Bro. Ch. Ca. 316, and in the cases there cited.]

OFFICE OF THE ATTORNEY GENERAL,

October 31, 1821.

SIR: In compliance with your note of last evening, I proceed to give you my opinion at this time, on the separate claim of Mrs. Charlotte Thornton, of London, on the Northumberland estate, which is the subject of the agreement between yourself and Messrs. Stith and Lomax of Virginia.

Colonel Presley Thornton, the husband of this lady, by his last will and testament, dated 29th March, 1763, and recorded in Northumberland county court on the 14th May, 1770, devises as follows: "I give and bequeath all my estate, both real and personal, except the several legacies and bequests that I shall hereafter make in this my will, to be equally divided between my two sons, Peter Presley and Presley Thornton." In a subsequent part of the will he has this bequest: "I leave to my dearly beloved wife, Charlotte Thornton, during her widowhood, the use of my dwelling-house and furniture, and all the offices and their furniture, with the garden thereunto adjoining; my chariot and four horses, and her choice of eight of my slaves. And my will is, that she, my said wife, shall have full liberty to make use of what provisions she chooses from my estate for her own table, and for the support of the said eight slaves and four horses; and that she shall be further allowed one hundred and fifty pounds current money, for her

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support, out of the profits of my estate; which said sum of one hundred and fifty pounds is to be paid to her annually, during her widowhood, and the whole to be taken in lieu of her dower."

On the 16th November, 1771, a written agreement was entered into between Peter Presley, then of age, and John Tayloe and Francis Thornton, guardians of Presley, whereby it was agreed to make a division of the whole estate, real and personal, between the two sons; and, among various other stipulations, it was agreed in relation to the annuity of Mrs. Thornton, that the part of the estate which was allotted to Presley should pay it until he became of age; after which it was to be paid in equal moieties by the two sons. Annexed to this agreement was a division of the slaves made under it; and the whole was recorded in Northumberland county court, 12th March, 1773.

The division of the land does not appear, except that by the agreement of the 16th November, 1771, it was stipulated that the part of the land whereon the dwelling-house and offices stood should be allotted to Presley. This, I presume, is the Northumberland-house tract; besides which, Presley received in his share a tract of land in Culpeper county, containing, by estimation, four thousand acres. To Peter Presley was allotted a tract called Bay Quarter, adjoining the Northumberland-house tract, and another tract in Culpeper county, containing, by estimation, three thousand seven hundred and two acres; and other lands both in Northumberland and Culpeper. The division of the land was, I presume, in writing, and has been recorded. I have nothing before me to show, with certainty, what either son received.

On the death of Peter Presley Thornton, his estate passed wholly to Winifred, his sister of the whole blood, who intermarried with John C. Cocke; and on 20th January, 1791, Presley exchanged with Cocke and wife his Culpeper lands for their Bay Quarter tract before mentioned.

On the 9th July, 1792, Cocke and wife convey all their real estate to Presley Thornton, in trust, among other things, to secure the payment of their moiety of the annuity to Mrs. Thornton; this deed, with the privy examination of Mrs. Cocke,

are duly recorded in the Northumberland county court on the day of its date.

It seems never to have been doubted by the guardians of the two sons, during their minority, or by the sons themselves, or their representatives, that the annuity of Mrs. Thornton constituted a charge on the whole estate left by the testator. In regard to the estate derived by Cocke and wife from Peter Presley in 1801, when they were portioning their daughters out of the real estate, they expressly encumbered each part of the land conveyed for this purpose with its proportion of the annuity; and to these deeds not only Cocke and wife, but also Presley Thornton, their trustee, are parties; and, besides this, they took separate bonds from the sons-in-law as further security for the payment of their proportions of the annuity.

In the bill filed by Mrs. Thornton, in the court of chancery of Virginia, to recover the arrears of this annuity, she is understood to admit that it was duly paid, on the part of both the sons, to the year 1784. In the record of her suit, there is evidence of the payment of Peter Presley's part to her attorney in fact, (Presley,) in the year 1787; and the representatives of Peter Presley, in their answers in that case, assert that they will be able to prove the punctual payment of his moiety of it, either to Presley Thornton, her agent, or to deputies appointed by him, so late down as 1804, when, being informed that she was dead, they declined paying any more.

Whether any payments were made of Presley's moiety since the year 1784, does not appear. Original letters from Mrs. Thornton to Presley, in the years 1797 and 1798, have been shown me, in which she complains of the non-payment, states her necessities, and presses for remittances.

On 22d March, 1797, Presley Thornton and wife, for the consideration of sixteen thousand pounds, sell and convey to Sharp Delany, of Philadelphia, the Northumberland-house tract, with the adjoining Bay Quarter tract. On the death of Sharp Delany, indebted to the United States, his heirs, on the 10th November, 1800, convey this land to his sureties on his collector's bond, in trust, and with a power; under which, on the 22d June, 1809, these sureties convey to the United States.

In 1808 Mrs. Thornton filed her bill to recover the arrears

of her annuity; and there being no part of the estate of her husband remaining and forthcoming to meet her claim, except the lands, she seeks to charge it on them.

The question is, Whether they are liable to the claim?

1. The charge is *on the profits* of the estate—that is, of the whole estate; and, by the direction that the annuity should be paid to her *annually*, it is manifest that the testator's calculation was that the annuity would be paid out of the yearly profits of the estate. Courts of equity, however, have given to this word "*profits*" a larger sense, where it is necessary to give effect to the main intention of the testator; thus, portions given to daughters, and directed to be raised out of the *rents and profits* of an estate, as soon as conveniently could be, the devise was decreed to authorize a sale, because *portions* means *marriage portions*; and the daughters being marriageable at the death of the testator, the main purpose of the testator could not be satisfied but by a sale. I am aware that subsequent decisions have narrowed this ground very much; yet, taking them all together, I consider the word *profits* by no means of so imperious a character as to forbid a sale, if it be called for by the general scope and character of the will; and the main object of the testator cannot be otherwise answered.

2. With respect to the general scope and character of the will: in the first clause, the devise is to the sons, of *all the estate, real and personal, except the legacies and bequests thereafter made*. The exception operates on the whole estate; and I consider it as equivalent to saying, "My debts and legacies being first deducted, I devise all my real and personal estate to J. S.;" and to the whole class of kindred cases in which a condition of paying debts and legacies has been annexed to such a devise; in all which the lands have been held charged, and liable to sale for the debts and legacies.

3. This annuity is given to testator's widow for her support, in lieu of dower, which is a charge on land. It was clearly testator's intent that it should be paid at all events. Suppose the sons, by their improvidence, or by the dissipation of the stock and negroes, had made no profits: was the widow to lose her means of subsistence? This case has in effect occurred,

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since there is now nothing on which the annuity can fall, save the lands.

4. As the deed from Thornton and wife to Delany refers to the will of Presley Thornton, and to the deed of partition between the brothers; and as both these instruments, as well as the deed from Cocke and wife, for Bay Quarter, were of record, Delany must be considered as a purchaser, with notice that these lands were charged with one-half of the annuity of Mrs. Thornton. But these instruments gave him no notice of the existence of any arrears of this annuity; and as they were suffered to accumulate, through the negligence or indulgence of Mrs. Thornton, she ought not to be permitted to charge them on Delany, who (as to them at least) will be regarded in equity as an innocent purchaser without notice. He ought not, therefore, to be charged with those arrears; but the estate in his hands, and in those of his representatives, becomes chargeable with the moiety of the annuity from the time of the purchase till the death of Mrs. Thornton: for I understand she is dead, though I am not informed of what time she died.

5. With respect to the United States, they are purchasers *pendente lite* as to Mrs. Thornton, and can in no view occupy other or higher ground than Sharp Delany.

6. With respect to interest on the arrears, there has been considerable discrepancy among the decisions of courts of equity on this subject. In one case, Lord Hardwicke said that there was no general rule as to the allowance of interest on annuities, though it had generally been allowed where it was the "*widow's bread*." At other times it has been held that the allowance of interest was discretionary, and dependent on the circumstances of the case. Modern cases seem to have settled it as a general rule that it is not to be allowed at all. There is, in my opinion, nothing in Mrs. Thornton's case to call for its allowance until the time of the filing of her bill; for until that period it does not appear that there was any known agent of Mrs. Thornton here to demand or to receive payment, or even that her residence or her being in life was known, so as to direct Delany's heirs whither to remit the annuity. But, after the filing of her bill, I should think it against the principles of natural justice that Delany's heirs should go on to reap,

Claim of Charlotte Thornton.

and to appropriate to themselves exclusively, those profits on which the testator had charged the support of his widow, without that participation in them which she had a right to demand and to receive, and without any compensation for withholding it.

The measure, therefore, of Mrs. Thornton's demand against the heirs of Sharp Delany, is, in my opinion—

1. The moiety of the annuity, to be calculated, without interest, from the date of the deed from Thornton and wife to Delany, to the period of the institution of her suit, (the year 1797, inclusive;) the sale having been made in the spring of that year.

2. The moiety of the annuity, with interest, after the institution of the suit till the period of her death.

I think that, in the peculiar situation of this case, a court of equity would, in the first place, direct the amount decreed to be paid by those of the parties before it, who had received the profits, resorting to the lands as the ultimate security in case of the personal inability of those parties.

I cannot settle the amount of this claim, for the following reasons:

1. Because I know not whether the lands sold to Delany are all that Presley Thornton derived from his father: if they are, they alone are subject; if there were other lands so derived by him, they are bound to contribute. I do not consider the question as affected by the exchange between Presley Thornton and Cocke and wife, of the Culpeper lands for the Bay Quarter, because both tracts were liable to the annuity in the hands of the first proprietors. This exchange was merely a modification of the partition between the brothers in 1771; and the lands, in changing hands, have merely changed the moiety of the annuity for which they were before responsible.

2. Because I do not know whether Presley may not have paid his moiety of the annuity for some of the years since the sale of the lands to Delany. Some letters which have been exhibited to me by Mr. Lomax, show that he was afterwards pressed by his mother on this subject, that she expected a remittance from him, and that he was making preparations to meet that expectation. If he did not make any payments since,

which were distinctly applicable to the *after-accruing annuity*, and not to the *previous arrears*, (for which I consider him personally and alone responsible to Mrs. Thornton,) such payments will operate as a credit to the lands.

3. I do not know when Mrs. T. died—if, indeed, she be dead. If she be alive, provision should be made to secure the future payment of the annuity. If the chancellor before whom the cause stands should concur in my opinion, he will probably order the cause to stand open, with leave to her to resort to the court for annual decrees, if necessary; this being the usual course in Virginia, in cases of this description.

Before I close this opinion, I will briefly notice the objections to the claim, and, consequently, to this opinion:

Objection 1. That Mrs. Thornton left this country in 1775, from political hostility to the principles of our Revolution, and received an equivalent from her King for her losses here.

Answer. The equivalent is assumed; and if it existed, does not operate as a credit to the devisees here. Nor does it affect the question of right between these parties; it was "*res inter alios acta.*" As to her departure in 1775, she was only one of many who took the same step; and if her claim was for the time suspended, or even extinguished, by the confiscating and sequestrating laws of Virginia, it was, in common with the other British debts, revived by the treaty of 1794.

This objection seems not to have occurred to the devisees themselves, to their guardians, or to the court of Northumberland county, who, prior to the treaty, (to wit: on the 12th April, 1784,) appointed commissioners to settle the claim of Mrs. C. Thornton on the estate of Peter Presley. These commissioners made their report on the 10th May, 1784, by which they ascertained the majority of Presley, and, consequently, the commencement of the claim on Peter Presley for his moiety of this annuity to be the 2d March, 1781; charged him with three years of this moiety, up to the 2d March, 1784; which, with the hire of two negro women, (belonging to the number of Mrs. Thornton's eight,) amounted to £300, which they direct to be paid to Francis Thornton, esq., the attorney in fact of Mrs. Thornton. And they further "award that the administrator of Peter Presley" (for he was then dead) "should

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pay to the said Francis Thornton, (or to any other person who should be properly authorized by the said Charlotte,) on the 2d March, 1785, £75; and annually, on the same day, during the widowhood of the said Charlotte, £75, the half of the annuity." And this report was approved and recorded by the court of Northumberland county on the 12th May, 1784.

Objection 2. That if Mrs. Thornton ever had a claim, she forfeited it by having carried out of the State, to England, one of the dower negroes, who there asserted and obtained her freedom.

Answer. This fact, also, is assumed; and if it were in proof, such an act produces a forfeiture only where it is done *without the consent of the remainder-men*. Here their consent is fairly and clearly to be inferred from their actions; particularly from their continuing to pay and to acknowledge the legality of the claim long after the period of this supposed forfeiture.

Objection 3. It is objected, on the part of some of Delany's representatives, that that part of the real estate which is in the hands of Peter Presley's heirs, being in the hands of *volunteers*, ought to be *wholly charged with the annuity*, to the exoneration of Delany and his heirs, who are purchasers for a valuable consideration.

Answer. They are, in legal contemplation, purchasers *with notice*, under the will of Presley Thornton the elder, that one-half the annuity only was chargeable on that portion of the estate which was in the hands of the heirs of Peter Presley, and the other half on that which was in the hands of Presley; for the same will which charges this annuity on the whole estate, divides that whole estate equally between the two sons. Having bought with that notice, it would be unjust to permit them to saddle the whole annuity on Peter Presley's portion of the estate, and would be entirely contrary to the clear intention of the testator.

The other objections, so far as they have been brought to my view, seem to be founded on a mistake of facts; such, for example, as the presumed abandonment from the non-claim of Mrs. T. There has been no such non-claim. Her letters as late as 1798 are before me, in which she presses the payment of the claim, and a letter from Presley, in 1799, acknowledging

Concerning the Importation of Slaves.

its justice. Presley, it is alleged, acted as her attorney in fact, in collecting this claim from the heirs of Peter Presley as late as 1804; and it is rendered extremely probable by the deeds signed by him, as trustee of Cocke and wife, to their daughters and sons-in law, in 1801, in which this claim is recognised by reference; and the bonds given by those sons-in law to *him*, in the same year 1801, in the penalty of £2,000 each, conditioned for the payment of their portion of the annuity during the life of Mrs. T., "that being a part of an annuity due her by the heirs of Presley Thornton, deceased."

Thus down to 1801, certainly, and most probably down to 1804, the validity of the claim was continually acknowledged and acted on both by Presley and the heirs of Peter Presley; and in 1808 Mrs. T. filed her bill to charge the land. The land was only the ultimate resort, and she was under no obligation to look to it until all reasonable hope from the personal responsibility of the devisees had failed.

There is nothing, I think, in these objections drawn from the supposed silence and non-claim of Mrs. T.; and they would probably not have been made, if the facts which I have stated had been known to the respondents who have advanced them.

I have the honor to remain, sir, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

CONCERNING THE IMPORTATION OF SLAVES.

The act of 1818, prohibiting the importation of slaves into the United States, was not intended to prohibit the return of slaves who should leave the United States as servants of their owners with intent to return after a short sojourn abroad.

ATTORNEY GENERAL'S OFFICE,

November 5, 1821.

SIR: Mr. Peter Fayoll, who, it appears, is a citizen of the United States, and a worthy and respectable inhabitant of Charleston, in South Carolina, states that his wife and children embarked for France in 1820, with intent to return in 1822, taking with them, as a servant, a black female slave belonging

EXECUTIVE PRACTICE IN CERTAIN CASES.

to him, about eight years of age, and a native of Charleston; that it is his wish that the slave should be permitted to return to Charleston, but that Mr. Pringle, the collector of the port, is of opinion that her return is prohibited by the first section of the act of 1818; and he prays that you will grant permission for her return.

I am of opinion that the case is not within the meaning of the law; that the legislature were not looking to the case of persons going abroad on a visit, or to sojourn for a short time, and taking a servant with them from the United States, which they were desirous of bringing back with them; that this was not at all the mischief which Congress had in view; that they meant not to prohibit the *return* of a body-servant with his master or mistress, but an *original importation, or bringing in, to increase the stock of slaves in the United States*. The slave in question already belonged to the United States, and had gone out on a mere temporary attendance on her mistress. The collector may, therefore, be safely directed to permit her return, without endangering the violation of any law of the United States.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

TO THE PRESIDENT OF THE UNITED STATES.

EXECUTIVE PRACTICE IN CERTAIN CASES.

Where it is claimed by a foreign minister that a seizure made by an American vessel was a violation of the sovereignty of his government, and he satisfies the President of the fact, the latter may, where there is a suit depending for the seizure, cause the Attorney General to file a suggestion of the fact in the cause, in order that it may be disclosed to the court.

ATTORNEY GENERAL'S OFFICE,

November 7, 1821.

SIR: If the President of the United States is satisfied that the seizure of "*La Jeune Eugénie*" by the United States schooner Alligator, Lieut. Stockton commander, was a violation of the sovereignty of the King of France, and that she

Executive Practice in Certain Cases.

ought to be restored on the demand of the French minister, I can perceive no impropriety in adopting the course which was pursued in the case of the Exchange, and approved by the Supreme Court (7th Cranch, 116); that is, to disclose this fact to the court before which the case is depending, by a suggestion, to be filed by the attorney for the United States. It was the course which was pursued by President Washington in 1796, with regard to the "*Cassius*," an armed vessel bearing the commission of the French republic (2 Dallas, 365.) In delivering the opinion of the district court in the case of the Exchange, Judge Peters (one of the most experienced of our judges) states that the suggestion in that case "was substantially agreeable to the *form usually practised upon* when the executive department of our government thinks it incumbent on it to give information, through the law-officer of the district, to the court, of any matter subject to the judiciary cognizance, which came to the knowledge of the Executive in the course of its communications with foreign powers or their agents." Judge Washington, reviewing in the circuit court the opinion of Judge Peters, in the case of the Exchange, says, as to the suggestion: "I do not feel disposed to disturb this practice, being of opinion that the department of our government charged with the care of our foreign relations shall be admitted, in some way or other, to give such information upon subjects which concern the peace of the nation, or which the Executive deems essential for the public good to communicate in this way." And Chief Justice Marshall, in delivering the opinion of the Supreme Court in the case, says: "There seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States." I cannot conceive any step more mild and inoffensive in its character, which the Executive, in discharging its constitutional trust towards foreign nations, could adopt, than that proposed. There is nothing mandatory in its character. It is, therefore, no interference with judicial authority and independence; it is, in truth, as it is called, a suggestion merely of the true character of the case, as it has been presented by the minister of a foreign sovereign; of the official demand of the vessel by that minister in the name of his sovereign, as not amenable

 Rights of Free Virginia Negroes.

to our tribunals; and the expression of the Executive opinion, that the demand is supported by the law of nations. Courts do not receive it as an order, but as a mere suggestion. They do not treat it as an order; they treat it as a plea to the jurisdiction of the court; discussing its merits, and disposing of it according to their own judgment, with the same freedom with which they would dispose of a plea.

The federal courts are not more completely vested with the judicial power of the nation, than the Executive is with that portion of the national power which relates to foreign nations; and when one of our citizens (in that freedom of action which belongs to them all) has carried before our tribunals a subject, in which, according to the opinion of the Executive, they cannot proceed without violating the rights of foreign nations, and endangering thereby the peace of our own, it appears to me that it would be a palpable dereliction of duty on the part of the Executive to withhold the communication of this opinion from the court; nor can I imagine a more unexceptionable form in which it can be made, than the proposed form of an official suggestion, through the attorney for the United States.

I have the honor to remain, sir, most respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF STATE.

RIGHTS OF FREE VIRGINIA NEGROES.

Free negroes in Virginia are not citizens of the United States in the sense in which the term "citizens" is used in the acts regulating foreign and the coasting trade, so as to be qualified to command vessels.

OFFICE OF THE ATTORNEY GENERAL,

November 7, 1821.

SIR: The question propounded for my opinion on the letter of the collector at Norfolk is, "Whether free persons of color are, in Virginia, citizens of the United States, within the intent and meaning of the acts regulating foreign and coasting trade, so as to be qualified to command vessels?"

I presume that the description, "citizen of the United States,"

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used in the constitution, has the same meaning that it has in the several acts of Congress passed under the authority of the constitution; otherwise there will arise a vagueness and uncertainty in our laws, which will make their execution, if not impracticable, at least extremely difficult and dangerous. Looking to the constitution as the standard of meaning, it seems very manifest that no person is included in the description of citizen of the United States who has not the full rights of a citizen in the State of his residence. Among other proofs of this, it will be sufficient to advert to the constitutional provision, that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." Now, if a person born and residing in Virginia, but possessing none of the high characteristic privileges of a citizen of the State, is nevertheless a citizen of Virginia in the sense of the constitution, then, on his removal into another State, he acquires all the immunities and privileges of a citizen of that other State, although he possessed none of them in the State of his nativity: a consequence which certainly could not have been in the contemplation of the convention. Again: the only qualification required by the constitution to render a person eligible as President, senator, or representative of the United States, is, that he shall be a "citizen of the United States" of a given age and residence. Free negroes and mulattoes can satisfy the requisitions of age and residence as well as the white man; and if nativity, residence, and allegiance combined, (without the rights and privileges of a white man,) are sufficient to make him a "citizen of the United States" in the sense of the constitution, then free negroes and mulattoes are eligible to those high offices, and may command the purse and sword of the nation.

For these and other reasons, which might easily be multiplied, I am of the opinion that the constitution, by the description of "citizens of the United States," intended those only who enjoyed the full and equal privileges of white citizens in the State of their residence. If this be correct, and if I am right also in the other position—that we must affix the same sense to this description when found in an act of Congress, as it manifestly has in the constitution—then free people of color in Virginia are not citizens of the United States in the sense

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of our shipping laws, or any other laws, passed under the authority of the federal constitution; for such people have very few of the privileges of the citizens of Virginia.

1. They can vote at no election, although they may be freeholders.

2. They are incapable of any office of trust or profit, civil or military.

3. They are not competent witnesses against a white man in any case, civil or criminal.

4. They are not enrolled in the militia, are incapable of bearing arms, and are forbidden even to have in their possession military weapons, under the penalties of forfeiture and whipping.

5. They are subject to severe corporal punishment for raising their hand against a white man, except in defence against a wanton assault.

6. They are incapable of contracting marriage with a white woman, and the attempt is severely punished.

These are some only of the incapacities which distinguished them from the white citizens of Virginia; but they are, I think, amply sufficient to show that such persons could not have been intended to be embraced by the description "citizens of the United States," in the sense of the constitution and acts of Congress.

The allegiance which the free man of color owes to the State of Virginia, is no evidence of citizenship; for he owes it not in consequence of any oath of allegiance. He is not required or permitted to take any such oath; the allegiance which he owes is that which a sojourning stranger owes—the mere consequence and return for the protection which he receives from the laws.

Besides the general reasons which I have advanced for the exclusion of free negroes and mulattoes in Virginia from the description of "citizens of the United States," under the constitution and laws of the Union, there are special reasons in support of that exclusion with regard to the command of vessels. Under our laws, such persons are not competent witnesses to affect, by their oaths, the life or property of a white man; yet if, by the constitution and laws of the United States, they are citizens competent to the command of vessels, they become

Foreign Requisitions—Law of Nations.

clothed with all the duties, powers, and authority of masters of vessels; and, among them, with the competency of affecting by their oaths, protests, &c., the property of white men, insurers, owners, freighters, and of the government itself; of which various instances under our laws, as well as under the maritime law generally, will immediately occur to you. Now, it could never have been the intention of Congress, in requiring that the master of a vessel should be a citizen of the United States; to create a citizen by the assumption of that employment, and clothe the man with rights and privileges of citizenship, which he did not previously possess. The act looked only to those who were previously citizens, and to whom alone it confines the right of entering on the employment.

In addition to these considerations, I may observe, with the collector, that Congress itself has recognised the distinction between citizens of the United States and persons of color, natives of the United States, in several instances; *e. g.*, the 1st section of the act of 3d March, 1813, "for the regulation of seamen on board the public and private vessels of the United States;" and the 3d, 5th, 6th, and 7th sections of the act of March 1, 1817, "concerning the navigation of the United States."

Upon the whole, I am of the opinion that free persons of color in Virginia are not citizens of the United States, within the intent and meaning of the acts regulating foreign and coasting trade, so as to be qualified to command vessels.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

FOREIGN REQUISITIONS—LAW OF NATIONS.

On the requisition of the British minister, a British vessel and cargo which the master had wantonly and feloniously taken into an American port in violation of our revenue laws, and there seized by the officers of the port for such violation, should be restored to an innocent owner. The forfeitures and penalties prescribed by our laws have never been inflicted on owners of vessels which have been brought within our power by others' crime.

Foreign Requisitions—Law of Nations.

Whether British subjects who have committed such an offence should be delivered up to the officers of their own government, to be dealt with according to its laws, as a question of international law, is very doubtful—such a case not having been provided for by any statute or existing treaty.

If there be citizens of the United States accessory to the offence complained of, the district attorney, for the district where the offence was committed, should be instructed to inquire into the facts, to see if any law of the United States has been violated.

OFFICE OF THE ATTORNEY GENERAL,

November 20, 1821.

SIR: The letter of his Britannic Majesty's minister of the 13th ultimo presents the following case: Daniel Sullivan, a British subject, master of a British schooner called the *Maria*, has run away with that schooner, and her cargo of fish and oil, and carried them into Mount Desert, in the State of Maine. The vessel and cargo have been seized by our officers at that port, for having entered in violation of our laws. Sullivan and six of his accomplices are still within our jurisdiction; and it is added, that two citizens of the United States, (to wit: Manchester, master of a schooner belonging to Mount Desert, and John Savage, a pilot,) are strongly suspected of having been accomplices in the execution, and perhaps instigators, of this felonious conspiracy.

On this case the minister of his Britannic Majesty requires—

1st. That the vessel and cargo shall be restored to their owner, Mr. Vallance, of St. John's, Newfoundland.

2d. That the British subjects who have committed this offence shall be delivered up to the officers of their own government, to be dealt with according to the laws of their nation.

3d. That the citizens of the United States charged with being accessory to the offence, shall be tried and punished by our laws.

On these requisitions you request my opinion, which I proceed to give.

First. The first ought, I think, to be granted. The forfeitures and penalties prescribed by our laws have never been inflicted on an innocent owner, whose property has been brought within our power by the crimes of others. The owner himself has in this case asked permission to sell the cargo, which is of a perishable nature, in our ports; and as it is within the legal

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competency of the Executive to grant this request, I am respectfully of opinion that, under the circumstances of this case, it is due to courtesy and humanity to grant it also.

Second. I wish that the course were as direct and clear with regard to the second requisition, and that I could also advise an affirmative answer as to that. There is certainly nothing in the particular case of these offenders against the laws of Great Britain to give them any claim on our sympathy or hospitality. But, in answering the requisition, it is proper to look beyond the particular case, to the principles on which it rests, lest we incautiously furnish a precedent which may embarrass us on future occasions; or, in our zeal to do right to a friendly nation, assume a power which may not belong to us.

This requisition is understood as being made on the authority of the law of nations. Do the law and usage of nations support it? I add the *usage*, because we know that there is a wide difference between this law as laid down by the received authors, who have treated of it, and the same law as it is to be read in the practice of nations. To become sensible of this, we have only to compare our own experience ever since the adoption of the constitution, with what has been delivered to us by those writers in relation to the rights of neutrals during a war between foreign powers. Now, as equality is the basis of the law of nations, it must be equally obligatory on all nations: but this equality is destroyed, if other nations, which respect this law only in theory, may rightfully call upon us to respect it in practice; or if, respecting it in their own practice only so far as their interest and convenience may dictate, and violating it at pleasure, whenever their interest and convenience may require it, they may nevertheless exact from other nations a full compliance in practice in every particular. According to the pure spirit of the law of nations, no nation gives herself a claim to call upon other nations for a strict observance of this law, who does not observe it strictly on her own part, not only in the particular class of cases in which she makes the call, but throughout the whole system of that law; for that law presents an entire system of the relative rights and duties of nations, founded throughout on the purest morality and the most

expanded philanthropy, and every part of it is equally obligatory on all nations. Those nations only who respect it in the practice throughout, have the right to call for a compliance with it in any particular from other nations; or if a nation may take it upon herself habitually to dispense with the observance of any considerable branch of this law, or (which is the same in effect) to modify, enlarge, restrain, and alter it at pleasure, to suit her interest or convenience, without the consent and against the interest of other nations, and may at the same time call upon other nations for a strict observance of this law, in other respects in which it may suit her interest and convenience to reciprocate this observance, that equality, which is the basis of this law, is gone, and it becomes the peculiar law of the nation which possesses this self-dispensing power; or, in other words, the law of the strongest, and is no longer what it professes to be—the law of reason and right among equal nations. Again: if, instead of one nation, several nations concur either in the entire non-observance, or in the modified observance, of any precept of the law of nations, treating practically, as a matter of discretion, what the writers on that law have treated as a matter of perfect obligation, it would be idle in us to take the measure of our conduct from the precepts of those writers only, in entire disregard of the practice of other nations. We know that the law of nations, as it has been presented by Grotius and the writers who have succeeded him, beautiful as it is in theory, has in many instances been found too perfect to be introduced into practice; and that in many and important particulars it has been made to yield and give way to other rules of action, dictated by the selfishness, the necessities, the pride, and the ambition of nations. Hence, when we are required to give effect to any precept of those writers, it becomes our right and our duty to look to the usage of nations, as furnishing the practical commentary on the precept, beyond which we cannot justly be required to go: since to require us to go further, would be again to destroy that equality among nations, which is the foundation of this law. Without stopping to inquire whether, according to these principles, Great Britain has given herself a claim on other nations for the strict observance of this

law; and admitting, *argumenti gratiâ*, the affirmative of the proposition to be true, let us proceed to examine whether this requisition be supported by the law and usage of nations.

Grotius (lib. 2, cap. 21, De Pœnarum Communicatione) takes up in the 3d section the question of giving refuge against punishment; and, after stating the authority of each government to punish offences against itself, he adds, that this authority is not exclusive in regard to crimes against mankind at large, much less as to those which have been committed against another State, and which the injured State has a right to punish; and this right, says he, the State in which the guilty person lives ought not to obstruct: "Cum verè, non soleant civitates permittere ut civitas altera armata intra fines suos pœnæ expetendæ nomine veniat, neque id expediat, sequitur ut civitas apud quam degit qui culpæ est compertus, alterum facere debeat, aut ut ipsa interpellata pro merito puniat nocentem, aut ut eum permittat arbitrio interpellantis." Here it is only necessary to remark, at present, that the person who is demanded shall have been culpæ compertus, which Barbeyrac translates "atteint et convaincu," and the English translator "the convicted offender;" and Grotius's note on the passage supports both translations. So much for the precept; now for the usage under it, as given us by the same author: "Cœterum jus hoc quod diximus deposcendi ad pœnas eos qui extra territorium profugerunt, hoc, et proximè actis secutis, et in plerisque Europæ partibus, circa ea demum crimina usurpatur quæ statum publicum tangunt, aut quæ eximiam habent facinoris atrocitatem; minora mutua dissimulatione transmitti invaluit, nisi fœderis legibus propius quiddam convenerit." The usage, then, of demanding fugitives from a foreign government, is confined, according to this author, to crimes which affect the government, and such as are of extreme atrocity: offences of a nature inferior to those, are not, according to that usage, made the foundation of a demand, *unless they have been provided for by treaty*. This is rather vague; and it is not helped by Grotius's note upon the passage, in which he illustrates the practice of nations, to provide for lesser offences by treaty, by reference to a treaty formerly subsisting between England and France, by which the parties mutually obliged themselves to

deliver up *rebels* and *fugitives*; from which it might be inferred that rebellion itself was a crime of inferior enormity to those which the author had in view as forming the usual ground of demand by nation on nation under the general law, since he refers to this crime as one of those *minora crimina*, which had been provided for by treaty.

In turning to Vattel for a more precise description of the offences as to which nations consider themselves authorized to make this demand, I find one passage only which seems to me to bear on the subject. It is in 1st book, 19th chap.; in which, after having treated of the rights of an exile in the land to which he flies for refuge, and having declared that it does not belong to the government which receives him to punish him for a crime committed in another country, because nature does not give to men or to nations the right to punish except for the purpose of defence and safety, whence it follows that we can punish only those by whom we have been injured, he adds: “ Mais cette raison même fait voir, que si la justice de chaque état doit, en général, se borner à punir les crimes commis dans son territoire, il faut excepter de la règle ces scelerats qui, par la qualité et la fréquence habituelle de leurs crimes, violent toute sûreté publique, et se déclarent les ennemis du genre humain. Les empoisonneurs, les assassins, les incendiaires de profession, peuvent être exterminés partout où on les saisit; car ils attaquent et outragent toutes les nations, en foulant aux pieds les fondemens de leur sûreté commune. C’est ainsi que les pirates sont envoyés à la potence par les premières entre les mains de qui ils tombent. Si le souverain du pays où les crimes de cette nature ont été commis, en réclame les auteurs, pour en faire la punition, on doit les lui rendre, comme à celui qui est principalement intéressé à les punir exemplairement. Et comme il est convenable de convaincre les coupables, et de leur faire leurs procès dans toutes les formes, c’est un second raison pourquoi livre ordinairement les malfaiteurs de cet ordre aux états qui ont été le théâtre de leurs crimes.” This is the whole passage from Vattel, and I can find nothing further in his work which touches this subject of the delivery of foreigners who come among us; for all that he says in his 6th chapter of his 2d book has relation to a nation and its own citizens, who,

having committed crimes in foreign parts, return home for refuge. The subject of this chapter is, avowedly, “*De la part que la nation peut avoir aux actions de ses citoyens;*” and the subject of the 76th section, which might for a moment mislead the reader by its generality, is “*Devoir du souverain de l’agressieur.*” To render this meaning still more clear, he commences the last section of that chapter thus: “*Enfin, il est un autre cas où la nation est coupable en généraux attentats de ses membres,*” &c. If, then, as I believe the fact to be, the passage which I have quoted at large be the only one in which Vattel has instructed us as to the cases in which a nation ought to deliver up a foreign offender who has taken refuge within it; and if we are at liberty to consider this author as the expositor of Grotius’s meaning in the use of those vague terms “*crimina quæ eximiam habent facinoris atrocitatem;*” the case which we have under consideration is not of this description: for Sullivan’s offence is so far from being of that aggravated character which Vattel describes, that it is not even of that kind which lawyers call “*malum in se;*” it is “*malum prohibitum*” only—the breach of a British statute. I think it is fairly to be collected from the train of Vattel’s reasoning, in the passage above quoted, and that part of the chapter with which it stands immediately connected, that a nation is authorized, and indeed bound, to open her doors and give protection to all strangers who come to her, except to those who, by *the quality and frequency of their crimes, are entitled to a home nowhere*, but who, *being the enemies of the whole human family*, are subject to punishment wherever they go. His instances are drawn from the civil law which is generally in force on the continent of Europe; they are “*poisoners, assassins, and incendiaries by profession;*” of whom he says, that “*they may be exterminated wherever they can be seized, because they attack and outrage all nations, in trampling under foot the foundations of their common safety.*” He gives another instance in *pirates*, who, being “*hostes humani generis,*” may be sent to the gallows by the first into whose hands they fall; and then he adds, (what bears directly on the question before us,) “*If the sovereign of the country where crimes of this nature have been committed [that is, crimes against the human family] demand*

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the authors of them, they ought to be given up to him, as to one who is principally interested in punishing them exemplarily;" and having given another reason for this procedure, he adds: "which is a second reason why *malefactors of this degree are usually given up.*" This, I apprehend, is the whole amount of Vattel's testimony both as to the law and usage of Europe in this particular.

Martens, who professes to found his work entirely on the treaties and customs of modern Europe, says that "a sovereign *can* punish foreigners, whether they have committed a crime in his dominions, or whether, after having committed it in a foreign country, they seek shelter in his dominions. In neither case is the sovereign *perfectly obliged* to send them for punishment to their own country, nor to the place where the crime was committed; *not even supposing they have been condemned before their escape.* According to modern custom, to send a criminal back to the place where the crime has been committed, is *more frequently granted on the request of a power who offers to render a like service*, than to send one from the place where the crime has been committed to his own country, or to some court of justice of his own country." As to *what crimes* is the author here stating the question? As to those for which, although committed by foreigners in their own country, and those fastened upon them by trial and conviction, the sovereign to whom they fly can lawfully punish them; and these, I apprehend, are the crimes of which Vattel treated *quâ supra*; crimes which, from their nature, are crimes against the society of mankind at large, and which, therefore, all nations may punish, whether committed within the limits of their territorial jurisdiction or not. For if Martens means to affirm that a sovereign can punish foreigners who fly to him for every kind of crime which they may have committed in a foreign country, no matter of what grade, he is at war with all the writers on the law of nations—and, indeed, with the very principles on which they found the right to punish at all; which, as we have just seen by Vattel, is only for their own safety, and which, therefore, he says is confined to those who have injured *us*. Since, then, what Martens, in the passage quoted, has advanced as to the power of a sovereign to punish foreigners for

crimes committed abroad, is true only as to those whose crimes are of a character to render them *hostes humani generis*; and since there is no change of subject in the sequel of the passage,—it is fair to infer that such are the crimes as to which alone he states the custom to exist. The obligation to deliver up, he says, is not a *perfect obligation*; and he adds, that, according to modern custom, to send a criminal back to the place where the crime has been committed, is *more frequently* granted (not always) on the *request* of a power who offers to do the like, &c. Now, if it be conceded that Martens is not speaking of the crimes of the high enormity described by Vattel, but that what he says is equally true of inferior crimes, then the amount of what he states is, that the obligation to deliver up is not a *perfect obligation*; hence he speaks of the application for each offender not as demands, but as *requests*; and says, *that they are more frequently granted on the application of those who offer to do the like, &c.* On which last words I will only remark, that if the obligation were a perfect one, and enjoined by the immutable and universal law of nations, there would be no option in the case; the thing would happen not *more frequently*, but *always*, and there would be no necessity for a *stipulation* on the part of the applying nation *to do the like*; because her obligation to do the like would be found, independently of any provision on her part, in the permanent law of nations. It is manifest, from this passage of Martens, that the nations of Europe dispose of these *requests* at their own pleasure; and grant them, or not, as they see fit, without considering themselves as giving any just cause of complaint to the nation making the application. Even where they profess to pay respect to this imperfect obligation, their apparent observance of it is notoriously insincere; and yet it is not considered that there is any just ground of complaint. Hume furnishes us with an instance of this, in regard to three of the regicides of Charles I, for whose arrest the King, (Charles II,) resident in Holland, applied for a warrant. “It had been usual,” says Hume, “for the states to grant these warrants, *though at the same time they had ever been careful secretly to advertise the persons, that they might be enabled to make their escape.*”

It is believed to be a fact notoriously true, that British offend-

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ers of the highest grade—those whose crimes even “*tangunt statum*”—consider themselves as perfectly safe in crossing the channel to France; and that from this position they have, with impunity, braved the government from whose vengeance they have fled. Such, I believe, was the case of Lord Bolingbroke; and I am yet to learn, either in his instance or in any other, even of high treason, (at least among nations sufficiently strong to act with independence,) that the custom exists in Europe either to demand or to deliver up fugitives, unless where it has been stipulated by treaty. Now, if it be waived with regard to the highest offences, (in relation to which, according to these writers, the obligation is most imperative,) I can see no reason for persisting in its use in regard to those minor offences, which, for the ages before and since Grotius, have been left to be regulated by treaty.

We ourselves had some experience as to the custom of Europe on this subject a few years since, in an atrocious and complicated case of mutiny, murder, and piracy, committed on board of one of our vessels—with which the offenders fled, I think, first to Denmark, and thence dispersed themselves over the states of Europe. Some of the powers gave up the offenders; others did not. One nation refused, because there was not full proof of the guilt of the accused; and another, because the party did not confess his guilt; which, in both instances, was equivalent to a refusal. Yet these nations would consider themselves as treated with great indignity and injustice if they were regarded as accomplices and equals in guilt with the culprits to whom they gave an asylum. We have not so spoken of them or regarded them; nor did any complaint on our part follow this exercise of their separate and independent rights of sovereignty.

How little the nations of Europe regard the precepts or denunciations of these writers on the law of nations, we may learn by the practice in regard to another but a kindred principle to that which we are discussing. These writers all agree that, in regard to offences committed by *her own subjects* against a foreign power, a nation is bound to do one of two things: either to punish the offender herself, or to give him up to be punished by the injured nation; that if she does neither of

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these things, she becomes the accomplice of the criminal, and is equally guilty with himself. Such is the precept: what is the practice under it? Nations do neither of these things. They simply disavow the act, and by the disavowal merely consider themselves as purged from the guilt of accomplices, and as having made all the reparation which the injured nation has a right to demand.

We have had some experience on this subject, also; and we know that our complaints of the most violent outrages committed by foreign subjects on our own citizens, and even on our national sovereignty, have in no instance been followed either by the punishment of the culprit on the part of his own nation, or by his delivery to us for punishment. On the contrary, our complaints, so far from subjecting him to either of these consequences, have certainly not impeded, if they have not accelerated, his advancement in honor by his sovereign.

This principle, if not the leading principle to that which his Britannic Majesty's minister supposes to exist, and of which he claims the benefit, is at least its correlative, and of equal dignity and obligation; and if, in regard to one, the obligation be of so imperfect a nature that a nation may obey it or not, or of her own accord superinduce so radical a modification of the rule as to substitute a mere *disavowal* in the place of that *punishment* which the law of nations *exacts*, I cannot perceive why, in regard to the other, another nation should not be at liberty to disclaim any participation in the guilty purpose or act of the foreign culprit, and there to let the matter rest. The latter would certainly be as substantial a satisfaction of the law as the former; for in both instances it amounts to the same thing precisely—a mere profession of innocence on the part of the nation; and, in both, the consequence to the culprit is the same, to wit: impunity.

The truth seems to be, that this duty to deliver up criminals is so vague and uncertain as to the offences on which it rests, is of so imperfect a nature as an obligation, is so inconveniently encumbered in practice by the requisition that the party demanded shall have been convicted on full and judicial proof, or such proof as may be called for by the nation on whom the demand is made, and the usage to deliver or to refuse being

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perfectly at the option of each nation, has been so various, and consequently so uncertain in its action, that these causes combined have led to the practice of providing by treaty for *all cases* in which a nation wishes to give herself a right to call for fugitives from her justice. As instances of this, I refer you to the treaties made by Great Britain with Denmark, in 1660; with Portugal, in 1654; with the same kingdom, in 1810; with Sweden, in 1661, &c.

In our treaty of 1794 with Great Britain, the 27th article provided for the cases in which the contracting parties agreed to bind themselves to surrender criminals, and the degree of proof which should be sufficient to impose the obligation to surrender. The two cases were *murder* and *forgery*; and the proof, such as should be sufficient to justify an arrest according to the laws of the country in which the demand was made. This article was, by the terms of the treaty, to continue in force for twelve years only; that is to say, the parties agreed to remain bound to this mutual surrender of criminals in the two specified cases, for twelve years, and no longer. The twelve years have expired; and with them, in my opinion, has expired the right to make the demand even in the specified cases. I see no other inference which can be drawn from having introduced the provision into the treaty, limiting its operation to twelve years, and suffering it to expire by mutual consent, without any attempt at renewal. Why was it introduced at all? Was it to narrow the general right now supposed to have pre-existed under the law of nations? No one who reads the article will find in its terms any such purpose; nor can it be believed, nor will it be averred, that such was its purpose. There remain, then, I conceive, but two other purposes for which this article can be reasonably supposed to have been introduced,—either to confer a new right, or to confirm a dubious one; and, on either supposition, the suffering the article to expire seems to me to operate as a mutual and intentional relinquishment of this claim. It was an engagement for a limited time, and the time has now expired. Can it be asserted that the engagement continues? If so, what was the meaning of the limit? Can Great Britain *now* demand of us to surrender persons guilty of *murder* and *forgery*, who have fled from her

dominions into our territories, these having been "*casus fœderis*?" If she can, what was the use of the temporary treaty provision for the case? If she cannot, whence does she derive the right, to demand minor offenders, who have broken her statutory provisions only? Could she, while the provision of the treaty was in force, have demanded a violator of his trust—a statutory pirate? I think it will be admitted that she could not, because this was not the "*casus fœderis*;" that is to say, the treaty, while it subsisted, gave the whole law, and marked out the whole extent of our obligations on this subject. From which it seems to me to follow, that when the treaty ceased to exist, our obligations on this head ceased with it.

Upon the whole, I am of the opinion that there is nothing in the law of nations, as explained by the usage and practice of the most respectable among them, which imposes on us any obligation to deliver up these persons; more especially on the very imperfect proof of their guilt, or rather the total absence of every thing like judicial proof, on which the application is founded. And this conclusion, drawn from an examination of the general law and usage of nations, derives confirmation in the particular case from the expired article of the treaty with Great Britain, to which I have adverted.

I am further of the opinion, that even if, by the laws and usage of nations, the obligation existed, and were a perfect obligation, and the proof which is offered of the guilt of the accused also satisfied the requisitions of that law, still the President has no power to make the delivery. The constitution, and the treaties and acts of Congress made under its authority, comprise the whole of the President's powers; neither of these contains any provision on this subject. He has no power to arrest any one, except for the violation of our own laws. A treaty or an act of Congress might clothe him with the power to arrest and deliver up fugitive criminals from abroad; and it is perhaps to be desired that such a power existed, to be exercised or not, at his discretion; for although not *bound* to deliver up such persons, it might very often be *expedient* to do it. There could certainly be no objection to the exercise of such power in a case like the present. It would violate no claim which these fugitives have on us. Humanity requires

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us to afford an asylum to the unfortunate, but not to furnish a place of refuge to the guilty. On the other hand, respect for ourselves, and a prudent regard for the purity of our society, admonish us to repel, rather than to invite, the admixture of foreign turpitude and contamination.

There is another consideration connected with this subject, which I beg leave to bring to your view. The people of the United States seem to have contemplated the national government as the sole and exclusive organ of intercourse with foreign nations. It ought, therefore, to be armed with power to satisfy all fair and proper demands which foreign nations may make on our justice and courtesy; or, in other words, with power to reciprocate with foreign nations the fulfilment of all the moral obligations, perfect and imperfect, which the law of nations devolves upon us as a nation. In this respect, our system appears to me crippled and imperfect. It might be set to rights, with regard to the subject under consideration, by an act of Congress providing for the punishment of our own citizens, who, having committed offences abroad, come home for refuge; and for the delivery of foreign culprits who flee to us for shelter.

Third. The third requisition, which calls for the punishment of such of our citizens as are *suspected* of having been connected with this statutory piracy, ought, I think, to be so far respected as to instruct the United States attorney for the district of Maine to inquire into the facts, and to institute a prosecution if they shall warrant it. Not knowing what the facts are, it would be premature in me to speculate on the legal guilt of these suspected men. I apprehend, however, that our legislation will prove defective in this particular also; and that these men will be found merely to have aided in the perpetration of an act, which act is itself no offence against our laws. Yet, since such conduct is a manifest injury to other nations, and tends to involve the peace and respectability of our own, it ought, I humbly conceive, to be provided for by law.

In the mean time, his Britannic Majesty's minister is aware that mere *suspicion* is no ground for a requisition like that which we are considering. The law of nations requires that *evidence*—*clear and positive evidence*—shall be furnished, where it is intended to *demand* of a nation the punishment of its citizens.

Registry of Vessels.

I do not understand the minister, however, as making a demand, but rather as throwing out a suggestion for our information and guidance in regard to our interests; to which he may, I should presume, be assured that we shall attend so far as our laws will warrant it.

I have the honor to remain, sir, your obedient servant,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

 REGISTRY OF VESSELS.

The benefit of the registry of an American vessel is lost to the owner during his residence in a foreign country, but upon his return to this country the disability ceases.

The fact that during the foreign residence of the American owner the vessel carried a foreign flag, does not work any divestiture of title, nor render the disability perpetual.

OFFICE OF THE ATTORNEY GENERAL,

November 24, 1821.

SIR: I understand the case of Mr. Winslow to be this: he is a native citizen of the United States, resided in New Bedford, Massachusetts, and owned vessels of the United States, which were entitled to registers as such, and received them. In this state of things, he carried his vessels to France; became a resident of Havre, in that kingdom; took a patent as a merchant, so as to be included under the designation of "*Amateurs des ports de France*," according to the first *ordonnance* of the King on the subject of the whale fisheries; and engaged in those fisheries, under the flag of France, and with French papers. He remained, however, all the time, and still, a citizen of the United States; and the vessels have all along continued, and still are, his own sole property. After several years' residence in France, he now desires to receive from our consul at Havre the American registers of these vessels, which had, according to law, been delivered to him on their assuming the French flag, and acquiring the character and benefits of French navigation; or that, on his return to the United States, registers may be issued anew for these vessels: his purpose being to

Registry of Vessels.

return home with them, and to re-establish himself at New Bedford.

The question which you submit for my opinion, is, whether either of these things can be done? And the answer to it depends, in my opinion, on the correct construction of the first and second sections of the act of the 31st December, 1792, "concerning the registering or recording of ships or vessels." The first section declares that ships or vessels which had been registered according to a former act, and those which should be registered pursuant to this act, and no other, shall be deemed ships or vessels of the United States. The second section describes the vessels which should thereafter be entitled to registers; and those of Mr. Winslow having fallen within this description, they were entitled to, and did receive, such registers: they were then vessels of the United States, and are still so, unless something has been done which our laws shall have declared to be a forfeiture of that character. The act which is supposed to have produced this effect, is, their owner's change of residence to a foreign country; but the proviso to this section meets this case exactly: "Provided that no such ship or vessel shall be entitled to be registered, or, *if registered, to the benefits thereof*, if owned in whole or in part by any citizen of the United States who usually resides in a foreign country, *during the continuance of such residence*." Let us read this proviso under a correct paraphrase, as it affects this case: "No ship of the United States, although registered, if owned by a citizen of the United States who usually resides in a foreign country, shall be entitled to the benefits of her register *during the continuance of such residence*." The disability attaches to the ship on account of the residence of her owner. But it is not *a perpetual disability*; it is temporary merely, being expressly to endure only with the cause which creates it—"during the continuance of such residence;" but the cause ceasing, the effect also, I apprehend, is to cease. The other circumstance which is supposed to work this perpetual forfeiture, is the employment of these ships, during the foreign residence of their owner, under the flag and pass of France. If there is any law which attaches this consequence to such employment, it must of course follow: but I find none such. I can find no act which declares

Pay of Brevet Major Generals.

such a forfeiture in any case, except the act of 27th June, 1797, which does not appear to me to touch the case under consideration; for this act confines the forfeiture, or perpetual disability, to cases in which there shall have been *an actual divestiture of the title of the American citizen*, either by seizure, or by capture and condemnation under the authority of any foreign Power, or by sale to a foreigner: and even in the case of seizure or capture, the act allows of the restoration of her American character, by a sort of "*jus postliminii*," in case the original owner regains a property in her. But, in the case before us, the title of the American citizen was never for a moment divested, and therefore the case stands clear of this act.

These, I think, are all the laws which affect the question. I know nothing of the practical construction which has been given them; but, construing them by their language, I am very clear in the opinion—

1st. That Mr. Winslow's ships are not entitled to the benefits of their registers while he continues to reside abroad.

2d. That, on his return home, and re-establishing his residence among us, those ships will be entitled to the benefits of their registers.

Very respectfully, &c., &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

PAY OF BREVET MAJOR GENERALS.

Generals Gaines and Scott being major generals by brevet, and brevets being recognised in the act of July 6, 1812, which has been continued in practice since the return of peace, and having commands according to their brevet rank, are entitled to the pay of major generals.

OFFICE OF THE ATTORNEY GENERAL,

December 29, 1821.

SIR: I proceed, according to your request, to give you my opinion on the laws touching brevet pay, as they apply to the cases of Generals Scott and Gaines.

The act of Congress of 6th July, 1812, "making further provision for the army of the United States, and for other pur-

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poses," authorizes the President to confer brevet rank in certain cases, "provided that nothing herein contained shall be so construed as to entitle officers so brevetted to any additional pay or emoluments, except when commanding separate posts, districts, or detachments, when they shall be entitled to and receive the same pay and emoluments to which officers of the same grades are now, or hereafter may be, allowed by law."

This act was passed *flagrante bello*, and was manifestly intended as a stimulus to enterprise in a struggle which it was foreseen would require all our strength. It received a liberal construction during the war, as it was proper it should do. On the return of peace, the act of the 3d of March, 1815, "fixing the military peace establishment of the United States," was passed: it provided, among other things, that there should be two major generals and four brigadiers; and on the subject of pay, it expressly provides, "that the compensation, subsistence, and clothing of the officers, &c., composing the military peace establishment, shall be the same as are prescribed by the act entitled 'An act fixing the military peace establishment of the United States,' passed 16th of March, 1802, and the act entitled 'An act to raise for a limited time an additional military force,' passed 12th of April, 1808; and that the *major generals* shall be entitled to the same compensation as is provided by an act entitled 'An act to raise an additional military force,' passed 11th of January, 1812."

The three acts thus exclusively selected to give the rule and standard of compensation to the officers, &c. on the peace establishment, recognise no such thing as *brevet rank* or *brevet compensation*. The act of the 6th of July, 1812, which alone recognises them, is not among the acts referred to as giving the rule of compensation. It is true, it is not *expressly* repealed; but as to the matter of compensation, it was virtually repealed; it was at least rendered inoperative, by its exclusion from the list of acts referred to as fixing the scale of compensation; for, in a case like this, "*expressio unius est exclusio alterius*." Such, however, was not the construction given to the act of 3d of March, 1815. The act of 6th July, 1812, was acted upon precisely in the same manner as if it had been among the acts referred to as prescribing the compensation; separate posts

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and districts were created and multiplied, as if to open a wide theatre for its more extensive operation; and there were few, if any, brevets in the army which did not draw brevet pay. The practical effects of this construction may be illustrated by the single case of the generals: the law clearly contemplated that two officers only should receive the pay of *major generals*; it expressly separates them from the other officers, by referring specially to the act of 11th of January, 1812, as fixing their compensation; but, by engrafting the brevet law of the 6th of July, 1812, on the act of the 3d of March, 1815, the distinction between the brigadiers and major generals was broken up; and we had six major generals in pay instead of two, as the law, it seems to me, clearly contemplated. The construction, I think, was erroneous; but it was an error in favor of those who had deserved most highly of their country in her hour of greatest peril and necessity.

The brevet law of the 6th July, 1812, being thus continued in practical operation after the return of peace, exactly as it had been during the war, the act of 16th of April, 1818, "regulating the pay and emoluments of brevet officers," was passed; by which it was enacted "that the officers of the army who have brevet commissions, shall be entitled to and receive the pay and emoluments of their brevet rank, when on duty and *having a command according to their brevet rank, and at no other time.*"

This law raises the question, What is a command according to brevet rank? Generals Gaines and Scott insist that the question can be answered only by a reference to the act of the 6th July, 1812, which alone designates what shall be considered as a brevet command; and declares it to consist *in the command of a separate post, district, or detachment*. But this was the construction already in practice; and, thus construed, the law was unnecessary. It is very manifest that the law was intended to alter something in the practice of the pay department, which Congress disapproved; but the construction for which these gentlemen contend would confirm the practice, and not alter it. It is true, that if we put aside the practice, and look at the laws themselves, the construction for which these gentlemen contend has great force; for, if the act of 1818 had been passed with reference only to the act of 1815, then,

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as the effect of the act of 1815 was, according to my construction, to destroy brevet rank and pay under the peace establishment, the act of 1818 must have been considered as designed to recognise and restore them—giving the pay wherever the rank existed, and referring for its exposition to the act of 1812, which was the sole creating and directing act upon the subject. Such, I acknowledge, was my own opinion, while I considered (as, from my situation, I necessarily must) the laws as standing alone, and the act of 1818 as growing entirely and solely out of the act of 1815. Understanding, however, from your department, that the practice was already precisely that which this construction would educe from the act of 1818, it becomes manifest that the latter act could not have grown out of the act of 1815, but out of the erroneous practice under that act, which it was intended to correct and reform; and the act of 1818, thus construed, with reference to the evil which it intended to remedy, has, I think, been correctly expounded by the order of the 8th of May, 1818, page 125 of the printed rules and regulations of the War Department, of the edition of 1820, to wit: "Brevet officers shall receive the pay and emoluments of their brevet commissions when they exercise command equal to their brevet rank. For example: A brevet captain must command a company; a brevet major and a brevet lieutenant colonel a battalion; a brevet colonel a regiment; a brevet brigadier general a brigade; a brevet major general a division." Brevet Major Generals Gaines and Scott did not, I understand, command divisions; and, therefore, according to this opinion, were not entitled to the brevet pay of major general under the act of 1818.

These gentlemen further insist, that if the act of the 6th July, 1812, is not to give the rule as to brevet rank and pay, and if we are to resort to the numerical force under command of an officer to give his rank, yet still, by this criterion also, they were entitled to the rank of their brevets, and, consequently, to the pay under the act of 1818; because, although their actual command was not equal to a full division, it was more than a brigade; and that, in passing the limits of a brigade, it transcended their commissions as brigadier generals, and called for a higher rank in the commander; which call

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could be satisfied only by their brevets of major generals. This position, considered with critical and technical rigor, is perhaps correct. But, in construing an act of Congress, we are to look to the intention of the law-makers; and there is nothing in the policy or language of the act to induce the belief that Congress were looking to any minute subdivision of the cases before them. The mischief intended to be remedied was the prodigal waste of the public money in the profuse allowance of the brevet pay; the remedy to be applied was to restrict this allowance—1st, to such officers as were actually on duty; 2d, to such whose command *accorded with their brevet rank*. If these latter words are susceptible of two constructions, that construction must be preferred which will best advance the remedy and repress the mischief; and if the construction which is to produce this effect be, moreover, the most obvious sense of the terms, on every principle of statutory construction it must be preferred. Now, I apprehend that if any one at all acquainted with the organization of an army were asked “what is the command of a brigadier general?” the obvious answer would be, “a brigade.” And so if asked “what is the command of a major general?” the obvious answer would be “a division.” And this, I apprehend, was the meaning of Congress in the words “having a command according to their brevet rank.” Hence, in this view of the subject also, I apprehend that the order of the War Department of the 8th May, 1818, before quoted, has correctly expounded the meaning of this act.

We come now to the act of the 2d March, 1821, “to reduce and fix the military peace establishment of the United States.” This act provides that the peace-establishment shall be composed of four regiments of artillery and seven regiments of infantry, with such officers of engineers, of ordnance, and of the staff, as are thereafter provided for. The act declares what officers shall belong to the peace-establishment, and, among others, that there shall be one major general and two brigadier generals; and, on the subject of pay, it is declared “that the officers shall have the same *rank, pay, and emoluments as are provided in like cases by existing laws.*” The President is required to arrange the officers and troops retained

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on the peace establishment; and he has made such an arrangement as has placed Generals Gaines and Scott at the head of more than four regiments each.

By the same act, Congress has adopted the system of general regulations for the army, compiled by Major General Scott; and by the 44th article, 2d paragraph, (page 85) of those regulations, it is stated that two regiments shall constitute a brigade, and two brigades a division; so that, according to this arrangement, each of these gentlemen is now at the head of a corps exceeding the amount of a division. It is true that this section of the regulations is headed "*Economy of an army in campaign;*" and the particular article under consideration contemplates the organization of troops into brigades, divisions, and army corps, *on their arrival at the appointed place of rendezvous*. Hence it may be said that this article furnishes no criterion of what constitutes a division *in quarters*. But I understand that in this organization of troops into brigades and divisions, General Scott has proposed nothing new, but has merely proposed to give an authentic form to the *pre-existing and well-known distribution*. That companies, regiments, brigades, and divisions, constituted an arrangement known in time of peace as well as of war, is manifest from the order of the Department of War, of the 8th May, 1818, founded on the act of the 16th April of the same year; and the act itself, which was passed in time of peace, must be considered as recognising the same arrangement, because it has been already shown that such is the only rational construction of the terms "*having a command according to their brevet rank.*" With such authority before us, it will not do for us to affirm that "a division" is a term of distribution known only in war, and wholly unknown in peace. I consider it as having been clearly within the contemplation of Congress when they passed the act of the 16th April, 1818; and the order of the 8th May as being only a more distinct declaration of the same fact. I understand, too, from the military officers in the department, that four regiments were clearly and always considered as composing a division before the adoption of General Scott's regulations, and consequently independent of their authority. This, however, is a question which you are much better qualified to decide than myself.

Assuming it, for the present, that each of these gentlemen is

Salvage.

now at the head of a division, the question is, whether they are entitled to the pay of their brevet rank since they were placed in this situation? The question is extremely difficult. Looking at the act in a general view, it would seem to have been clearly the intention of Congress that the government should be charged with the expense of one major general only, and of two brigadiers; and that no *permanent arrangement* which the President could make of the troops on the peace establishment should avail to defeat this purpose. This, however, is matter of inference, from a general view of the policy of the law, which must yield to any express declaration of their purpose on the direct subject of pay; and on this subject they have expressly declared, as we have seen, that the rank and pay should be governed by the *existing laws*. Now, among the existing laws on the subject, is that of the 16th April, 1818, which recognises the brevets of the officers composing this establishment, and declares that they shall draw the pay of their brevets, whenever they have a command according to their brevet rank; that is to say, (according to the correct exposition of this department,) that those who hold the brevet of major general shall draw the pay of that rank when they command divisions, which is the case here. This conclusion seems to me to be forced upon us by this explicit provision on the subject of pay; and whether Congress foresaw this consequence or not, they seem to me to have rendered it impossible for us to avoid it by any fair process of reasoning.

If, therefore, these gentlemen are in command of divisions under the last arrangement, I think them entitled to the brevet pay of major generals for that period.

I remain, very respectfully, &c., &c.,

WM. WIRT.

To the SECRETARY OF WAR.

SALVAGE.

The recaptors of American vessels from pirates are entitled to salvage; but the rate rests in the discretion of the court before which the cases shall be brought.

OFFICE OF THE ATTORNEY GENERAL,

January 8, 1822.

SIR: With regard to the American ship *Lucius*, James Mess-room master, recaptured by the United States brig *Enterprise*,

Copy-Rights.

Lieutenant Kearney, off Cape St. Antonio, from a band of pirates, I am of opinion that the recaptor is entitled to salvage, and that he may assert this right either in the Spanish court of admiralty in Havana, into which the vessel was carried by the solicitation of the parties interested in her cargo, or, on the arrival of the vessel at Charleston, in the United States district court of South Carolina, or in any other district of the United States in which the vessel may arrive, or in which the owners of the recaptured ship and cargo may be found. With regard to the rate of salvage, it is not fixed by any law in relation to a recapture from pirates; it must therefore rest in the discretion of the court before which the case may be brought; but, from the analogy of other cases, I presume the salvage allowed will not be short of that which the recaptured, in the moment of their deliverance, were willing to allow—to wit, one third. See the cases of *Talbot vs. Seeman*, 1 Cranch, 1; *Mason vs. the Blaireau*, 2 Cranch, 240.

I have the honor, &c., &c.,

WM. WIRT.

To the SECRETARY OF THE NAVY.

COPY-RIGHTS.

A copy of a book may be deposited with the Secretary of State after six months from the time of its publication, if not done before, and it will avail from the time of such deposit.

OFFICE OF THE ATTORNEY GENERAL,
January 15, 1822.

SIR: The author or proprietor of Daboll's Arithmetic has, I understand, complied with all the requisites of our laws for securing the copy-right, save only the depositing with the Secretary of State a copy of the book within six months from the time of its publication, according to the 4th section of the act of 31st May, 1790. In the mean time, the book has not, I understand, been published by any one else. Under these circumstances, I am of the opinion that a copy may now be deposited in the Department of State, to avail from the time of its being so deposited.

Deeds are required by the statutes of several of the States

Proof Requisite to Pensions.

to be recorded within a given time after their execution; but it has been always held, that, although not recorded within that time, the deed is not thereby made void; but that, if recorded afterwards, it will avail *as a recorded deed* from the time of its recordation.

I have the honor, &c., &c.,

WM. WIRT.

To the SECRETARY OF STATE.

PROOF REQUISITE TO PENSIONS.

It is irregular for the War Department to accept certificates of navy surgeons instead of their "affidavits," as required by the act of 3d March, 1819, regulating payments to invalid pensioners.

OFFICE OF THE ATTORNEY GENERAL,

January 17, 1822.

SIR: The act of Congress of the 3d March, 1819, "regulating the payments to invalid pensioners," requires "*the affidavits* of two surgeons or physicians, whose credibility as such shall be certified by the magistrate before whom the affidavit is made, stating the continuance of the disability," &c. I am of the opinion that it would be irregular in your department to accept the mere *certificate* even of a navy surgeon, in lieu of the *affidavit* so expressly required by the law; and although the circumstance of their being *surgeons in the navy* might seem to dispense with the necessity of a certificate of their credibility, yet, as the law has also expressly required *that*, and as the surgeons will have to go before a magistrate to make their affidavit, there will be but little additional trouble in satisfying the requisition of the law in both particulars; which had therefore better be done.

I have the honor to remain, sir, with great respect, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE NAVY.

 Restoration of Africans Recaptured from Pirates.

LOCATION UNDER NEW MADRID CERTIFICATES.

No person can locate over 160 acres under a New Madrid certificate, unless the aggregate of lands lost exceeds 160; in which case he can locate not exceeding 640 acres.

OFFICE OF THE ATTORNEY GENERAL,
January 22, 1822.

SIR: I concur entirely in the opinion expressed by the Commissioner of the Land Office, that it is not the intention of the act of Congress of the 17th of February, 1815, to permit the owners of town lots in the county of New Madrid to locate a tract of 160 acres for *each town lot* they may own; but one tract for *the whole of their town lots, however many*, unless the aggregate shall exceed the quantity of 160 acres, when they will fall within the general enactment of being authorized to locate the quantity they have lost.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

RESTORATION OF AFRICANS RECAPTURED FROM PIRATES.

Where a French vessel, with Africans on board unlawfully taken from their native land, was captured by pirates, and from them recaptured by an American vessel and brought into port; and a demand for the Africans was made by the French minister, with a view to their restoration—**HOLD**, that the application was well founded and should be acceded to.

OFFICE OF THE ATTORNEY GENERAL,
January 22, 1822.

SIR: I have again considered the request of the French minister, that the Africans found on board the French brig *La Pensée*, on her recapture from the pirates, should be delivered to him, as having been found on board of a French vessel; he proposing to restore them to their native land, from which they have been unlawfully taken; and it appears to me entirely proper to accede to his request.

The only difficulty in the case arises from considering the African who enters our country under circumstances like these as standing upon equal ground with the freeman of Europe, and having the same claims to our hospitality and protection.

Restoration of Africans Recaptured from Pirates.

It is supposed that all the rights of asylum attach equally to the African and European; and if the premises were true, so would be the conclusion. But they are not true. The introduction of Africans into our country is expressly forbidden by law; and when brought into this country by the intervention of those who took them from their native land, provision is made for their re-exportation. There is no similar prohibition nor provision with regard to the freeman of Europe, and there is, therefore, no fair reasoning from the case of the one to the other.

The Africans in question are not in the predicament in which our statutes prescribe the duty of the President: there has been no intention to violate our laws; they were not on their way to this country when captured by the pirates, nor when recaptured from them. They have been brought in by our own vessel—the recaptor; not to violate our laws, but with a view, I presume, to secure the salvage, and perhaps to put the case under the direction of his own government. They are not, therefore, within the provisions of any of our statutes.

It has been hence doubted whether you have any power to act on the subject. But it was determined in the case of the “*Jeune Eugénie*” that we had no right to meddle with the flag of France; and that when a vessel covered by that flag had been turned from her course by one of our cruisers, the President had power to restore her, or to hand her over, on application of the minister of France, to the French consul. It is, in my opinion, for the exercise of the same power only that the French minister has called here. For his call is only to restore the vessel, with her cargo, in the same plight in which they were when seized by the pirates; to place her, in all respects, “*in statu quo*,” or to hand over the vessel and her cargo to the minister of the nation to which the vessel and crew belong, to be dealt with according to the laws of France, which we can have no agency either in enforcing or defeating. The application is, I think, well founded.

I have the honor to remain, sir, most respectfully, your obedient servant,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

Munoz's Claim for the Isabella.

VALUE OF CERTAIN LAND WARRANTS.

Land warrants under the act of Congress of 3d March, 1801, must be received at the rate of two dollars per acre in payment for any lands on the west side of the Mississippi. The act of 24th April, 1820, does not affect their value.

OFFICE OF THE ATTORNEY GENERAL,

January 29, 1822.

SIR: I am of opinion that the warrant No. 1, to Meriwether Lewis, of date 6th March, 1807, for 1,600 acres of land, (and which, in strict conformity with the act of Congress of 3d March, 1801, stipulates, in the alternative, that it may be received at the rate of two dollars per acre, in payment of any lands lying on the west side of the Mississippi,) *must* be received at that rate; and that Congress did not intend, by the act of 24th April, 1820, "making further provision for the sale of the public lands," to affect the value of such a warrant; nor could they do it, without a violation of the public faith regularly pledged.

I have the honor to remain, sir, respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

MUNOZ'S CLAIM FOR THE ISABELLA.

The Isabella having been condemned by the Supreme Court of the United States as a British vessel, falsely and fraudulently covered by Spanish documents, and consequently held to be good prize of war, (6th Wheaton, p. 1 to 100,) and a claim being made by Alonzo Benigno Munoz for reimbursement by Congress, and the Attorney General being requested by the Judiciary Committee to communicate information upon the subject, the case and its history are stated, and the conduct of the President, the judiciary, and the Attorney General defended. (See the whole case in 6th Wheaton.)

ATTORNEY GENERAL'S OFFICE,

April 24, 1822.

SIR: I regret that absence from Washington prevented my receiving sooner your letter of the 9th instant, enclosing the petition of Alonzo Benigno Munoz, and requesting me to communicate to the Judiciary Committee any information I may possess on the subject.

Munoz's Claim for the Isabella.

The petitioner claims reimbursement for the ship *Isabella* and her cargo, which he represents as having been Spanish property, owned by himself, and as having been condemned by the Supreme Court of the United States as British, and consequently prize of war, under circumstances which, if true, would justly subject that tribunal, the President of the United States, and myself, to impeachment and condemnation. In reply to which, I shall take the liberty to say, that so far as it imputes guilt either to the judiciary, the Executive, or myself, it is a despicable libel, whether the author of it be Spanish or American. In saying this, I wish it to be distinctly understood that I do not intend to inculcate the honorable gentlemen to whom reference is made in the letter accompanying the memorial, because I consider them as utterly incapable of giving any countenance to so unfounded a calumny.

With respect to the case of the *Isabella* and her cargo, I beg leave to refer the committee to the report of it published by Mr. Wheaton in his 6th vol., p. 1 to 100. According to this report, (p. 4,) every tribunal before which this case has ever been brought, has condemned this ship and cargo as British property and prize of war, falsely and fraudulently covered as Spanish, under the name of Munoz. If the report be correct, (and I have not the record before me to test it, nor have I any recollection which is at all in conflict with the report,) the petition is false in the statement that the district court, in which the libel originated, acquitted the vessel and cargo; it cannot be otherwise than false in the assertion that the chief justice, who affirmed that sentence (according to the report) in the circuit court of North Carolina, *proceeded on a mistake, which he afterwards acknowledged*, if the petitioner means to state that the opinion of the chief justice on *the Spanish treaty* (which he, the petitioner, declares to have been the ground on which the case was finally decided) was different when the case was decided by the Supreme Court from what it was when he condemned the ship and cargo in the circuit court of North Carolina, because Judge Story, in delivering the opinion of the Supreme Court against the petitioner, on this ground, states (p. 76) that *six* judges concur in the opinion which he delivers—leaving, consequently, *one dissentient only* on this point;

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and the opinion of Judge Johnson informs us that *he*, and not the chief justice, was that dissident.

With respect to the merits of this case, they divided themselves into two general questions: 1st. Whether the documents which the ship carried were such as, under the 17th article of our treaty of 1795 with Spain, protected her as Spanish property, and exempted her from farther examination? 2d. If they were not, whether the evidence proved the ship and cargo to be British and prize of war? Unless both questions were decided against the petitioner, the property could not have been condemned to the captors. There was no hurry in the case. The most ample time was allowed to the petitioner to make good his claim. There was an order for farther proof in the circuit court, and farther proof was there admitted; after which it was that the chief justice affirmed the sentence of condemnation, which had been pronounced by the district court, (p. 4.

In the Supreme Court full time was again allowed, and farther proof was admitted; the case was elaborately argued again and again; and after the last argument, the Supreme Court kept the case under advisement for a *whole year*, (from February, 1820, to February, 1821;) after all which discussion and ample deliberation it was that the Supreme Court affirmed the sentence pronounced by the chief justice in the circuit court, condemning this ship and cargo as British property and prize of war, falsely and fraudulently attempted to be covered as Spanish under the name of Munoz. If, under these circumstances, Munoz is entitled to claim the value of this ship and cargo from the United States, his title can be founded only on the admission of such a degree of corruption in the tribunals through which the case has passed as would make it the duty of the committee which admits *his claim* to direct *their impeachment*. With respect to the particular circumstances which the petitioner represents as having occurred in the Supreme Court of the United States, for the purpose of showing that "justice was not administered in purity" by that tribunal, they were simply these:

On the argument of the cause before the Supreme Court, one of the grounds taken by the appellant's counsel, as already stated, and that on which they seemed chiefly to rely for suc-

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cess, was, that the ship bore the documents required by the 17th article of our treaty with Spain of 1795; and they were understood by me as maintaining, from the necessity of the case, the extreme position, that, although we might, on behalf of the captors, be able to exhibit the most clear and conclusive proof that the ship and cargo were actually British, and that the documents in question had been procured by a fraud practised by the British owner and his Spanish confederate on the Spanish authorities in Cuba, yet still the court was estopped by the treaty from looking beyond the documents themselves, and must, *by the mere force of these documents*, restore the ship and cargo to the claimants, however manifest and palpable the fraud by which they had been procured, and the falsity of the ownership, which they affirmed. Such was my understanding of the position for which the adverse counsel contended, and for which they were obliged, by the emergencies of their case, to contend; because, looking beyond the documents, I held it clear (and the court so decided) that the property was British, under the fraudulent cover of Munoz's name. On the other hand, the counsel for the captors insisted that the documents were not those which the treaty required; and even if they were so in *form*, still that it could be made to appear to the satisfaction of the court that they had been obtained by a fraud practised on the Spanish authorities in Cuba; these papers were not a substantial satisfaction of that treaty, and presented no bar to the assertion of our belligerent rights against Great Britain and her subjects.

The Supreme Court, perceiving the importance of this question, not only in the individual case, but in its bearing on the belligerent faculties and rights of this nation, called for further argument on this separate question; and it was again argued on their call. It will be observed by the committee that the 17th article of the Spanish treaty, besides a general description of the documents by which the ships of the respective nations should be exempted from further search or delay, refers to the forms of these documents as annexed to the treaty. No forms, however, having been annexed to the treaty as printed, I was led to inquire of the Secretary of State if any such were annexed to the original treaty in our possession. In making this

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inquiry, I stated the case which had produced it; and I believe that not only the President, but every member of the executive council, was impressed with the importance of the question. The question on the Spanish treaty having thus become, apparently, the *nodus* of the controversy, and my own mind having been thus solemnly and repeatedly called to its consideration, it required no great sagacity on my part to discover that if the principle for which the claimant's counsel contended were once established by the authority of our own courts, an enemy of the United States would only have to cover himself with documents, procured by whatsoever means, from the inferior authorities of any nation with which we might have such a treaty as we had with Spain, (and we had several such,) and he would become consecrated against our cruisers; that, although we might possess the most conclusive proof of the corrupt and fraudulent practices by which these documents had been obtained—nay, although the party himself might admit the fact—he might still defy our power, while he laughed at our folly. As my professional observation had shown me with what ease false papers could be procured to elude and baffle the rights of belligerents, it became manifest to me that we could never wage any future war with a commercial nation on equal terms, since, by the device to which this principle must give such facilities, by the constant frauds to which it would invite, by holding out the double premium of indemnity and profit, it would be perfectly easy for such a nation to place her commerce beyond our power; to become our carriers, as well as her own; and thus to derive from the war itself an increase of the means of carrying it on. Pursuing this subject still further, and looking to the character and pursuits of those nations from whom alone the United States had reason to anticipate future hostilities of a serious nature, the principle became, in my opinion, more and more important; and I beg leave to refer you to the opinion of the Supreme Court, as delivered by Judge Story, for the purpose of showing that I was not singular in regarding this question as involving “matters of deep and universal interest” to the nation. With this view of the subject, what was it my duty, as the Attorney General of the United States, to do? Was it not my duty to

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apprize the executive government of the pending of this question, and of the deep stake which the nation had in it, and to suggest the propriety, while the case was still *sub judice* and *in dubio*, to ask a reargument of it on the part of the nation? The act of Congress which prescribes the duties of the Attorney General, makes it his duty expressly to prosecute and conduct all suits in the Supreme Court in which the United States *shall be concerned*. He is thus expressly charged with the care and protection of the interests of the United States in all the controversies which come before the Supreme Court. Suppose that I had had no private professional connexion with this cause, but, as a mere hearer of the debate, I had become apprized of the deep interest of the nation in this question, would it not have been a most culpable neglect of my official duties to have suffered it to pass without notice? And if so, did the circumstance of my having been retained in the cause, as one of the counsel of the captors, and having been thereby led to a more intimate knowledge of the subject, and a more profound consideration of its bearing on the interests of the nation, absolve me from the discharge of this official duty? Such may be the opinion of Munoz, and of those who are using him as their instrument in this case, if such there be; but it was not mine. I thought it my duty to bring the subject to the consideration of the President, and of the gentlemen who compose his council; and I did so. I was requested to make the communication to the President in writing; and I did so by a letter, of which I annex a copy, marked A. I believe that the President and every member of his council concurred in the opinion, that, if the court were still in doubt on the construction of the treaty, a motion ought to be made for a further argument of it. I received the President's instructions to this effect; and thereupon addressed to the Chief Justice the letter of which I also annex a copy, which is marked B. I beg the particular attention of the committee to the terms of these letters. It will be observed that my communication to the President is perfectly open and aboveboard with regard to my antecedent professional connexion with this case. I stated to him, with truth, the motive by which I was influenced. My suggestion was, simply, that a motion should be made to have

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the case reargued, if the court itself still had doubts, and deemed the motion not improper. My correspondence with the President was laid before the court in my letter to the Chief Justice. The court saw the whole of my agency in this affair, and, if I had unwittingly fallen into error, would have corrected me: much more would they have done so, had they supposed that the course pursued either by myself or the Executive, under whose orders I acted, had resulted from any sinister view of tampering with their purity or interfering with their independence. But the court saw in this simple proposal for a reargument nothing either indelicate or improper. They so stated to me: whereupon I made the motion; the cause was reargued; and this point, as to which alone the Executive had asked a new argument, was decided, by six judges against one, in favor of that construction of the treaty which denied our enemy the cover of false papers fraudulently obtained from the tribunal of a friend; and thus left us in the full exercise of our belligerent rights and faculties.

The petitioner enters with very little decorum, and, I presume, with as little accuracy of knowledge, into the secret conferences of the judges of the Supreme Court of the United States, and affects to exhibit a statement of their respective opinions in the various stages of their private official advisement. Through what channel this foreigner, residing all along in Havana, gained the information which he professes to detail on this subject, I shall not stop to inquire. To suppose him accurately informed, is to make a supposition not very compatible with the respect which we profess and feel for the judges who compose that court. But when he proceeds to state that at the time at which I addressed the letter (B) to the Chief Justice, they had made up their opinions in his favor, and were prepared to deliver it, I shall only say, that if such was indeed the state of things, it was a state to which my letter and motion were entirely inapplicable; for the committee will observe that the motion which I was instructed to make, and which I did make, was founded expressly on the supposition, twice repeated, *that the court still entertained doubts on the point*. If the court, entertaining no doubts, still heard the argument, it was not what I was instructed to ask, and did

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ask. I have no doubt that in hearing it, as well as deciding it, they were moved by a pure sense of public duty; and that the petitioner has no just cause to complain of anything that has occurred either in the progress or the decision of his case.

I will merely add, with regard to the insinuation that the petitioner "*hopes to be able to prove*" that in my conduct in this affair I "*was acting under engagements which had in contemplation a considerable remuneration depending on the final issue of the suit,*" that if this insinuation be of American manufacture, I am sorry to say that it is a wilful and wicked falsehood; if it be of foreign origin, I will merely say that the British subject who uses the name of Munoz has probably taken the standard of his conjecture as to my contingent fee from that which was engaged on the other side. It happens, however, unfortunately for the hypothesis, that although the captor's side of a prize is, as you know, sir, pre-eminently the side for contingent fees, yet, on this occasion, owing to previous services for the same privateer in other cases, I had no contingency but the petty one of three hundred dollars dependent on the issue; and whether the conduct which I observed on this occasion was prompted by any sordid consideration for this paltry and contemptible sum, or directed by the great public considerations of national importance which I have stated, I am perfectly willing to submit to your award, sir, and that of the honorable gentlemen who compose the Judiciary Committee.

I have the honor to be, &c., &c.,

WM. WIRT.

To the CHAIRMAN of the Judiciary Committee
House of Representatives of the United States.

CLAIMS UNDER ACT OF MAY 4, 1822.

No claims for losses sustained by officers, volunteers, rangers, or others engaged in the campaign against the Seminole Indians, are to be allowed, except those which took place in consequence of the government of the United States failing to supply sufficient forage, and to such claimants only as can furnish the evidence called for by the proviso of the act of May 4, 1822.

OFFICE OF THE ATTORNEY GENERAL,

May 22, 1822.

SIR: It is manifest from the statement accompanying the act of May 4, 1822, "for the relief of the officers, &c., engaged

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in the late campaign against the Seminole Indians," that this act was passed without adverting to the precise state of things on which it was intended to bear: thus, in the enacting clause, *rangers* are named as a part of the objects for whom the act intended to provide; yet in the same enacting clause, the provision is tied down to cases totally inapplicable to *rangers*, to wit: to the case of losses of horses "*in consequence* of the government of the United States failing to supply sufficient forage;" *rangers*, by the existing laws, having been bound to supply their own forage.

So in the enacting clause, by the general terms "*any officer*, volunteer, ranger, cavalry, or other person engaged in the campaign of 1818, against the Seminole Indians," a purpose is indicated to provide for all for whom the United States were bound to furnish forage, and not to limit the provision to those who could be considered as belonging to any particular company: thus the term "*any officer*" would embrace field-officers; and the description "*any persons*" would embrace the owners of teams; and yet, when the act proceeds to state the evidence *without which no claim shall be allowed*, the generality of these is unavoidably restrained to those who do belong to companies; for the words are, "provided that no claim shall be allowed under the provisions of this act, until proper evidence shall have been received by the accounting officers from the commanding officer of the company to which the claimant shall have belonged." Then *no claim* can be allowed under the provisions of this act, except to those who can furnish the evidence which the law exacts as the indispensable prerequisite, to wit: to claimants who shall have belonged to some company from which this indispensable evidence is required to come. If there were any ambiguity in these expressions, there would be room for construction, and I should adopt that which you suggested, to wit: that this provision is to be considered as confined to the case of claimants who have in fact belonged to companies. But there is no ambiguity in the terms, and, consequently, no room for construction. They look to *all claims* that may be offered under the act; and declare, in sweeping and absolute terms, that "no claim shall be allowed under the provisions of this act, until," &c. This proviso is a qualifica-

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tion which operates on the whole law; and though I believe myself that it narrows the enacting clause beyond the real purpose of Congress, it will not do to take this purpose on credit, against the terms of a restriction so clear and so absolute, so explicitly exclusive of all claims, in support of which the specific proof required cannot be furnished. To enlarge by construction language so unambiguous and so imperious, would be to confound construction with legislation. It is better to take the sense so clearly and positively expressed, and leave it to Congress, if they think proper, to explain their purpose by a subsequent law, than for us to legislate under color of construing a law.

I am therefore of the opinion that no losses are to be allowed, except those which took place in consequence of the government of the United States failing to supply sufficient forage; and that no claims are to be allowed under the provisions of this act, but to such claimants as can furnish the evidence called for by the proviso which I have been considering.

I am perfectly aware of the inconveniences which this opinion may produce, but it is the effect of positive enactments, with which, I think, the executive officers have no power to dispense.

I have the honor, &c.,

WM. WIRT.

To the SECRETARY OF WAR.

THE OUTFIT OF MINISTERS.

The fund for foreign intercourse is an annual fund placed at the disposal of the President to defray its expenses; and he is limited in respect to an outfit, only by the provision that it shall not exceed a year's salary. When the outfit has been paid, it is beyond the recall of the President or Congress.

OFFICE OF THE ATTORNEY GENERAL,

June 5, 1822.

SIR: After a careful consideration of the case of Mr. Adams, which you have submitted for my opinion, I think him clearly entitled to the whole of the outfit which was allowed and paid

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to him by the President out of the funds placed by the law at his disposal for this purpose.

I think Mr. Adams's view of the subject unanswerable. The question of outfit is given to the President exclusively, and without limit, save only that he is not to exceed a whole year's salary. In the present case, he kept within this limit, and his decision was final and irrevocable. The refusal of Congress to sanction the allowance is wholly immaterial to this question. Their sanction was not necessary to consummate either the power of the President or the right of Mr. Adams. They were both perfect without it. They stood upon existing laws, acting upon an existing fund, and not upon a fund thereafter to be called into being by a vote of Congress. Had the latter been the case, my opinion would have been different. Were an allowance of outfit nothing more than an *estimate* prepared by the President to be laid before Congress, with the view of leading to an appropriation out of which it was to be paid, then Congress would have the control of the subject, and their refusal to appropriate would overrule the President. But the fund for foreign intercourse is, I understand, an annual fund, out of which the expenses of that intercourse are paid; and it was from this fund, thus placed at the disposal of the President, that the outfit allowed to Mr. Adams was drawn and paid; and, consequently, no appropriation was necessary to give the President's decision effect.

The allowance having been thus regularly made and paid, I consider the subject as placed beyond the reach of recall, either by the President or Congress. It would be extremely unjust and cruel were it otherwise. An allowance is regularly made to a foreign minister on the express ground of its being necessary to the additional expenses which he must encounter in his new mission. He accepts the mission and encounters the expense on the faith of the allowance made and paid to him by the President; and when the business is all over, and the expenses have been incurred and paid, he is told he must refund one-half of the advance! I am persuaded that no court of justice would tolerate this; and I will barely suggest, in conclusion, that if you think otherwise, it is practicable to make the experiment by ordering a suit against Mr. Adams for the

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alleged balance in his hands; to which, I dare say, he would have no objection. But you will not understand me as advising this course, for I am thoroughly persuaded that the suit would fail.

I have the honor, &c.,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

BREVET PAY OF GENERAL MACOMB.

Whether General Macomb is entitled to the brevet pay of brigadier general, depends upon whether he has a command according to his brevet rank. But, what a command according to brevet rank is, the law does not decide; the same is left to be determined by the regulations of the army.

OFFICE OF THE ATTORNEY GENERAL,

June 5, 1822.

SIR: The question whether General Macomb is entitled to the brevet pay of brigadier general, is one of those questions on which I express an opinion with diffidence and reluctance, because they do not depend on positive law only, but call for an intimate knowledge of army regulations and organization, which constitutes no part of the science of my profession. The act of April 16, 1818, regulating the pay and emoluments of brevet officers, provides that the officers of the army who have brevet commissions shall be entitled to and receive the pay and emoluments of their brevet rank when on duty, and *having a command according to their brevet rank, and at no other time*. What is a command according to brevet rank? It is obvious that this is not a legal question, unless there be some law in force which explains what is a command according to brevet rank. We cannot look to the act of the 6th of July, 1812, to answer this question, for the reasons given in my opinion in the case of Generals Scott and Gaines, on the 29th of December last, and which, therefore, it is unnecessary to repeat here. I have met with no act of Congress which gives us the organization of an army, so as to inform me what is the command of a brigadier general. The title imports that he shall command a brigade; and the military regulation of

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8th May, 1818, declares that brevet officers shall receive the pay and emoluments of their brevet commissions when they exercise command equal to their brevet rank; for example—a brevet brigadier general, a brigade. But here another question arises—"What is a brigade?" I can find no law that is still in force which gives us the organization of an army. The act of 3d of March, 1799, for the better organizing the troops of the United States, and for other purposes, ordains, *inter alia*, that two regiments of infantry or cavalry shall constitute a brigade; but the troops raised under this act have long since been disbanded, so that the law ceased to have a subject on which it could operate. There is no act of Congress, then, which enables me to decide what is a command according to the rank of brigadier general. In the silence of the law, I suppose it to have been always perfectly competent to the President of the United States to declare, by his own orders, what should constitute a brigade, or what should be a command according to brevet rank. The act of 24th April, 1816, for organizing the general staff, and making further provision for the army of the United States, provides, in the 9th section, that the regulations in force before the reduction of the army be recognised, as far as the same be applicable to the service; subject, however, to such alterations as the Secretary of War may adopt, with the approbation of the President of the United States. It was, I presume, in the exercise of this power that the order of 8th May, 1818, was passed; and which declared (undoubtedly with reference to the act of 16th of April preceding, and as explanatory of it) that a brevet brigadier general should receive brevet pay only while he commanded a brigade. The same power authorized the further definition of brevet rank which is given in the 3d article, 2d paragraph, of the regulations of the army, compiled by General Scott, and sanctioned, as I understand, by the President; by which it is provided that brevet rank shall take place only in the following cases, *inter alia*: 1st. When it renders an officer present on duty with a separate command, comprising troops of different corps, the superior thereof. 2d. By special assignment, made by either the President of the United States or the general in-chief of a particular army in the field, whereby a brevet officer

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may be invested with a separate command, comprising troops of a different corps, although not previously on duty with it. Whether General Macomb is in either of these situations, is a question of fact, which it is not my province to settle; but if in either, I think that brevet pay cannot be refused him.

The law stops with saying that he shall have brevet pay only when he commands according to his brevet rank. What constitutes a command according to brevet rank, the law does not decide. It leaves this matter, I apprehend, to be settled by those regulations which had been made, and on which an unlimited power of alteration is confided to the President. What regulations have been made by him—what was their purpose—whether they reach this case—and in what predicament these regulations now stand—are all military, and not legal questions. If those to which I have adverted are still in force, and are all that are in force, then the only question is, whether General Macomb is in either of the situations described by those regulations; and this is a question which belongs exclusively to your department.

I am aware that the sanction given by Congress to the army regulations compiled by General Scott, by the 14th section of the act of 2d of March, 1821, was withdrawn by the act of 7th of May, 1822; still, however, these regulations had received the separate sanction of the President, and after the withdrawal of the legislative sanction, they were still continued in force, by the authority of the President, in all cases where they do not conflict with positive legislation. The sanction of the President alone is entirely sufficient, under the act of the 24th of April, 1816, to give them full effect as army regulations; and those which I have cited are by no means in conflict with positive legislation, since positive legislation has stopped short with making a command according to brevet rank the criterion of brevet pay; leaving wholly open and undecided the question, what is a command according to brevet rank? The purpose of these regulations, then, is merely to supply what positive legislation had wholly omitted, and not to contradict it in anything which it had enacted. Standing clear, then, of all legislation, the sanction given by the President to these regulations becomes absolute and unconditional.

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Nor are the regulations of 1820, I presume, in conflict with that of the 8th of May, 1818, which I have cited; they are supplemental and additional; they leave the order of the 8th of May, 1818, to act upon the line, and supply a provision for cases which appear not to have been contemplated by that order. This, however, is again a question much more proper for your department than mine; for I profess not to have that acquaintance with the whole range of your army regulations, nor that knowledge of the organized bodies on which they are intended to act, which is necessary to qualify me to compare them, and decide on their relative bearing and effect. This knowledge belongs peculiarly to the Department of War, and with it I presume not to meddle, so far as to hazard an official opinion on it.

I am very sensible that this opinion does not go the whole length of deciding the question which you have referred to me; and the reason is, because the law, which is my science, does not go the whole length of deciding it. I must be permitted, therefore, to stop where the law stops, and leave to the Department of War that part of the subject which lies within its particular province.

I have the honor, &c., &c.,

WM. WIRT.

To the SECRETARY OF WAR.

INTEREST ON THE GEORGIA CLAIMS.

Interest ought not to be allowed on the Georgia claims settled by the commissioners under the treaty of the 8th of January, 1821, with the Creek nation of Indians.

OFFICE OF THE ATTORNEY GENERAL,

June 11, 1822.

SIR: I have considered the question of the allowance of interest on the Georgia claims settled by the commissioners under the treaty with the Creek nation of Indians of the 8th of January, 1821; and am of the opinion that interest ought not

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to be allowed, for the following reasons, which, at present, I have merely time to suggest, without enlargement.

1. By the treaty, the United States take the place of the Creek nation, as to those claims within the limit of \$250,000. The character of the claims thus assumed by the United States could be learned only by the existing treaties with the Indians, to some of which the State of Georgia was party; to others, the United States, representing in this particular the interests of the State of Georgia. In all these treaties, the only claim asserted by and for the State of Georgia, and admitted by the Creeks, consisted in the return of the specific property, as far as it was in being and capable of being returned. There is no stipulation in either of these treaties for damages for the detention of the property; and this, being the claim assumed by the United States, ought to remain as it stood under all the treaties, without the addition of damages or interest in any form.

2. The claim ought to be liquidated against the United States exactly on the principle that it would be liquidated against the Indians; and it is believed that a claim of interest against a nation of Indians, under circumstances like these, would be unprecedented.

3. Interest is not a thing of course; it is no part of the debt, nor is it a necessary consequence of the debt. By many nations it is not allowed at all; and by those whose laws allow it among individuals, it is not allowed in every case, but only where the circumstances of the case call for its allowance, as a matter of equity in the particular case. These principles are nowhere more clearly stated, nor more ably illustrated, than in Mr. Jefferson's letter to Mr. Hammond. (State Papers, vol. 1, p. 304.)

Do the principles of equity call for the allowance of interest in this case? I apprehend not, for the following reasons:

1. Because I understand that the value of the property itself is assessed on an average nearly at double prices: *e. g.*, eighty-eight negroes are valued at \$32,201, making an average of \$365 80 each; four hundred and seventy-one horses are valued at \$41,171, making an average of \$87 41; and these horses

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on the frontiers of Georgia—at their value, too, thirty and forty years ago! Equity cannot require the addition of interest on allowances like these.

2. The claim itself is confined to property *in being*, and therefore capable of being returned; but the existence of all the property claimed is presumed by the commissioner, without proof in any instance except where the claim itself is directly for property destroyed. Now, the presumption that all the negroes, horses, and hogs, that were stolen by the Indians, or that eloped into their borders and found a refuge there twenty or thirty years ago, are still in being, is the presumption almost of a miracle; and operates favorably enough, in all conscience, for the Georgia claimants, without loading claims so extremely improbable with interest.

3. Interest in this case would be in the nature of damages for the detention of the specific article; but, to take the value of the article at the time of its first coming into the possession of the Indians, and to calculate interest on that value down to the present time, would be to add to the extremely improbable presumption that the property is still in being, another still more improbable, to wit: that it has continued all along of the same value; that is to say, that a negro or a horse, whose services were worth to the owner six per cent. on the value thirty years ago, is worth the *same per cent.* on the same value at the present day—a presumption certainly not required by any considerations of equity; but, on the contrary, repelled by every such consideration.

I am of the opinion, therefore, that equity, so far from requiring, forbids the addition of interest to the present appraisalment.

4. The claims of the citizens of Georgia against the Creek nation were in the nature of unliquidated damages; and on unliquidated damages, as a general rule of law, interest is not allowed; and there are no circumstances of equity in this case, as we have seen, to take it out of the operation of the general rule.

5. In the act of assumption, interest is expressly disallowed on the claims when ascertained—a *fortiori* I should suppose

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before ascertainment. Unliquidated damages, as I have said, do not carry interest; but, from the time of their liquidation, interest is in some cases allowed. Open accounts, as a general rule, do not carry interest while they remain open; but from the time of their settlement (that is, from the time of the ascertainment of the balance due) they are allowed to carry interest. But here is a treaty which stipulates that these unliquidated claims shall not carry interest from the time of their liquidation. At the very point of time at which the general principles of law would raise the operation of interest, this treaty forbids it; and the implication seems to me very powerful, that there could have been no intention that the claims, while unliquidated, should be carrying interest. It was needless to have stipulated that these claims, before their liquidation, should not carry interest, because the general rule of law produced this effect. It was only where the law would have permitted the interest to commence, that the prohibition by treaty became necessary; and at this point of time, precisely, the prohibition is directed.

6. It will be observed that this whole article of the treaty studiously forbids the allowance of interest in every case in which there could be anything like a legal color to claim it. Thus, in the previous part of the article, it is stipulated that there shall be fourteen annual payments, in fourteen successive years, of sums fixed and certain. Now the payments being of fixed and certain sums at fixed and certain periods, there would have been a strong legal color for the charge of interest; the treaty, therefore, studiously forbids it. Now, to suppose the treaty-makers thus studious to forbid the interest when the general rules of law might have allowed it, and yet to have intended the allowance of it when the general rules of law would have forbidden it, is to impute to them an intention equally irrational and improbable.

For these reasons, I am of the opinion that interest ought not to be allowed on the sums assessed in favor of the Georgia claimants.

I have the honor, &c., &c.,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

Interest on the Georgia Claims.

INTEREST ON THE GEORGIA CLAIMS.

Interest ought not to be allowed on the sums assessed by the commissioner in favor of the Georgia claimants, it not having been stipulated in the case, and the United States never having agreed to become responsible to the claimants further than the Indians, whose place they have taken, were.

Interest is not any part of a debt, nor a necessary consequence of a debt. By the polity of many nations, it is forbidden; and by those whose laws allow it in any case, it is not made a right in all. In cases of unliquidated damages, it is, in general, disallowed; and the Georgia claims being of that character, are excluded by the general rule.

The debt having been adjusted on liberal principles, the property having been averaged above its value from 1783 to 1802, it would be prodigality, not justice, to add interest to such a valuation.

The treaty interposes after the amounts are liquidated, and forbids the payment of interest upon them.

OFFICE OF THE ATTORNEY GENERAL,

July 20, 1822.

SIR: I have reconsidered the opinion which I had the honor to express to you on the 11th ultimo, touching the allowance of interest on the Georgia claims, under the treaty of 8th January, 1821, with the Creek Indians; and proceed to give you the result of this more deliberate examination.

The stipulation in the treaty, under which the question arises, is in the following words: "And as a further consideration for said cession, the United States do hereby agree to pay to the State of Georgia whatever balance may be found due by the Creek nation to the citizens of said State, whenever the same shall be ascertained, in conformity with the reference made by the commissioners of Georgia, and the chiefs, headmen, and warriors of the Creek nation, to be paid in five annual instalments, *without interest*; provided the same shall not exceed the sum of two hundred and fifty thousand dollars."

By the agreement between the commissioners of the State of Georgia and the Creeks, annexed to the treaty, these claims are referred to the decision of the President of the United States; and the commissioner appointed by the President has reported the amount of claims, exclusive of interest: the President having reserved for his own consideration the question of interest. It is on this question that my opinion is required.

Interest on the Georgia Claims.

I. The first consideration which strikes the mind on this subject is, that this is a question which arises between sovereign and independent States, in transactions between whom the allowance of interest (unless where it is expressly stipulated, or arises on contracts of loan) is, it is believed, without example. It might, therefore, be safely assumed, in the front of this examination, that interest not having been expressly stipulated in this case, and the case not being one of contract of loan, the demand of interest is in conflict with the usage of nations, and therefore ought not to be made.

II. There is another general consideration which belongs to the subject, and which is this: The United States, in this case, have taken the place of the Indians; they have agreed to be responsible, as the Indians were responsible; and therefore the same principles and usages should be applied to the liquidation of these claims, in relation to the United States, as if they were still to be paid by the original debtors, the Indians; and it is believed that a claim of interest against a nation of Indians, or the payment of interest by them, would be without a precedent. In a treaty with them, in such a case, nothing more, it is believed, could be expected to be gained, or has been asked, than the return of the property, or its fair value at the time of the conversion of it to their use, without any addition whatever of interest or damages.

III. To come more closely to the subject: interest is not a thing of course; it is in no case a part of the debt, nor is it a necessary consequence of the debt. By the polity of many nations, it is forbidden in all cases; and by those whose laws allow it in cases between individuals, it is not allowed as a matter of right in every case; on the contrary, it is allowed only where the character of the contract expressly covers the claim of interest, as in penal bonds; where the penalty exceeds or equals the claim; or where the parties have, by their contract, expressly stipulated for its payment; or where the circumstances of the case call for its allowance as a matter of equity in the particular instance. In whole classes of cases, it is, as a general rule, disallowed; and one of these classes is the case of unliquidated damages. These principles are nowhere more clearly stated, nor more ably and amply illustrated, than in Mr.

Jefferson's correspondence with Mr. Hammond in 1792.—See vol. 1, State Papers, 304.

Let us test the question of interest by these principles:

1. This is a claim of interest on unliquidated damages. Laying aside the criminal character of the charges in which some of these claims are said to have originated, and considering them *civilly*, these claims are either for trespasses committed by the Indians on the property of the citizens of Georgia, or for the conversion, to their own use, of property of those citizens which had strayed within the Indian limits. In both aspects, these claims are sound in damages, and in damages unliquidated until the report of the commissioner was made: being, then, a claim of interest on unliquidated damages, the claim is excluded by the general rule.

2. This is not a claim of interest on a penal bond or specialty, nor in a case in which the parties have expressly stipulated to pay it. Unless, then, there be something in the nature of the claim to call for its payment as a matter of equity, in this particular instance there is, according to the principles already stated; no ground for the claim. What, then, is the nature of the debt itself on which this claim of interest arises? and what are the circumstances under which this debt presents itself as raising the question of interest?

First. The nature of the debt. The United States have agreed to pay to the citizens of Georgia whatever may *be found due to them* by the Creek nation. The nature of this debt was to be ascertained only by reference to those antecedent treaties which had been made between the Creeks and the State of Georgia, and between the Creeks and the United States, acting in this behalf for the State of Georgia, to which this treaty of 8th January, 1821, must be considered as having relation. These treaties are those of Augusta, in 1783; Galphinton, 1785; Hopewell, 1786; Shoulderbone, in the same year, &c. In all these treaties, the stipulation on the part of the Indians, which fixes the character of this debt, is to restore all the negroes, horses, and other property, *now* (that is, at the time of the respective treaties) *in the nation*, to such person as the governor should appoint, &c. Not a word concerning compensation for the detention, nor compensation for any negro, horse, or other

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animal that had previously died of disease, or had been consumed in the use. It is simply a naked engagement, on the part of the Indians, to restore the specific property, so far as it could be done—that is, so far as the property was still in being, and within their reach. Here the stipulation stops. This is the whole extent of the duty or debt. The United States, in assuming the responsibility of the Indians under these treaties, undertake to do only what the Indians ought to have done—that is, to restore the specific property within the reach of the Creek nation at the date of each treaty; but this being impracticable, the only thing that remains to be done, and which is practicable, is to pay, in commutation, the value of the article at the time at which it should have been delivered. All beyond this would be damages for detention, with respect to which the treaties contain no stipulation. This claim for damages might be the subject of a new treaty, and, being admitted by the Creeks, might become a debt. But they might not admit it; they might have counterpoising claims and complaints to balance and extinguish the ulterior demand of damages for the detention. It is enough, however, that at present they have not admitted such claim; that the treaties actually existing, which constitute the measure of the present debt, stop at the engagement for the specific property, the value of which, at the time, is the fair representative; and that we are only bound to pay what has been already gained by treaty—not what might be gained by further negotiation.

Let it be admitted that the State of Georgia might, in the negotiations which led to these treaties, have fairly claimed a stipulation for damages for past detention, or damages on the future non-delivery of the property—yet treaties, voluntary treaties, are always the effect of mutual concession; each party surrenders something of what he deems his rights; and nothing can be claimed by virtue of the treaty, except what has been expressly stipulated to be done. All beyond this is matter of negotiation between the parties themselves, for the adjustment of which they alone are competent, because they alone are informed of the reciprocal grievances which must enter necessarily into such further negotiation. The treaties, therefore, in this case, furnishing the sole measure of the debt, and

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stopping with the engagement for the return of the specific property; the value of that property at the time becomes its substitute and representative, and is all that the citizens of Georgia could demand of the Creeks on the face of these treaties; and is, consequently, all that they can demand of the United States, who, as to this, take the place of the Creeks. So much for the nature of the debt itself, in relation to this claim of interest on it.

Secondly. With regard to the adjustment of the *amount* of this debt, it enters deeply into the equitable consideration of the question of interest; for, if the amount of the debt itself has been settled on principles hard and severe on the citizens of Georgia, there is the greater color of reason for the allowance of interest to them; if, on the contrary, the debt itself has been adjusted on principles large and liberal, the demand of interest would come with an ill grace. View the subject in another light: I have said that the principal debt itself, in this case, is in the nature of damages for trespass on the property of the citizens of Georgia, or for the conversion of other property of theirs to the use of the Indians. If the commissioner, in assessing these damages, has given to the citizens of Georgia strict and stinted measure, there is nothing offensive to equity in their asking for interest; but if he has already given them vindictive and even double damages, the addition of interest to such damages is not, I think, a demand for which equity, of her own accord, would cry aloud. With this consideration in view, let us look to the report of the commissioner, and see by what rules he has adjusted the debt.

1st. We have seen that, by the treaties, the United States, taking the place of the Creeks, are answerable only for such property as was in being within the Creek nation, and so capable of being restored at the dates of the respective treaties. Has the commissioner been strict in calling on the Georgia claimants for proof of the affirmative fact, that the property for which they made their claims was in being and within the Creek nation at the dates of the respective treaties? On the contrary, he has in every instance presumed this fact in favor of the claimants, without proof, and allowed the claim, except where the claim itself is directly *for property destroyed*. I do

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not say that in this the commissioner did wrong: but, surely, in this there was no rigor towards the Georgia claimants; it was impossible to have adopted a more liberal rule.

2d. As to the standard of value. The epoch with relation to which the values are to be considered is from 1783 to 1802; that is, from 20 to 40 years ago; the region of country to be regarded with reference to the same subject of value, is the frontiers of Georgia. In relation to that country, and in relation to that time, negroes, old and young, men, women, and children, are valued at an average of \$365 80, (*i. e.*, 88 negroes at \$32,201;) horses, of all ages and descriptions, are valued at an average of \$87 41, (*i. e.*, 471 horses at \$41,171;) and in the same proportion in regard to other articles; which, I understand, is fixing the property at an average of double its value *at that time in that quarter of the country*. If this be so, equity, so far from demanding, would revolt at the proposition of adding interest to such a valuation; it would be usury, not interest—prodigality, not justice.

3d. With regard to the nature of the interest claimed in this case: it is, as we have seen, as damages for the detention of the property itself. The measure of these damages is the annual value of the property. Permit me to illustrate this with respect to negroes and horses, the two most valuable subjects of claim under these treaties. The measure of damages for a negro or horse detained from his owner, is the annual value of that negro or horse to the owner. But it is manifest that this must depend on the age and other qualities of the negro or horse; *e. g.*, old negro men and women, and young negro children, so far from being valuable, are a heavy charge to their owners; those that are at their maturity are valuable while vigorous and firm, but, as they advance towards old age, their annual value becomes less and still less, until they in their turn become a burden instead of a profit to their owners; and among those that are really valuable, death puts an end to the value, and there, in the analogous case of hire and profits, the account as to such individual always stops. These remarks are equally applicable to the subject of horses, with these further disadvantages—that the duration of usefulness in a horse is much shorter; and that, among horses of the description embraced

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in this report, the breed is not continued, nor, consequently, the annual value in any degree kept up. The equitable ground of the allowance in both cases is the real utility of the animal, *year by year*; and hence, in making up an account in cases of this sort, the commissioners are required to report ages and sexes, the value *year by year*, and to note *deaths*, in order that the chancellor may do entire and complete equity between the parties. This is the course of equity.

The demand here is of the same uniform interest upon the original value of every article of property, from the time it came to the hands of the Creeks down to the present day, without any allowance for deaths or deterioration by age; which is to suppose not only that every negro man, gelding, ox, and hog, that came into the possession of the Indians forty years ago, was worth six per cent. on their respective values *at that time*, (which is itself a moral impossibility,) but that they have all continued to live on to this day; and, what is still more incredible, that each and every of them, throughout the whole period, has continued to be worth six per cent. on his original value down to the moment at which interest is proposed to be paid. Does equity demand our assent to impossibilities like these? I think not; and yet it is only on this hypothesis that the claim of interest can be supported as an equitable claim. Such is the nature of the interest which is claimed; and that, too, to be calculated on double the value of the property!

4th. It will be observed by the article of the treaty which has been quoted, that these claims of the citizens of Georgia, *when ascertained*, are to be paid in five annual instalments, *without interest*. I have said that, as a general rule of law, unliquidated damages do not carry interest while they remain unliquidated; but, from the time of their liquidation, interest is in some cases allowed. So open accounts, as a general rule, do not carry interest while they remain open; but from the time of their settlement and a balance struck, they are allowed interest. Apply this principle to the case of this treaty. While the claims of the Georgia claimants remained unliquidated, they would not, according to the general rule of law, bear interest; but, from the time of their liquidation by the commissioner, a claim of interest would, by the same general rules

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of law, arise in favor of the claimants. But here the treaty steps in, and declares that *even after their ascertainment* there shall be no allowance of interest on these claims. Does not this provision present a strong inference, *a fortiori*, against the allowance of interest prior to liquidation? There was no occasion to guard, by treaty, against the allowance prior to liquidation; because, as to that period, the law furnished the guard. But at the moment at which the law would have allowed a claim of interest to arise, the treaty interposes, and forbids the allowance. This refusal of interest in the stronger case—in the only case in which it would become a serious legal question—furnishes to my mind a powerful implication that it could never have been the intention of the parties to the treaty to allow it in the weaker case, as to which the prohibitions were already sufficiently strong and numerous, without any express prohibition by the treaty.

5th. It will be observed that this whole article of the treaty studiously forbids the allowance of interest in every case in which there could be any color to claim it. Thus the sum stipulated by the first part of the 4th article to be paid to the Indians themselves, in part of the price for the lands ceded, *is liquidated at the time of the contract*, and is to be paid in specified sums, in fourteen annual payments, but expressly *without interest*.

To suppose the treaty-makers thus studious to forbid the interest wherever a question might be raised whether the general rules of law did not allow it, and yet to have intended the allowance of it where the general rules of law would have forbidden it, is, in my humble judgment, to impute to them an intention neither natural nor probable.

In short, in every light in which I have been able to look at this subject, the claim of interest seems to me unfounded. I cannot conceive on what possible ground the claim can be made, unless on the postulate that every debt carries interest as a matter of right—and *that* from its first inception; which I have shown not to be true. It is only "*sub modo*" that a debt carries interest at all; and the modifications, as I have shown, do not reach this case.

For these reasons, which I deem it totally unnecessary to

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recapitulate to you, sir, I am of opinion that interest ought not to be allowed on the sums assessed by the commissioner in favor of the Georgia claimants.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

COMMENCEMENT OF PENSIONS.

Pensions under the act of 15th May, 1820, do not commence until the testimony in the case shall have been taken, authenticated, and in all respects completed, as the same is required to be, in order to its reception at the department.

ATTORNEY GENERAL'S OFFICE,

July 19, 1823.

SIR: I now understand that the doubt with regard to Colonel Richard M. Johnson's claim of pension relates to the time of its commencement. The second section of the act of 15th May, 1820, declares "that the right any person now has, or may hereafter acquire, to receive a pension in virtue of any law of the United States, be considered to commence at the time of completing his testimony, pursuant to the act hereby revived and continued in force." The affidavits which prove Colonel Johnson's title to a pension were taken before Job Stevenson, a justice of the peace of Scott county, in the State of Kentucky, on the 1st day of August, 1816; but it was not until the 5th of November, 1820, that the certificate of the clerk of Scott county that Job Stevenson was a magistrate was obtained and annexed to those affidavits. The question is, When was this evidence complete—on the 1st of August, 1816, when the affidavits were taken; or on the 5th of November, 1820, when the certificate of the clerk was added?

In the short personal conference which we had on this subject, the predisposition which it is almost impossible to avoid feeling in favor of so meritorious a claim, led me to take the earlier date in favor of the claimant; but, on reflection, I must recede from this opinion, and abide by those old and plain rules with which we are all familiar, and from which it is always

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unsafe to depart. The word *complete* is a strong one; nothing is complete while anything of form or substance is wanting. Testimony is never complete until it comes in such a shape that its admissibility is unquestionable. If it be inadmissible in the form in which it is presented—if it want any thing of authentication to render it admissible—it is incomplete; and never is it complete until every objection to its reception is removed.

Would Colonel Johnson's evidence have been received at the department, without the certificate of the clerk that Job Stevenson was a justice of the peace of Scott county? If it would not, it is not complete; and such I understand is the fact, according to the rules of evidence in these cases adopted by the department. I also understand that, according to these rules, this certificate of the clerk removed all objection to the testimony; hence, I am constrained to conclude that the testimony was not complete until this certificate was procured—to wit, 5th November, 1820. My regret, however, is diminished by the consideration that there can be no moral doubt that Congress would, on application, carry back the pension to the time of the wounds; which will be better for the petitioner than to assume the earliest date which these laws could, by any possible construction, permit.

WM. WIRT.

Hon. J. C. CALHOUN.

SPANISH GRANTS IN FLORIDA.

The King of Spain had ample power to grant lands in Florida while the province was his, and the Roman Catholic church was capable of taking his grants; but whether the lands in question were granted prior to the time stipulated, is a question of fact to be determined.

OFFICE OF THE ATTORNEY GENERAL,

July 19, 1822.

SIR: My answer to your communication of the 3d has been delayed by absence from the city, to which I have just returned.

Doctor England states the law correctly. There can be no doubt of the power of the King of Spain to grant lands in Florida while the province was his; nor of the capacity of the

 Brevet Pay of Generals Gaines and Scott.

Roman Catholic church to take by grant. Our treaty with Spain recognises and ratifies all such grants made prior to a certain day.

The only question in this case is a question of fact. Did the King of Spain grant these lands to the Roman Catholic church prior to the time stipulated? On this, which is the only question in the case, there is no evidence before me. If it is intended that I am to take Doctor England's statement of facts as correct, I am of the opinion that he is right in his conclusions of law; if otherwise, it will be necessary that I shall be furnished with a report of the facts, which I presume the attorney of the United States for the Territory of Florida can readily furnish. Or the whole subject can be remitted to that officer for his opinion; which, I would respectfully submit, is the better course, because the evidence is more easily accessible to him, and because the archives of that province will give him a better understanding of the characters of Spanish grants, and the laws by which they were regulated, than we can possess here.

I remain, sir, &c.,

WM. WIRT.

JOHN Q. ADAMS, Esq.,
Department of State.

 BREVET PAY OF GENERALS GAINES AND SCOTT.

The opinion of the Attorney General of the 29th December, 1821, was founded on the act of the 16th of April, 1818, and the army order of the 8th of May following, founded thereon and giving construction to it. The repeal of the section of the act of 2d March, 1821, which sustained the army order, removes one of the grounds upon which it was suggested that they were in command of divisions, and leaves that fact to be settled by the Department of War.

If they are in command of divisions according to the arrangement of troops on the peace establishment, they are, nevertheless, by force of the act of the 16th April, 1818, entitled to the pay and emoluments of their brevet rank.

OFFICE OF THE ATTORNEY GENERAL,
 September 21, 1822.

SIR: The letter of the Second Comptroller, dated April 28, 1822, and handed to me a few days back, asks whether the act

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of Congress of the 7th May, 1822, repealing the 14th section of the act of the 2d March, 1821, entitled "An act to reduce and fix the military peace establishment," alters or affects my opinion given on the 29th December, 1821, respecting the claims of Generals Gaines and Scott for brevet pay and emoluments.

It will be observed that that opinion is founded on the act of the 16th April, 1818, and the army order of the 8th May, 1818, founded on that act, and giving the executive construction of it. The former enacted "that the officers of the army who have brevet commissions shall be entitled to and receive the pay and emoluments of their brevet rank when on duty, and *having a command according to their brevet rank*;" and the latter declared "that a brevet major general *had a command according to his brevet rank when he commanded a division*." As this order had been made under the authority of Congress, and had been published without any censure or alteration whatever on the part of Congress, I considered it of as much force as if it had formed a part of the original act of the 16th of April, 1818, and the two together as amounting to a legislative declaration *on the part of Congress* that a brevet major general should receive his brevet pay and emoluments *whenever he commanded a division*.

All that remained, then, was to ascertain whether Generals Gaines and Scott commanded divisions. This question I did not intend to decide, because I considered it as more properly belonging to the Department of War than to the Attorney General.

I did take the liberty to suggest, however—

1st. That the army regulations compiled by General Scott, and adopted by Congress, appeared to me to settle the amount of a division; and,

2d. That I understood from the military gentlemen in the War Department that, in this particular, the regulations so compiled by General Scott proposed nothing new, but had merely given an authentic form to the pre-existing and well-known distribution of troops.

But I closed these suggestions by the express declaration, that the question, whether these gentlemen did or did not command divisions, was a question which the Department of War

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was much better qualified to decide than I could possibly be; and then proceeded to say, that, *taking it for granted* that they do command divisions, I am of the opinion that they are entitled to the brevet pay of major generals.

The act of 7th May, 1822, repealing the 14th section of the act of the 2d March, 1821, merely takes away the authority of Congress from the regulations compiled by General Scott, and so removes one of the grounds on which I took the liberty to suggest that these gentlemen were in the command of divisions; leaving the question still open to the Department of War, whether there is such arrangement of the troops on the peace establishment as places these gentlemen at the heads of divisions. All that I meant formerly, and still mean, to decide, is, that if these gentlemen command divisions, they are, by force of the act of the 16th April, 1818, as expounded by the order of the 8th May following, entitled to the pay and emoluments of their brevet rank. But whether they do command divisions, is a question which I am not competent to decide; for I have not been put in possession of the organization of the army so as to be able to answer it. But, surely, if there can be a question purely military, it is the question, what constitutes a division of an army? With this question, therefore, I shall not presume to intermeddle, unless it shall be your desire, sir, and you shall be pleased to put me in possession of the organization of the army, so as to enable me to decide it.

I remain, &c., &c.,

WM. WIRT.

To the SECRETARY OF WAR.

RESTORATION OF A DANISH SLAVE.

It is the duty of the President to cause to be delivered to the minister of Denmark a slave who, by concealment in an American vessel lying at St. Croix, had been brought to the port of New York, and detained in prison until orders might be given concerning the further disposal of him.

So long as Denmark tolerates slavery in her dominions, it is an invasion of her sovereignty to take away from St. Croix, by seduction, invitation, connivance, ignorance, or mistake, slaves from the possession of Danish owners, and, if avowed and unredressed on our part, is a just cause of war; to bring them to the United States, and to refuse to return them to their owners on

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the call of their government, would be such a violation of private property, and such a lawless infraction of the rights and sovereignty of Denmark, as to expose us to the just resentment of that nation, and the merited reproach of the civilized world.

The President may issue an order directed to the marshal of the State of New York, requiring him to deliver the slave to the order of the minister of Denmark; or he may notify the governor of that State of the facts, and request him to cause him to be delivered to the marshal for the purpose of delivering him over to the minister.

OFFICE OF THE ATTORNEY GENERAL,

September 27, 1822.

SIR: The case which is the subject of two communications from the Danish minister, and which you submitted a few days back for my opinion, is understood by me to be this: The American ship *Elias Burger*, Thos. Disney master, David Rogers & Son owners, sailed from the island of St. Croix on the 25th June last, on her return voyage to New York. After the ship had made a hundred and sixty miles of her way home, the master discovered that a slave named James Barry, belonging to a Mrs. Johnson, a Danish subject and inhabitant of St. Croix, had, while the vessel lay in the harbor of Christiansted in that island, concealed himself on board, where he still was. The ship, being too far on her way to return, for the purpose of restoring this slave to his owner, proceeded to her home-port of New York, where the case was, by the master of the vessel, laid before the civil authorities of the State; and the slave has been committed to the Bridewell prison as a vagrant. The slave has himself confirmed the truth of the captain's statement; and the minister of Denmark, on this admitted state of facts, has, in the name of his government, demanded the restoration of the slave.

The questions which I understand to be propounded for my opinion are—

1st. Whether we are under any obligation and have the power to restore this slave? and if so,

2d. What form of proceeding should be adopted for this purpose?

I beg leave to premise that both these questions rest chiefly on national and constitutional law, and on the practice of the government, of which I presume the evidence is to be found

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in the archives of state. They are not, therefore, exclusively within the province of this office; but, on the contrary, are questions which address themselves as appropriately to the statesman as the lawyer. I remind you of this truth, that more weight may not be attached to my opinion, under the notion of its being official, than it fairly deserves; and, having made this suggestion, I proceed with great respect to express my opinion on the question propounded to me.

I. Whether we are under any obligation to restore the slave?

The right of self government is the essential attribute of the sovereignty of nations. Whether Denmark will tolerate slavery within her territories, is a question for herself alone—a question with which no other nation has a right to intermeddle. Denmark does tolerate slavery in St. Croix; and any attempt on the part of the United States, or the individual citizens thereof, under the sanction and protection of their government, to interfere with the Danish regulations in this respect, would be an invasion of the sovereignty of Denmark, and, if avowed and unredressed on our part, a just cause of war. To take away the slaves from the possession of their owners, whether by seduction, invitation, connivance, or ignorance and mistake, affected or real; to bring them to the United States, and to refuse to return them to their owners on the call of their government, would be such a violation of private property, such a lawless infraction of the rights and sovereignty of Denmark, as to expose us to the just resentment of that nation, and the merited reproach of all the civilized world. We have, in my opinion, just as much right to order our national ships to unfurl the banner of freedom among the slaves of all the West Indian islands, and proclaim insurrection and liberty among them, as we have to detain this single slave; for his detention would be to offer by proclamation an asylum to all who chose to fly from their masters to our shores. And if our own vessels may be with impunity used for this purpose, under such pleas as the plea of concealment and ignorance on the part of the captain and crew, set up in this case, the discontented black spirits of the West Indies will not encounter much difficulty in finding their way to the United States. Such a course would be holding out a temptation to them to desert their masters, which,

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in sound principle, is not distinguishable from seduction. The successful elopement of a few, would have the effect of rendering those who should remain discontented, and disposing them to revolt and bloodshed; while those who should come among us would be so many firebrands cast upon the magazine of combustible materials, which unfortunately exists among us already, and thus become the instruments of inflicting upon us that just vengeance which we should so richly merit for our interference with the government of other nations. Putting aside from our view of the subject the aggression on the sovereignty of Denmark and the actual robbery of individual property, which our refusal to surrender this slave would involve, such a course would be in direct conflict with the whole spirit and policy of our own laws with regard to the introduction of blacks among us. Our laws expressly prohibit their introduction among us; and when brought in against the authority of our laws, the President is expressly authorized to send them out. The policy of this law is to avoid the increase of the number of blacks among us; for if the policy of it had been merely to prohibit the extension of slavery, this purpose might have been effected by declaring such persons free, without sending them out of the country. The design, then, was to prevent the augmentation of the number already among us, which would be thwarted by permitting this slave to remain; and, if I may be permitted to suggest a consideration which strikes me as deeply interesting in relation to this policy, I will add, that, if we are to have an augmentation of these people among us from any quarter, it would be much more for the repose of the country that it should be drawn from Africa than from the insurgent and ferocious slaves of the West Indies.

From these views, I am of the opinion that it is due to the sovereignty of Denmark, and to our own character as a nation, to restore this slave to the condition from which he has been taken by a ship carrying our flag and belonging to our citizens; and that the policy of our own laws conspires to enforce the performance of this duty.

With regard to the President's power to order the restitution, I consider the question as settled long since by the practice of the government, sanctioned by the acquiescence of the peo-

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ple. The point once conceded, that Denmark alone had the right to pronounce upon the condition of this man—that she had pronounced him a slave, and the property of a Danish subject—I see no difference between the President's authority to restore this slave, and his authority to restore a ship or any other property belonging to a subject of a foreign prince, which has been improperly taken from his possession by our citizens, or by a force furnished from the United States. This question, as it regards ships, was very solemnly and on great deliberation settled by President Washington, assisted by the officers of government who formed his first council in 1793; and the existence of the power was unanimously affirmed. The same power has been since repeatedly exercised on various occasions and in different forms. Even where proceedings have been instituted against the subject in a court of admiralty, and the President has been required by the government to which or to whose people the property belongs, to cause it to be restored, the President has, by a mere suggestion, filed in court by the attorney of the United States, acting avowedly under his authority, arrested the proceedings of the court, and thus effected a restoration of the property; of which the following instances occur: the cases of the *Cassius* in 1796; the *Exchange* in 1812; the *Young Eugenia* in 1821. In all these cases, the restoration was the mere effect of the interference of the President; and I can perceive no sound distinction in principle between those cases and the case under consideration.

After so long an acquiescence in the exercise of this power on the part of the President, it would seem unnecessary to investigate the source from whence he derived it. But I understand the process of reasoning which has led to the exercise of this power to be this: The President is the executive officer of the laws of the country; these laws are not merely the constitution, statutes, and treaties of the United States, but those general laws of nations which govern the intercourse between the United States and foreign nations; which impose on them, in common with other nations, the strict observance of a respect for their natural rights and sovereignties, and thus tend to preserve their peace and harmony. The United States, in taking the rank of a nation, must take with it the obligation to respect

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the rights of other nations. This obligation becomes one of the laws of the country; to the enforcement of which, the President, charged by his office with the execution of all our laws, and charged in a particular manner with the superintendence of our intercourse with foreign nations, is bound to look; and where wrong has been done to a foreign government, invasive of its sovereignty, and menacing to our own peace, to rectify the injury, so far as it can be done, by a disavowal, and the restoration of things to the "*status quo*."

In the particular case before us, the performance of this duty would find another sanction in the spirit and policy of our statutes prohibitory of the introduction of people of color among us: in relation to which, so large a power is given to the President by the 2d section of the act of the 3d of March, 1819, "in addition to the acts prohibiting the slave-trade."

II. What form of proceeding should be adopted for this purpose?

I presume that the President might, by an order directed to the marshal of the State of New York, require him to deliver this slave to the order of the minister of Denmark. But as I understand that the civil authorities of New York have taken possession of this slave, for the purpose of guarding the State against the danger of being burdened with the expenses of his maintenance, I submit to you, sir, whether it may not be due to comity to make the case known to the governor of the State, and to request that he will cause the slave to be delivered to the marshal, for the purpose aforesaid; giving to the marshal the necessary corresponding instructions. This, however, is a question which, not being settled by law, and involving, moreover, national comity, I cannot presume to decide "*ex cathedra*." I merely recommend what strikes me as the most respectful course towards the State authorities. The archives in the department must, I suppose, throw more light on this subject than I possess. Forms of proceeding will probably be found in the analogous case of ships in 1793, to which I have already referred.

I have the honor, &c., &c ,

WM. WIRT.

To the SECRETARY OF STATE.

Deed of Trust to Secure the United States.

DEED OF TRUST TO SECURE THE UNITED STATES.

It is not competent for a bank, with an ordinary charter, to set apart by deed, not under seal, lands, so as to exempt them from execution for the debts of the bank. The principle, that a corporation can grant only by its seal, is of universal application, and applies as well to the case of a grant to the United States as to an individual.

OFFICE OF THE ATTORNEY GENERAL,

October 2, 1822.

SIR: The question which I understand to be propounded to me on the letter of Messrs. John Badolet and J. C. Harrison, is, whether the deed of trust which has been executed by the Bank of Vincennes, to secure a debt due to the United States, be legal? By which I suppose is meant, whether it be effectual to set apart this property exclusively to the use of the United States, and thus exempt it from execution for the debts of the bank. Neither the charter of the Bank of Vincennes nor the deed in question being before me, I feel some reluctance in answering the question. Upon the postulates, however, that the charter is according to the usual form, and that the deed is without seal, it is not, in my opinion, effectual to set apart the property to the use of the United States, nor to shield it from execution for other debts of the bank. The principle, that a corporation can grant only by its seal, is of universal application, and applies as well to the case of a grant to the United States as to an individual. The doctrine of priority, alluded to in the letter, does not operate to give validity to a deed made in behalf of the United States, which deed would be invalid with regard to an individual. That doctrine does not, in any manner, touch the efficacy of such deeds; it is a matter totally distinct, and leaves this question to stand by itself. Whether there be a priority in this case, in behalf of the United States, is a different question; which is not referred to me in this letter, and which, if it were, there are no facts to enable me to answer. It may not be amiss, however, to suggest, that according to the acts of Congress from which this priority is derived, expounded as they have been by the Supreme Court, this priority does not exist in every case in which there is an inability in the debtor to pay all his debts; there must be a known and

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legal insolvency to pay all his debts manifested by some open act, as taking the oath of insolvent debtors, under the laws of some of the States; there must be an assignment of all the debtor's effects for the use of his creditors, or there must be an attachment against the effects of an absent or absconding debtor.

I remain, most respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

LIABILITY OF SURETIES.

The estate of a surety for a receiver of public moneys for lands is liable after the death of such surety, for the faithful performance by the receiver of his duties until the end of his term.

Sureties of a collector of taxes appointed by the President during a recess of the Senate and confirmed by the Senate at its next session, who signed the bond given by the collector when he entered upon his official duties, are liable for the faithful performance of the duties of the collector throughout the term—the appointment during the recess and the subsequent nomination to, and confirmation by the Senate, making but one and the same appointment.

OFFICE OF THE ATTORNEY GENERAL,

October 30, 1822.

SIR: I have the honor to acknowledge the receipt of your letter of the 25th instant, addressed to me direct, in the absence of the Secretary of the Treasury, and proceed to give you my opinion on the points stated.

Patton, one of the sureties of Samuel Finlay, a receiver of public moneys for lands, &c., died in 1812. The principal, nevertheless, went on in the discharge of his duties as receiver, and, on the settlement of his accounts in 1818, was found indebted to the government in a sum exceeding \$20,000. The administrators of Patton have pleaded that the estate of their intestate is not liable for any defalcation of Finlay after Patton's death. But there is no such limitation in the bond. The bond is Patton's contract. He binds himself, his *heirs, executors, and administrators*, in the penal sum of \$10,000, conditioned that Finlay shall well and truly execute the duties of his office of receiver;—not that he shall execute them faithfully

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during the life of Patton, but that he shall execute them faithfully throughout. The plea, therefore, seeks to annex to the contract a modification which is not to be found in the contract itself, and which it is not competent to either party to annex to it without the consent of the other. I am of opinion, therefore, that there is no force in the objection.

The other case is this: Charles R. Sherman, a collector of the direct tax and internal revenue, was appointed by the President, in the recess of the Senate, under the 2d section of the act of the 22d July, 1813, which gives him the power of making such appointment, by granting commissions which shall expire at the end of the next session of the Senate. During the next session of the Senate, Sherman was nominated to that body, and his appointment confirmed by them. Under his appointment by the President, however, and before his confirmation by the Senate, he gave the bond and surety required by the 18th section of the act of 1813; and his sureties in that bond contend that they are not liable beyond the end of the next session of the Senate after his appointment—that being the term of his authority when they became his sureties.

In my opinion, there is nothing in this objection more than in the former. There is nothing on the face of the bond, nor in the nature of the engagements, as explained by the law and constitution of the United States, which warrants the objection.

The bond is required by the law to be in double the amount of the duties assessed on the district. The contract, therefore, looks to the collection of *all* those taxes. The condition of the bond is, that Sherman shall duly collect and pay all monies assessed upon the district. The appointment made by the President in the recess, and the subsequent confirmation by the Senate, make but one and the same appointment. It has been so ever considered in filling vacancies in the recess under the constitution. The parties to this contract could not look at the law under which they were about to enter into this engagement, without seeing clearly and distinctly that they were entering into an engagement for the collection of all the monies assessed upon the district. The whole act is full of this information. The 27th section expressly makes the collector chargeable with the whole amount of taxes received by him.

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The following section subjects both the collector *and his sureties* to the warrant of the comptroller for any part of such sum not accounted for by the collector; and, by the same section, the amount of the sums committed to any collector for collection is declared to be a lien on the lands and real estate of such collector, until the same shall be discharged according to law. The act of the 2d August, 1813, imposing the direct tax, as well as those laying the internal duties, all declare that they shall be collected by the officers appointed under the act of July, 1813, and in the manner therein provided. These acts are all "*in pari materia*:" they constitute an entire system; and looking at them all together, it is impossible to suppose that the sureties of the collectors could suppose they were engaged only till the end of the next session of the Senate. They must have known they were engaged for an officer whose permanency depended only on the confirmation of the Senate, and that their obligation was co-extensive with the duties prescribed to that officer by the laws under which he was appointed; and I am of opinion that the penalty of their bond will become absolute on them (unless they show that their principal has discharged all those duties) the whole time that he held the office of collector, under the President's appointment, confirmed by the Senate.

I have the honor to remain, sir, &c., &c.,

WM. WIRT.

To the AGENT OF THE TREASURY.

DUTIES OF ATTORNEY GENERAL.

The Attorney General will decline giving official opinions concerning infringements of the rights of patentees by dealers in the patented articles of manufacture, it not being the duty of the officers in charge of the Patent Office to decide upon the legal effect of patents issued in conformity to the laws, nor to inform patentees of their rights.

ATTORNEY GENERAL'S OFFICE,

November 5, 1822.

SIR: I have the honor to acknowledge your communication of the 2d instant, covering a letter from Dr. Thornton, of the Patent Office, with its accompaniment, (a letter from Mr. J. R.

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Nourse,) requesting my opinion on the following question: Mr. Nourse represents himself as part proprietor of Powles's patent bedstead, for the State of New York; and that he has authorized cabinet makers to manufacture and sell them in that State. The question which he asks is, whether bedsteads thus sold can be legally carried and resold in any other State or section of the United States, without infringing the right of the patentee?

If it is any part of your duty, or that of the officer who is charged with the patent business attached to your department, to answer questions like these, then it becomes my duty to meet the reference which is made of it to me; for my duty, as prescribed by law, is to give my advice and opinion upon questions of law, when requested by the heads of any of the departments, touching any matters that may concern their departments—that is to say, touching the discharge of any duty which is imposed by law on their departments. Now, on turning to the patent laws, I do not discover that it is anywhere made the duty, either of the Secretary of State, or the Patent Office, to answer questions touching the legal effects of patents which they have issued in conformity to the laws; nor to inform patentees, or the assignees of these patents. Their duty is confined to issuing patents in the cases and with the forms prescribed by law; having done this, their duty is at an end. The rights which those patents confer, and what will amount to a violation of those rights, are questions with which they have nothing to do. They are questions of law, which are to be settled by courts and juries, and on which individuals may, if they choose, consult counsel for their own guidance; but the law gives them no authority to bring such questions to the Department of State, nor to the Patent Office attached to that department. If there is any act to be done by the patent officer, which demands the previous settlement of this legal question, then, indeed, it becomes a question touching the duties of the department, and I shall be ready to answer; but since it comes to me in the mere form of an abstract question of law, having nothing to do with any duty which is to be performed by the Patent Office, and not touching any matter that concerns the department, I must, for the present, decline an-

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swering it, being very certain that you will hold me excused from creating any unnecessary augmentation either of your duties or my own.

I have the honor to be, &c.,

WM. WIRT.

To the SECRETARY OF STATE.

SALVAGE.

A recapture from pirates gives a fair claim for salvage by the general maritime law; and by the act of March 3, 1800, national ships are entitled to salvage from the ships of friendly powers rescued from their enemies; which act, in spirit, applies to rescues from pirates.

OFFICE OF THE ATTORNEY GENERAL,

November 30, 1822.

SIR: In reply to your communication of the 29th instant, relative to the salvage voluntarily paid by the French brig *Theodore*, on her recapture from pirates by the United States sloop-of-war *Hornet*, I would remark, in the first place, that a recapture from pirates gives a fair claim for salvage by the general maritime law—(See Wheaton on Captures, page 237, note *m*, and the authorities there cited; see, also, the case of *Talbot vs. Seeman*, 1 Cranch, 1.) That national ships are entitled to salvage from the ships of friendly powers rescued from their enemies, see the 3d section of the act of 3d March, 1800, providing for salvage in cases of recapture. It is true, that this section does not in terms apply to cases of property rescued from pirates; but, in its reason and spirit, the application is manifest—more especially when taken in connexion with the principle that a recapture from pirates gives at least as strong a claim to salvage as a recapture from enemies carrying on a regular war. The distribution of the salvage-money is regulated by the 4th section of the act just referred to, (that of 3d March, 1800,) which takes the rule adopted by law for the distribution of prize-money; and this last is regulated by the act of April 23, 1800, for the better government of the navy of the United States.

I have the honor, &c., &c.,

WM. WIRT.

To the SECRETARY OF THE NAVY.

Brevets in the Marine Corps.

BREVETS IN THE MARINE CORPS.

Captain Wainwright, of the marine corps, having served ten years in the grade of captain, and having applied for brevet promotion under the act of 16th April, 1814, the question is presented whether, since the act of 3d March, 1817, fixing the peace establishment of the marine corps, and abolishing the office of major in the same, the President can confer the brevet of major at all? and if so, whether it should not be the brevet of major in the army?—**HELD**, that the only brevet rank of major which the President can confer is that of brevet major in the army of the United States.

If it shall be deemed inexpedient to confer upon a captain of marines the brevet rank of major in the army, then he is entitled, if entitled at all to promotion, to the brevet rank of lieutenant colonel in the marine corps.

OFFICE OF THE ATTORNEY GENERAL,

December 11, 1822.

SIR: The question submitted for my opinion on the 22d April, 1820, was, whether the President was authorized to confer the brevet rank of major *in the marine corps*? The case which produced the question was stated to be this: Under the 3d section of the act of 16th April, 1814, in relation to the marine corps, the President had conferred the rank of brevet major on several captains of that corps, while the rank of major belonged to the organization of that corps. But one captain, equally meritorious with the rest, and equally entitled, had been accidentally pretermitted. On this posture of things came the act of the 3d March, 1817, to fix the peace establishment of the marine corps, which abolished the grade of major in that corps: the single question, therefore, was, whether the President could now confer this grade *in that corps* by brevet, to relate back to the time when it should have been conferred? and my answer, on the 22d April, 1820, was, that as the rank of major no longer existed in the corps, the President could not confer it by brevet. Captain Wainwright (the same gentleman, I presume, whose case is above stated) has renewed his application for brevet promotion, under the act of 16th April, 1814, on the ground that he has served ten years in the grade of captain; and the case is again submitted for my opinion on the questions—

1. Whether Captain Wainwright is entitled to brevet promotion;

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2. If he be so entitled, whether it is to the rank of lieutenant colonel, or that of major.

On the first question, I think there can be no doubt. The act of 16th April, 1814, is still in force; and, in the 3d section, it expressly authorizes the President to confer brevet rank on such officers of the marine corps as shall have served ten years in any one grade. Captain Wainwright has served ten years in his present grade; and, therefore, the brevet rank which the President is authorized to confer there can be no propriety in withholding; especially towards an officer so meritorious as, from the documents with which you have accompanied your letter, Captain Wainwright appears to be.

The second question is one of more difficulty, and is, I humbly think, rather a military than a legal question. Laws on military subjects, as you know, sir, seldom fall within the sphere of a lawyer's practice or consideration; and he is consequently without that key of experience in the subject-matter which is so essential to their just construction. The origin and nature of brevet rank—for example, the cases in which it is conferred, and the effects which it produces—are purely questions of military experience, with regard to which we have no written laws; and all questions in relation to that rank must be, of necessity, beyond the province of the mere jurist; but the question which you have submitted to me demands all this military knowledge; and although I shall proceed, according to my sense of duty, to give it the best answer in my power, yet I submit it, whether the President would not be much more safe in resting on the opinion of military men, in this case, than on mine.

I had always supposed that (in our service at least) brevet rank was the mere shadow of real or commission rank; that the power of organizing our armies, and all the corps of our armies, belonging to Congress, it was theirs alone to say what officers there should be; that these officers constitute the substantial commission grades or ranks of honor in the army, of which the brevets are the mere reflection; and, consequently, that the President cannot confer brevet rank, except in relation to a correspondent rank by commission, which has been previously created by Congress. I had supposed that the reason of

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resorting to brevets (in our service, at least) was because the post to which the brevet pointed was already full; and therefore, as the President could not promote to the commission, he was authorized to confer the rank by brevet, which, beside the present honor, produced the further effect of giving the brevet officer a priority to the correlative commission, whenever it should become vacant by the death or resignation of the present incumbent.

It is said to be otherwise in the British service. Brevets are said to be conferred in that service as original appointments, and without reference to any analogous commission in the line. Thus it is said that in the British service there is no commission higher than that of colonel or lieutenant colonel; the brigadiers, major generals, lieutenant generals, and field marshals, being appointed by brevet only, (as are, it is said, various other subordinate officers in that service,) without any reference to a correspondent rank by commission in the army. All this may be true: and when it shall be shown that the President has precisely the same power over the armies of the United States which the King of Great Britain has over his armies, the British practice will deserve our serious attention. But there is a fundamental difference between these powers: in England, the sole power of raising and regulating fleets and armies belongs to the King; (1 Black. Com. 262;) in the United States this power belongs solely to Congress. Since, then, in Great Britain "the sole supreme government, command, and disposition of the militia, and of all forces by sea and land, and of all ports and places of strength, is, and by the laws of England ever was, the undoubted right of his Majesty and his royal predecessors, kings and queens of England; and that both or either House of Parliament cannot nor ought to pretend to the same:" (to use the words of the statute 13 Car. II, c. 6,) it is manifest that the whole organization is exclusively in the hands of the King; and that he may create whatever military officers it may please him to create, and by whatever commissions, brevets, or letters patent or close, his judgment or caprice may suggest.

But in this country, Congress alone has the power "to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and

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naval forces.” The power to raise armies, is a power to decide the *quantum* of the army that shall be raised; that is to say, how many officers and privates, and of what grades the officers shall be—a power which Congress has uniformly exercised. Even the government and regulation of the army belong constitutionally, as we see, to Congress; and the President possesses only derivative powers over this subject. The power, then, being given solely to Congress to raise the army, to mould and modify it at their pleasure, to say what officers of what grades there shall be in the army—they alone are the creators of what I have called real or commission rank. To the President they have assigned the power of confirming *brevet* rank—rank by *brevet*, in contradistinction to rank by commission; the brevet rank being in every instance, as I conceive, the mere type or symbol of the commission rank; and, consequently, the representative rank existing in no case except where there is a principal or constituent rank which it may represent. It was from this view of the subject that I supposed, that when Congress had, by the act of 3d March, 1817, annihilated the office and rank of major in the marine corps, the President could not restore it by brevet. The power which they gave him to confer brevet rank, presupposes the existence of *the rank*, emphatically—that is to say, the rank by commission; it is a power limited to the organization which they have created; a power to confer the type of what they had previously given the prototype. If the power be not thus limited to the demarcation of rank, as prescribed by Congress, I do not see what is to affix any limit to this power of conferring brevet rank, nor why the President may not, if he choose, confer by brevet the rank of lieutenant general or field marshal. It would be no answer to say that no such rank was ever known to our armies; because, according to this hypothesis, it is not necessary to brevet rank that there should be any analogous rank by commission in the army.

Again: Congress has said that there shall be no such rank as major in the peace establishment of the marine corps: that is to say, in effect, that they will pay no such officer the former allowance of major. Let us suppose the President to confer

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the brevet rank of major in the marine corps on Captain Wainwright to-day, and to order him to-morrow with a detachment of marines to occupy Fort Washington, and take the command of it. The third section of the act of 16th April, 1814, which authorizes the President to confer this rank, declares that the brevetted officer shall receive the pay of his brevet rank when commanding separate stations or detachments: what would become of the congressional declaration virtually made by the act of the 3d March, 1817, that they would no longer allow pay to major of marines? Would not the President have so far counteracted the power and authority of Congress, and *quoad hoc* changed the peace establishment? These are the views which induce me to think that the President cannot confer the brevet rank of major *in the marine corps*.

Still, Captain Wainwright is, by the act of 16th April, 1814, entitled to brevet promotion: how can he be promoted *in that corps*, but by giving him the brevet of a lieutenant colonel? But this, it is said, will be to give him two steps instead of one. Not so: on the present organization of that corps, there is but one step from the post of captain to that of lieutenant colonel; the former intermediate step of major having been abolished by Congress: it being in the power of Congress to modify the army at pleasure, they may give it any form they please. 'They may have, if they choose, only three grades in the army; making the captain the first grade, the colonel the second, and the general the third. Thus, in the present instance, they have exercised their power by abolishing the intermediate grade of major, and making the lieutenant-colonelcy the proximate grade to the captaincy. And who shall gainsay them? Suppose the promotion was by commission, instead of brevet: must not the captain step at once from the post of captain to that of lieutenant colonel? and would not all the inconveniences follow which are urged against this promotion by brevet? Still it is said that, by this course, Captain Wainwright will step over the heads of those who had been brevetted as majors under the act of 1814, and while the corps was yet on the war establishment. The answer is, that this is the effect of the law, which the President must execute as it stands, and not as he would

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wish it. Besides, what should hinder him from advancing the brevet majors in that corps to the rank of lieutenant-colonel also?

But it is again objected, that this would be unjust towards the rest of the army, because those brevetted lieutenant-colonels, when the marine corps comes to be united with any part of the army (proper) for service, will take the command of majors, who have been much longer in the service, and are perhaps better entitled to promotion. The answer is, again, that this is the effect of the law, which the President must execute as it stands, without being at all responsible for consequences.

At the same time, I admit this inconvenience; and, if a legal remedy can be found for it, I think it ought to be adopted. In looking to the opinions of the military gentlemen, I find that they are not entirely in harmony with each other. Colonel Drayton thinks, with me, that the promotion, *if to be made in the marine corps*, must be to the grade of lieutenant-colonel, which, under the law as it stands, is the proximate grade to that of captain. The other gentlemen think that the brevet should be for the rank of major; because they say that, although there is no such rank *in that corps*, the brevet will not take effect *in that corps*, but only when that corps is called to do service in unison with other corps of the army. Then why should the brevet be as major *in that corps*? I see no objections to the President's giving Captain Wainwright the brevet of major in the army of the United States, because there is such a *commission rank* as major *in the army of the United States*; and all the objections I have urged against a brevet as major *in the marine corps*, would be inapplicable to such a brevet *in the army of the United States*; and as, according to these military gentlemen, the brevet is only to take effect when that corps is united in service with the army, or a portion of it, I should suppose it would answer every purpose to Captain Wainwright, without being open, so far as I can discern, to any objection. One military gentleman of great experience, with whom I have conversed on the subject, seems to think a brevet *as major in the army of the United States* free from all objection. The major general of the army of the United States is here, and is certainly much more competent to decide on this

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subject than I can presume to be. I observe that he is among those who recommend the brevet rank of major for Captain Wainwright. He does not say the brevet rank of major *in the marine corps*; I should rather suppose he meant that of major *in the army of the United States*, from the reasons which he assigns, to wit: that, although the grade does not exist in the marine corps, it exists in all kindred establishments of which the organization is full. This is a very good reason for conferring the brevet rank *in those kindred establishments*, but is certainly none for conferring it in the marine corps.

I possibly look at this subject with too much of the strict technicality of a lawyer. It is my opinion, however, that the only *brevet rank of major* which the President can safely confer under the law, as it stands, is that of major *in the army of the United States*. There may be objections to this course, which, for the want of practical military knowledge, I may not see. This knowledge, however, is easily commanded here, and there will be no hazard of error from this defect. If this rank cannot be conferred, then my opinion is that Captain Wainwright should be brevetted as a lieutenant colonel in the marine corps, be the consequences what they may.

I have the honor, &c.,

WM. WIRT.

To the SECRETARY OF THE NAVY.

RATES OF SALVAGE.

The rate of salvage to which recaptors of an American vessel from pirates are entitled, is governed by the act of Congress of 3d March, 1800, giving, where the vessel shall have been sent forth and armed as a vessel of war, one-half of the vessel, but only one-sixth of the cargo. (See case of the *Adeline*, 9th Cranch, 267; *Wheaton on Captures*, 237; 1 Cranch, 28.) The only general rule that can be suggested is one-sixth, and half of the vessel, if she shall have been armed after her capture.

If the recaptured vessel had been long in the hands of pirates, and had been used as their own, a higher salvage ought to be allowed than if she were recaptured in the moment of her capture, having just struck, and her crew still in a capacity to make resistance.

OFFICE OF THE ATTORNEY GENERAL,

December 9, 1822.

SIR: I understand your letter of the 6th instant (received on the night of the 7th—Saturday night) to relate to recaptures

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from pirates; and the instructions you are about to give our armed vessels, to relate to the *quantum* of salvage which they may demand from vessels recaptured from pirates, so as to save the delay and expense of bringing in such recaptured vessels, to have the rate of salvage judicially settled. You are certainly right in the opinion that salvage may be rightfully demanded for recapture from pirates. In the case of *Talbot vs. Seeman*, (1 Cranch, 28,) the Chief Justice, delivering the opinion of the Supreme Court, says: "Salvage is a compensation for actual service rendered to the property charged with it. *It is demandable of right for vessels saved from pirates, or from the enemy.*" (See also Wheaton on Captures, 237, sections 10 and 11; and the references cited in note *m*.)

With regard to the rate of salvage, it would be no ground of complaint, either to our own or foreign merchantmen, to consider it as governed by the act of Congress of 3d March, 1800; because this act seems to look to property captured in a regular course of war among civilized nations, and, therefore, not in such desperate peril of ultimate loss as when in the hands of lawless pirates. That the *quantum* of salvage is affected by this consideration, by the regulations of other nations, will be seen by reference to the above-cited page *et seq.* of Wheaton on Captures. Looking to this act, therefore, as giving the most moderate standard of salvage, it is—

1. As to American vessels recaptured by our public armed ships, one-eighth part of the vessel and cargo; or, where the vessel shall have been sent forth and armed as a vessel of war, one-half of the vessel, but still only one-sixth of the cargo:—adjudged in the case of the *Adeline*, 9th Cranch, 287.

2. As to vessels and goods of other persons resident within the territory, and under the protection, of any foreign prince, government, or state in amity with the United States, the rate of salvage given by the act is "such proportion of the true value of the vessel or goods so to be restored, as by the law or usage of such prince, government, or state, &c., shall be required on the restitution of any vessel or goods of a citizen of the United States, under like circumstances of recapture made by the authority of such foreign prince, government, or state; and where no such law or usage shall be known, the

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same salvage shall be allowed as is provided by the first section of this act"—that is, one-eighth (as stated under 1st head) where the recapture is by a public armed ship; one sixth, where by a privateer of the United States.

If this principle of retribution were strictly applied, it would, with regard to some nations, go to the entire confiscation or appropriation to the captor of the whole subject rescued from the pirates. Such was the law of Venice and of Holland, and is understood to be still the law of Spain. (Grotius, lib. 3, c. 9, §§ 16 and 19, with the notes of Barbeyrac; see also 2 Valin. lib. 3, tit. 9, *Des Prises*, art. 9; and Wheaton on Captures, 237.) But until some nation shall have first applied this rule of total confiscation to American property rescued from pirates, it would not comport with our character, nor the spirit of the act just quoted, to commence so discourteous a proceeding.

Instead, then, of applying to this case the rules of foreign nations as they bore on property rescued from pirates, let us examine the rates of salvage allowed by them in recaptures made in a course of regular war among civilized nations, and see whether we can find in them a satisfactory standard.

1. France allows one-third of vessel and cargo; and applies this rule to recaptures of vessels and effects of her allies—(2 Valin. lib. 3, tit. 9, *Des Prises*, art. 8; Wheaton on Captures, 244.) She allows the same on recaptures from pirates.—(Wheaton, 297; 2 Valin. lib. 3, tit. 9, *Des Prises*, art. 9.)

2. Wheaton says the law is the same as to Spain; he does not cite his authority, and I am not in possession of the ordinances of Spain on this subject.—(Wheaton, 245-'6.)

3. By the Portuguese ordinance of May, 1797, the rate of salvage on recaptures was established for ships-of-war at one-eighth, and one-fifth for privateers.—(Wheaton, 246.) The ordinance is not in my possession; and I suspect that it was a mere regulation as to recaptures of Portuguese merchantmen by Portuguese ships-of-war and Portuguese privateers: a domestic regulation merely, and therefore no proof of the standard they would adopt with regard to salvage to be paid by a foreign ship rescued by them from enemies.

4. Denmark gives one-half on the recapture of a Danish ship, if she has not been twenty-four hours in the enemy's

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possession; if she has been twenty-four hours in the enemy's possession, the recaptor takes the whole.—(Wheaton, 246.)

5. By the Swedish ordinance of 1767, the recaptor takes two-thirds, and one-third only is restored to the owners, without regard to the time the property has been in possession of the enemy.—(Wheaton, 246.)

6. Great Britain has no fixed rule as to the quantum of salvage on a foreign vessel. Her statutes (33 George III, c. 66, and 45 George III, c. 72) provide merely for recaptures of British ships and cargoes by British national ships or British privateers. With regard to foreign ships, she acts upon the strict rule of retaliation, not only with regard to the rate of salvage, but the rule of the *jus postliminii* itself; applying the rule of total divestment of property by a mere capture to those nations which hold that rule, or the rule of permutation; and twenty-four hours, or that of *infra præsidia*, or that of bringing in and condemnation, according to the practice of the nation on whose vessels she is adjudicating. There being, then, no fixed rule in Great Britain as to the proportion which could be required for the salvage of an American ship and cargo recaptured from an enemy, our act directs that, in this case, the same salvage shall be allowed as is provided by the first section of our act. But the first section makes a difference of salvage when the recapture is made by a national ship, and when made by a privateer; giving only one-eighth in the former case and one-sixth in the latter. Why this distinction? Does it not turn on a reason which is inapplicable to a foreigner? i. e., the American citizen has contributed to the national fund from which the national ship is equipped; he is therefore to pay less for services performed by such a ship, than when rendered by a private armed ship, towards the equipment of which he has contributed nothing. Now, the last being the predicament of a British ship, whether rescued by a national or private armed ship of the United States, it would seem to me more correct, on this general reference to the first section, to take that standard of the two whose reason is applicable to the British ship—to wit, the one sixth. There have been regulations by treaty on this subject between the United States and some of the European powers; but these treaties looked distinctly to cases

Rates of Salvage.

in which the contracting parties were at war with the same civilized enemy; and being no longer in force, it would be improper to act on the discrimination which they introduced. (See the references to those treaties at the end of the act of 3d March, 1800, before referred to.)

On this review, it appears, that whether we look to the usage of nations with regard to rescue from pirates, or to recapture from a lawful enemy, the rate of salvage is different as allowed by different nations. Nor does it appear to me that our information with regard to their respective usages is sufficiently certain and precise to enable us to adjust our retaliatory instructions to our cruisers towards those nations respectively. If we could, through the ministers of the foreign nations resident among us, learn with accuracy and certainty what salvage would be demanded by them of an American vessel saved from pirates, we should be relieved from all embarrassment, because our act of Congress authorizes the adoption of the same standard towards them. If their usage be not known, we are authorized by the act to apply to them the same rule as is provided by its first section—that is, one-sixth of vessel and cargo; except where the vessel has been, since her capture, fitted out as a vessel of war, and is recaptured in this condition; in which, one-half of the vessel and her armament, and one-sixth of her cargo, is allowed for salvage. If our cruisers would be content with this allowance, they might safely claim it, and, on refusal, send in the vessel for adjudication. But I think that a court would allow more. The courts of Great Britain, in cases of derelict, have allowed one-half; and a vessel captured by pirates (in which case the original crew, if they could, would be very glad to make her derelict, so far as they are concerned) seems to me to be in quite as desperate a condition. How far our courts would go in the allowance of salvage in such a case, it is impossible to divine: perhaps no general rule would apply to every case; each case might depend on its own peculiar circumstances. If the original crew had been entirely separated from their vessel by the pirates, so as to preclude the moral possibility of recapture, higher salvage might be allowed than if they were on board at the time of the recapture: so if they were on board, but in chains, higher

Offsets at the Treasury.

salvage might be allowed than if they were at large on the deck of the vessel, in a condition to contribute, and perhaps actually contributing, to the recapture; or assisting in the subsequent defence, protection, or navigation of the vessel into a safe port. So if the captured vessel had been long in the hands of the pirates, and used as their own, a higher salvage might, and probably would, be allowed, than if she was recaptured in the moment of her capture, having just struck, and her crew still in a capacity to make resistance. It is not possible to devise any general rule applicable to this variety of cases, nor any set of rules, aimed at a discrimination among them, which we can be sure that our courts would confirm. The only general rule which I can suggest as safe under all circumstances, is that of the sixth, which I have before mentioned, and half of the vessel if she has been armed since her capture. I think that there cannot be a case of the piratical capture of a foreign vessel in which a court would not at least make this allowance on recapture. This, therefore, may be safely recommended, not only under the authority of our act, but because the sixth is the usual allowance of military salvage, under the general law of nations, as practised in our own and the British courts, where the case is marked with no extraordinary circumstances of difficulty or danger. Our courts, I presume, would therefore make at least this allowance in every case of recapture from pirates. I understand that there has been a case of salvage allowed, by the court of the United States for the district of South Carolina, on a case of recapture from pirates. What that allowance was, I am not informed; if you can learn it, it will be, perhaps, safer to assume in your instructions that standard, than the one which I have recommended.

Yours, respectfully,

WM. WIRT.

To the SECRETARY OF THE NAVY.

OFFSETS AT THE TREASURY.

The accounting officers will not be justified in admitting as an offset to an amount due from an individual on a contract with the Navy Department, an amount found due to such individual by a jury in Kentucky. The finding of the jury is not *per se* such an establishment of a claim against the United States as to justify accounting officers in admitting it as a set-off.

Offsets at the Treasury.

To allow a set-off is in effect to make payment of the claim set up against a debt due the United States; and unless the accounting officers would be justified in paying it as a separate and independent claim, they cannot properly allow it as a set-off.

OFFICE OF THE ATTORNEY GENERAL,

January, 1823.

SIR: In the cases of the United States against James Johnson, and against Ward & Johnson, in Kentucky, it is stated that verdicts have, in both cases, been found for the defendants; and in the former case, that the jury have found, specially, that there is a balance due the defendant of upwards of \$13,000. This balance, thus found, Mr. Johnson offers as a set-off against a claim of about \$17,000 due from him on a contract with the Navy Department; and the question which you propound for my opinion is, whether the accounting officers of the government would be justified in admitting this offset, on the ground of this finding merely.

Before I answer the question, it is proper to state, that, on inquiry of the agent of the Treasury Department for the letter of Mr. Bibb, referred to in Colonel Johnson's statement, and for any other information which he might possess on the subject, I find that the agent is not disposed to acquiesce in the decisions in these cases, but has directed the district attorney to carry the cases up to the Supreme Court, if, in the instructions of the court to the jury, or any other part of the proceeding, there is ground for a writ of error.

This letter was written in November, as you will see by the copy enclosed; and the answer has not yet been received. In this posture of things, it would be improper to interfere with the proceedings of the officer appointed by law to superintend the collection of debts due to the United States, even if the set-off were in other respects admissible.

But I am of the opinion that it is not admissible, considering it merely as the finding of a jury in behalf of the defendant. The claims themselves, on which this finding rests, may be legal claims; and I might so pronounce, if the claims themselves were submitted for my opinion. But they are not submitted; and I am called on to say whether the finding of the jury, *per se*, establishes this claim against the United States in

Offsets at the Treasury.

such a manner as to justify the accounting officers in admitting it as a set-off.

Allowing a set-off is, in effect, making a payment; and if the accounting officers would be justified in allowing this claim as a set-off against the debt due from Mr. Johnson to the government, they would be equally justified in allowing and paying it as a separate and independent claim, if there were no debt against which it might be applied as a set-off. The question, then, is, whether this finding of the jury establishes the debt in such a manner as to constitute a *legal claim* on the government—since it is only legal claims that our officers would stand justified in admitting and paying; and my opinion is, that this finding of the jury for the defendant, so far as it affects to give him a claim on the United States, the plaintiffs in the cause, is, in legal contemplation, a mere nullity. I am not unapprized of the local law of Kentucky on this subject, passed (I think) in the year 1796; but I am very sure that it does not operate on this case: not only because the United States are the plaintiffs, but because that law itself has never been incorporated with the laws of the United States, and is not the law of the courts of the United States; and, under the general law, such a finding is a wild anomaly.

It is alleged that it will be in vain to refuse this set-off; because, if the government should sue Mr. Johnson on the contract with the Navy Department, he will be allowed this set-off on the trial of that cause. This, I think, is a mistake. No federal court acting under the laws of the United States would permit that mere finding of a jury to go to another jury as evidence of a debt; or if they should, the Supreme Court would certainly reverse the judgment for error. The defendant will have to prove his claims anew in the action founded on the navy contract, and could not rest on the former verdict in his favor. And what a court of law could not admit as evidence of a set-off, I apprehend that the officers of the government, as strictly controlled by the law as courts, could not admit.

I have the honor, &c., &c.,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

 Security for a Debt not a Payment.

FURLOUGHES TO NAVAL OFFICERS.

A furlough granted to a sailing-master, on condition that he should relinquish from that date his pay and emoluments as a naval officer, until further orders, is absolute; the condition being void in law.

OFFICE OF THE ATTORNEY GENERAL,

January 22, 1823.

SIR: The act of Congress of the 21st of April, 1806, "in addition to an act entitled 'An act supplementary to the act providing for a naval peace establishment,' &c.," contemplates only two conditions in which the officers of the navy can be placed—that is to say, under orders on full pay, and not under orders on half-pay. It is not in the power of the Secretary of the Navy, in my opinion, to create a third state of things in relation to any officer who was not *in delicto*. I am, therefore, of opinion that the furlough granted by the Secretary of the Navy to John Drew, sailing-master in the navy of the United States, on the 18th of April, 1815, until further orders, "on condition that he should relinquish from that date his pay and emoluments as a naval officer, until further orders," must be considered as an absolute furlough, the condition being void in law. If there has been any long-established usage in the department, reaching so far back, and having been so continued and uniform as to have created a kind of common law in support of such furlough, I would, notwithstanding my confidence in the construction which I have given the law, yield it to such usage. The furlough is returned.

I have, &c.,

WM. WIRT.

To the SECRETARY OF THE NAVY.

 SECURITY FOR A DEBT NOT A PAYMENT.

The Fourth Auditor is not authorized to consider security offered for a debt, however ample it may be, a payment of a debt due the government.

OFFICE OF THE ATTORNEY GENERAL,

January 24, 1823.

SIR: Security for debt is certainly not a payment of it; and therefore the Fourth Auditor would not be authorized to con-

Duties of Ship-Masters concerning Seamen.

sider the security offered by General Swartwout, however ample you may deem it, as a payment of the balance due from him to the government, and on this ground to balance the accounts.

As this is the single question which you present to me, it would be officious to suggest anything beyond it.

I have, therefore, the honor to remain, sir, with great respect, yours, &c.,

WM. WIRT.

To the SECRETARY OF THE NAVY.

LEASES OF THE LEAD MINES.

The President has unrestricted power to lease the lead mines, on such conditions as he may think proper, for any term not exceeding three years, provided the leases be not inconsistent with existing laws.

OFFICE OF THE ATTORNEY GENERAL.

SIR: I entertain no doubt that the President of the United States has power to make leases of lead mines, under the authority of the act of the 3d March, 1807, without restriction as to persons, for any term not exceeding three years, and on such conditions as he may think proper, provided they be not inconsistent with existing laws. This is, I think, the only tenable construction of the second section of that act.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF WAR.

DUTY OF SHIP-MASTERS CONCERNING SEAMEN.

Seamen left behind in a foreign country on account of inability, from sickness, to return in the vessel in which they went out, are within the provisions of the act of 28th February, 1803, supplementary to the act concerning consuls, and for them the master should deposit with the consul three months' pay over wages, &c., as in other cases of voluntary discharge.

OFFICE OF THE ATTORNEY GENERAL,

February 18, 1823.

SIR: The 3d section of the act of the 28th February, 1803, "supplementary to the 'act concerning consuls,'" &c., directs

Distribution of Salvage for Recaptures from Pirates.

that when a seaman or mariner, a citizen of the United States, shall, with his own consent, be discharged in a foreign country, it shall be the duty of the master or commander of the vessel to produce to the consul the list of his ship's company, certified as before directed; and to pay to such consul, for every such seaman or mariner, three months' pay, over and above the wages which may then be due to such seaman or mariner. The doubt expressed by Mr. Maury, our consul at Liverpool, is, whether this provision applies to seamen left behind in a foreign country, as being too sick to return in the vessel in which they went out. But the act applies to all seamen discharged with their own consent in a foreign country, without distinction, and without any reference to the cause of the discharge. Seamen who are too sick to return in the vessel which carried them out, and are therefore left behind in a foreign country, are, I presume, discharged with their own consent in such foreign country; and as they are, therefore, within the description of the law, I see no satisfactory reason for excepting them from its provisions.

Mr. Maury's letter is returned.

I have the honor, &c., &c.,

WM. WIRT'.

To the SECRETARY OF STATE.

DISTRIBUTION OF SALVAGE FOR RECAPTURES FROM PIRATES.

The 4th section of the act of 3d March, 1800, refers to the prize law for the proportion of the salvage which the officers and crew shall take in a given case, as well as for the mode in which the share, so taken by them, shall be distributed.

The rules for the distribution of prize-money are: That the whole of the prize belongs to the captors, when the vessel captured is of equal or superior force to the vessel making the capture; and when of inferior force, the prize is directed to be divided equally between the United States and the officers and men making the capture. (See 5th and 6th sections of the act of 23d April, 1800.)

OFFICE OF THE ATTORNEY GENERAL,

February 20, 1823.

SIR: I have, according to your desire, perused the opinion you have enclosed me, with regard to the distribution of salvage for property recaptured from pirates. The Supreme Court is now in session, and my duties in that court allow me no time

Distribution of Salvage for Recaptures from Pirates.

for extended discussion on subjects on which I have heretofore expressed an official opinion. I shall therefore only here repeat, that there is no act of Congress known to me which applies directly and expressly to this subject of property recaptured from pirates. I did consider the act of the 3d March, 1800, as applying analogically; and I did consider the 4th section of that act as having adopted the same rules of distribution for salvage which had been, or might be, provided by law for the distribution of prize money. These rules of distribution are found in the 5th and 6th sections of the act of the 23d April, 1800, by which the whole of the prize is given to the captors when the vessel captured is of equal or superior force to the vessel making the capture; and when of inferior force, the prize is directed to be divided equally between the United States and the officers and men making the capture; the moiety, which in this case is to go to the United States, being by the 9th section of the act devoted still to the service of the navy—to wit, to the navy pension fund. All the general considerations which would tend to prohibit the United States from claiming a portion of the salvage for the use of the navy pension fund, tend equally to forbid them from touching any portion of the prizes won by the gallantry of her sailors. Incentives to gallantry are as much necessary to urge our mariners to make prizes as to earn salvage. The former is generally rather the more hazardous enterprise of the two; and therefore requires, one would suppose, rather the stronger stimulus of the two. I presume that the ground on which the United States withdraw from the captors one half of the prize where the captured vessel is of inferior force, is, that the capturing vessel, with her armament, is the property of the United States; and so far as pecuniary means are concerned, that the capture has been made at the sole expense of the United States. The same consideration precisely applies to the case of salvage; and if there be a want of magnanimity in making the claim in one case, there is the same want in the other; with this difference—that where an armed vessel prize has been carried by the bravery of our mariners, there would seem to be a greater want of magnanimity in depriving them of any portion of their prize, than where an unarmed merchantman has been cheaply retaken, to claim a

Duties of Accounting Officers.

portion of the salvage. But, in truth, there is no want of magnanimity in either case; since, in both, the portion claimed by the United States does not go into her treasury for the general purposes of the government, but is exclusively devoted to the navy pension fund that is to support the separate establishment to which the captors belong.

This, so far as I am informed, is a new question. If there has been any practice to settle it the one way or the other, I would abide by that practice; for the question is not only new, but difficult. It is one of those questions in which opposite opinions may be held, and probably would be held, by enlightened judges on the bench. It seems to me that the 4th section of the act of 3d March, 1800, may be fairly expounded as referring to the prize law for the *proportion* of the salvage which the officers and crew shall take in a given case, as well as for the mode in which the share so taken by them shall be distributed. On the other hand, the opinion submitted for my perusal interprets that section as giving the whole of the salvage to the officers and crew in every case, and as referring to the prize law only for the distribution. There is great plausibility in this construction. Looking, however, to the reason and policy of the law, as well as to its language, I cannot change the opinion I have already expressed. The opposite opinion is, I admit, the more generous of the two; and the arguments which support it are of such a nature that you might adopt it without censure. It is one of those cases in which a judgment either way cannot be pronounced absolutely wrong. But I beg leave to submit it to you, as Congress is now in session, whether it would not be better to clear the subject of all difficulty by an explanatory act: a very short one would do it, and might, I should presume, be easily carried through both houses.

I remain, sir, &c.,

WM. WIRT.

To the SECRETARY OF THE NAVY.

DUTIES OF ACCOUNTING OFFICERS.

The accounting officers have the right to adopt the report of a committee of Congress upon which a given law was reported and passed, for the principles which are to govern in the settlement of accounts under the law. The passage of a bill, accompanying a written report, may be considered the adoption of that report.

Duties of Accounting Officers.

The accounting officers may also receive depositions taken on notice, as proof of the items of an account.

The accounts of the Vice President should be settled on principles of equity and good conscience, subject to the revision and final decision of the President.

The accounting officers *must* act upon the accounts in the first instance. They *must* pass upon them, so that there shall be decisions to be approved or disapproved by the President, whose power is only appellate in its nature, to be exercised after the accounting officers shall have exercised their prerogatives in the matter.

The report of a committee accompanying a bill which has passed into a law, may be referred to as well by the President whilst exercising his revising power, as by the accounting officers in their examination of the accounts submitted, for the principles to govern settlements under such law.

OFFICE OF THE ATTORNEY GENERAL,

March 7, 1823.

SIR: On the questions which you have just done me the honor to submit for my opinion, on the case of the Vice President, accompanied by the report of the select committee in that case, and the law which accompanied that report in the form of a bill, (and which passed into a law, I understand, without any amendment to the bill as reported by the committee,) I am respectfully of the opinion—

1. That the accounting officers, in settling the accounts and claims of the Vice President, have a right to adopt the report of the committee, as establishing the principles which are to govern them in the examination and settlement thereof; for I consider the bill which accompanied the report as part of that report, and the passage of the bill into a law as a virtual adoption of the report, of which it was a mere consequence.

2. I perceive no objection to the accounting officers receiving depositions in evidence of the several *items* of the account; the depositions being taken on notice, and with some skilful agent attending on the part of the United States; and, consequently, I perceive no objection to their making previous arrangements with the Vice President to this effect.

3. The law authorizes the proper accounting officer of the treasury to adjust and settle these accounts on principles of equity and good conscience, subject to the *revision* and *final decision* of the President. My opinion, therefore, is, that the accounting officers *must* act on the subject in the first instance; the power of the President being merely in the nature of appel-

Duties of Accounting Officers.

late power; and that, consequently, he cannot, in the regular execution of the law, put those officers aside, and take the whole subject at once into his own hands.

4. I do not think that it would be proper, on the part of the President, in the exercise of his revising power, to reject the principles established by the report of the committee, and to adopt others in conflict with them. Considering the report, as I do, in the light of a preamble to the law, I think that its principles ought to be respected so far as they go; where they stop short of decision on any question that may arise, the President, I conceive, is entirely at liberty to adopt his own principles of decision.

I have the honor to remain, &c., &c.,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

DUTIES OF ACCOUNTING OFFICERS.

Accounting officers may re-examine any case where judgment has been rendered by a court and jury before the passage of the act of 1st March, 1822, where the defendant, against whom the judgment has been rendered, has any solid ground on which to ask a court of law for a new trial.

Where it shall appear to an accounting officer that there is newly-discovered evidence, of which the defendant was wholly and innocently ignorant at the time of the trial, and which, if he had had the benefit of it, would probably have produced a different result, and that it is such as may be given in courts of justice, he may open the matter and give the party the benefit of it.

But accounting officers are to re-examine and admit no claims under said act where suits have been commenced, unless where new evidence is adduced other than that of the party interested.

OFFICE OF THE ATTORNEY GENERAL,

March 20, 1823.

SIR: The questions propounded for my opinion on the act of the 1st March last, in addition to the act, &c., for the prompt settlement of public accounts, are these:

1. "Whether the accounting officers of the Treasury Department are to re-examine any case where judgment has been rendered by a court and jury before the passage of said act?"

2. "Whether they are to re-examine and admit any claims under said act, where suits have been commenced, *unless*

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where new evidence is adduced other than that of the party interested?"

The act which we are to construe having been made to remove some inconvenience in the existing state of things, it is important to ascertain what this inconvenience was, in order to a correct understanding of the law which is intended to remove it; and, on inquiry, I find that, under the 9th section of the act of May 8, 1792, "making alterations in the Treasury and War Departments," which enacts "that the forms of keeping and rendering all public accounts whatsoever shall be prescribed by the Department of the Treasury," regulations so strict and rigid had been prescribed, and had grown into settled practice, that the accounting officers did not feel themselves authorized to admit secondary proof, even in those cases in which courts of law, from the loss of the primary proof, would admit it: and hence it was no unusual thing for a person found a debtor by the rules of evidence which governed the accounting officers, to request that he might be sued for the supposed balance, in order that he might have the benefit of the more liberal rules of evidence which prevail in courts of law. It was to avoid the delay, trouble, expense, and anxiety arising from suits instituted for this cause, that this law was passed; and its purpose was, simply, to give the individual the benefit of the same rules of evidence before the accounting officers, which he would have if a suit was instituted against him in a court of law for the recovery of the alleged balance: hence the provision in the 1st section, that where the impracticability of producing regular vouchers shall be proved to the satisfaction of the accounting officers, those officers shall receive, in lieu thereof, the best evidence of which the nature of the several cases shall admit, provided the evidence so offered be *such as would be received in courts of justice*. Hence, also, the words which close the 2d section of the law, relative to the annual report to be made to Congress by the Secretary of War, of accounts settled under this law, in which credits have been allowed upon evidence other than such as had been prescribed by the *laws* and *regulations* existing before the passage of this act.

With this leading fact in view, that the act was intended to

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remedy the mischief of a resort to a court of justice, by establishing for the accounting officers the same rules of evidence which govern those courts, there is no difficulty in answering your questions.

1st. Where the party has already had the benefit of those rules of evidence which prevail in courts of justice, and a verdict has been found, and a judgment rendered against him under those rules of evidence, the act is not applicable to his case. The verdict and judgment are as conclusive on the accounting officers, as on the court in which they were rendered; but not more conclusive: that is to say, that if the defendant has any solid ground on which to ask the court of law for a new trial, the verdict and judgment ought not to be held conclusive upon him. For example: if there be newly discovered evidence, of which the defendant was wholly and innocently ignorant at the time of the trial, and which, if he had had the benefit of it, would probably have produced a different result, I think that the accounting officers, being satisfied of these facts, and that the evidence is such as would be received in a court of justice, may allow the party the benefit of it, notwithstanding the verdict and judgment; and that it would not be necessary to send the party back either to a court of law or to a court of equity to ask for a new trial. In reference, however, to the particular case out of which the question grows, (as I discover by the documents accompanying the questions,) neither a court of law nor a court of equity would ever grant a new trial for the purpose of letting in the oath of this defendant himself as evidence in his own cause, because that oath is not such evidence as would be received in a court of justice.

It had been supposed, I understand, that this act makes the accounting officers chancellors, with all the power of relief which belongs to a court of equity. The history of the act, as I have received it, and given it above, would suffice to refute this construction. The express words of the act, too, enlarge the power of the accounting officers in no particular except in the admission of secondary evidence—and this, too, under the restriction that the proof so admitted shall be such as would be received in a court of justice.

It is alleged that the oath of the party is admissible in his

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own favor, *in matters of account*, both in courts of law and in courts of equity; in the former, in the action to account, before the auditors; in the latter, as I understand the argument, both as to facts sworn to in the defendant's answer, and in the support of items on an account directed before a master commissioner.

But, in the first place, if the purpose of the act was, in truth, merely to avoid the necessity of resorting to an action to recover balances due or alleged to be due to the United States, and to give the defendant the benefit of all the evidence which would be admissible on the trial of such action, then he can ask the accountants for nothing more than to admit such evidence as would be admitted by the courts on the trial of such action; and as his own oath would not be admitted on the trial of such action, the accountants have no authority to admit it under this act.

In the next place, even if it were necessary for the United States to go into a court of equity, charging the defendant with the sums advanced to him, and calling upon him to account, (for which there is no necessity,) the defendant could not discharge himself of the claim by his answer, on oath, alleging that he had disbursed it; but, being matter in avoidance, would be compelled to prove the disbursement by other evidence.

With regard to the party's right to discharge himself by his own oath, either in the old action to account at common law, or on a settlement before a commissioner in chancery, the rule to which the argument is supposed to allude is a very narrow one, and the affidavits offered by Captain Staniford are totally inapplicable to it. The rule is this: that an accountant shall be allowed all sums under forty shillings on his oath; but then he must mention in his affidavit *to whom paid*, and *for what*, and *when*: and, in chancery, at least, it is said that the whole sum so allowed is not to exceed £100. But, in this case, Captain Staniford proposes to discharge himself of an aggregate sum of upwards of seven thousand dollars, *by his own oath alone, without any detail of particulars, much less of any such specifications as the rule requires, even as to the small sums it suffers to pass on such oath*—to wit, the specifications

 Colored Troops entitled to Bounty Lands.

as to *whom paid*, and *for what*, and *when*. I believe that no court of justice, whether of law or equity, has ever allowed such a sum to be discharged by such evidence; and if the public debtors of the United States have a right to demand their discharge on such evidence, there can be no further use for accounting officers, much less for an agent and attorneys to collect alleged arrears due to the United States. The act, so construed, would amount to a virtual abolition of all such balances; for, though the character of Captain Staniford stands too high to admit the suspicion that he would make any statement, either with or without an oath, which he did not conscientiously believe to be true, yet the rule, if adopted at all, must be a general one; and there is no reason to doubt that, between innocent mistakes and intentional misstatements, every balance standing on the books of the United States against individuals would be sworn away. This, it is believed, could never have been the intention of Congress; and it is equally clear that it is not their language.

2d. I answer the second question in the negative. I do not think, however, that the fact of suits having been commenced is any bar to the resettlement of accounts on evidence admissible under this act; for such settlement may ascertain that there is no balance due to the United States, and, consequently, render the farther prosecution of such suit unnecessary.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF WAR.

 COLORED TROOPS ENTITLED TO BOUNTY LANDS.

Since the acts of Congress under which troops were raised in the late war were construed so as to permit of the enlistment of colored men; and since recruiting officers recruited them on a contract for the pay and bounty stipulated by law; and as the officers of government recognised them as a part of the army, (receiving pay and rations with other troops,) a *practical* construction has been given to those acts which entitles the colored soldiers to the promised lands.

OFFICE OF THE ATTORNEY GENERAL,

March 27, 1823.

SIR: Had I been called on, *a priori*, to give a construction to the several acts of Congress which are the subject of Mr.

Colored Troops entitled to Bounty Lands.

Cutting's letters of the 21st May, 1821, and 30th January, 1823; of Major Charles J. Nourse's of the 20th of January, 1823, and Mr. J. W. Murray's of 22d December, 1822, I should have had no hesitation in expressing the opinion that it was not the intention of Congress to incorporate negroes and people of color with the army any more than with the militia of the United States. But the acts of Congress under which this body of people of color are understood to have been raised during the late war, use no other terms of description, as to the recruits, than that they shall be "able bodied, effective" men, (act of 24th December, 1811, for completing the existing military establishment; and act of 11th January, 1812, to raise an additional military force;) or "free, effective, able-bodied men," (act December 10, 1814, making further provision for filling the ranks of the army of the United States.) As either of these descriptions was satisfied by the persons of color in question—as the recruiting officers, who are *quoad hoc* the agents of the United States, recruited these persons on a contract for the pay and bounty stipulated by law—as the officers of government recognised them as a part of the army, by their regular returns of this corps, who received, till the close of the war, the same pay and rations with other troops, were subject to the same military law, and performed the same military services—it seems to me that a practical construction has been given to the law in this particular, from which it is not in the power of the government justly to depart. I think, therefore, that they ought to receive the promised land bounty. But, without some further and more explicit declaration of the purpose of Congress, I would not recommend a repetition of such contracts on any future occasion, or laws worded like those under consideration; by which I mean, not merely the three laws which I have cited, but the whole military system of the United States, militia included.

The papers are returned.

And I remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF WAR.

U. S. Treasurer as Garnishee not subject to Execution.

BREVETS—WHEN TO TAKE EFFECT.

Brevet rank takes effect whenever, by special assignment, the brevet officer is invested with a separate command, comprising troops of different corps, at a particular post.

OFFICE OF THE ATTORNEY GENERAL,

March 27, 1823.

SIR: By the 9th section of the act of April 24, 1816, for organizing the general staff and making further provisions for the army of the United States, it is enacted "that the regulations in force before the reduction of the army be recognised, so far as the same shall be found applicable to the service; subject, however, to such alterations as the Secretary of War may adopt with the approbation of the President." It is understood that the Secretary of War, with the approbation of the President, has adopted the "General Regulations for the Army," published in 1821. These general regulations provide that brevet rank shall take effect when, by special assignment, a brevet officer is invested with a *separate command*, comprising troops of different corps. And a separate command is therein defined to mean, among other things, a particular post. Colonel Fenwick has been assigned, I understand, to the separate command of the post of Pensacola; and was placed in command there, under his brevet, by virtue of these general regulations. The command, it seems to me, was properly conferred on him; and as the same regulations which gave him that command are still in full force, (to all the purposes of rank, at least,) I can see no good reason why his command should not still continue.

The papers are returned.

And I have the honor to remain, sir, your obedient servant,
WM. WIRT.

To the SECRETARY OF WAR.

U. S. TREASURER AS GARNISHEE NOT SUBJECT TO EXECUTION.

The Treasurer of the United States is not subject to execution against his person, goods, nor chattels, nor to any other process, as against a garnishee,

Interest on Allowances.

under the laws of Maryland. Where such process shall have issued, the district attorney may be instructed to move to dismiss it.

OFFICE OF THE ATTORNEY GENERAL,

April 4, 1823.

SIR: I understand from the marshal that the attachment which has been served on the Treasurer of the United States was taken out under the law of Maryland, still in force in this District, which gives the plaintiff in a judgment the option either of an execution against the defendant or his goods, in the usual form, or an attachment against his goods, chattels, and credits, in the plaintiff's own hands, or in the hands of any other person; and, with regard to the latter proceeding, provides, that, unless the garnishee shall appear at the return of the attachment and show cause to the contrary, the court shall condemn the goods, chattels, and credits in his hands, and award execution, either by *capias ad satisfaciendum* against the garnishee's person, or *feri facias* against his own goods and chattels, or any other process which the plaintiff might have had against the defendant himself on the original judgment.

I am of the opinion that the Treasurer is not subject to this process. It would be proper to put the district attorney in full possession of the whole case, that he may move to quash or dismiss the attachment.

I remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

INTEREST ON ALLOWANCES.

The Secretary of the Treasury has no authority to increase an allowance made by the Secretary of the Navy to certain citizens under the act of 25th April, 1822; and it would be an increase of it to give interest on the amount, or to assume it as a debt due at a day antecedent to the allowance.

The allowance becomes a debt due from the United States only from the time it is made.

OFFICE OF THE ATTORNEY GENERAL,

April 7, 1823.

SIR: I am of the opinion that the Secretary of the Treasury has no authority to increase the allowance made by the

Rating of War Ships the Criterion of Pay.

Secretary of the Navy to certain citizens of Baltimore under the act of 26th April, 1822. And it would be an increase of that allowance, either to give interest on the sum so allowed, or (what would be, in effect, the same thing) to assume it as a sum due in 1815, and give it the operation of stopping interest from that time on any debt due from those individuals to the government. The whole adjustment of these claims being confided *exclusively* to the Secretary of the Navy, the amount allowed by him becomes a debt due from the United States *at the time of the allowance*, which no other officer of the government has a right either to augment or to diminish by any process whatever.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

RATING OF WAR SHIPS THE CRITERION OF PAY.

The number of guns at which a ship-of-war is rated is the standard for the regulation of the pay of her officers under the acts of Congress. The number of guns a ship may actually mount is variable, and increases or diminishes with the particular service in which she may be employed.

The act of the 25th February, 1799, does not contemplate the case of a master commandant commanding a vessel of twenty guns; such being required to be under the command of captains.

OFFICE OF THE ATTORNEY GENERAL,

April 10, 1823.

SIR: The act of the 25th February, 1799, does not contemplate the case of a master commandant commanding a vessel of twenty guns. The first section explicitly directs that *all the vessels* in the service of the United States, mounting *twenty guns* and upwards, be commanded by *captains*; those not exceeding eighteen guns, by masters or lieutenants, according to the size of the vessel, to be regulated by the President. The second section, therefore, which fixes the pay of a master commandant at sixty dollars per month and five rations per day, must be taken in connexion with the first section, and must be construed as giving him that pay while in the command of a

Rating of War Ships the Criterion of Pay.

vessel not exceeding eighteen guns. If the death of a superior officer, or the orders of the President, should place him in the command of a twenty-gun ship, he would, in my opinion, be entitled to the pay affixed by the act to the command of such a ship, and must be considered as a captain *pro hac vice*.

But this question must, I apprehend, have been long since settled by practice, as to the command of the *Hornet*. That vessel has been in the service of the United States for many years, and the pay of her commanding officer during this period ought to be regarded as a practical exposition of the act of 1799. I find in the Naval Register for 1820, that the *Hornet* is called a ship of eighteen guns; and as such, I understand, she has been considered and paid for during the last eighteen years.

Captain Read, I find, has anticipated this objection: he says that she does rate as an eighteen-gun ship only; but that she *mounts, in fact, twenty guns*; that the rate of a ship is an arbitrary standard; and that, as the act of Congress used the word *mounting*, the question should be as to the number of guns she *mounts*—not what she *rates*. As this is a technical question, I have thought proper to refer to the Commissioners of the Navy Board for information on it; and I learn from them, that the pay under the act of 1799, not only in regard to the *Hornet*, but all other vessels, has been uniformly regulated by the rate; that, in estimating the force of a ship, *carronades* are not counted as guns; that it is only the number of long guns she carries that fixes her denomination; that, as the *Hornet* carries only two long-guns, she is in strictness only a two-gun vessel. I learn from them, also, that the number of guns a ship may actually mount is extremely variable; her number of guns may be increased for a particular service; but whether increased or reduced, her *rate* has always given the standard of pay. The rate, then, seems to be the most fixed standard of the two.

The register of the navy being reported to Congress, their appropriations can look only to the description given in that register; and it would be a practical imposition on them to exhibit one standard for appropriation, and to assume another for pay. It is further to be considered, that if Captain Read is now to be paid by the number of guns actually mounted in the *Hornet*, in the popular sense of the word *mounted*, those who

Attorney General and District Attorneys.

have previously had the command of her, and have been paid for her as an eighteen-gun sloop, as well as all others in all our other vessels similarly circumstanced, will have a fair claim on the government for the arrears which will be due to them by this new standard.

Upon the whole, I am of opinion that this word *mounting*, in the act of Congress, must be considered as having been settled, by practical construction, to refer to the fixed *rate* of the vessel as the standard of pay and rations; and that Captain Read, in the command of the *Hornet*, must be considered as a master commandant in the command of an eighteen-gun vessel, (the regular command contemplated for a master by the act of 1799,) and be paid accordingly.

I have the honor to remain, sir, respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE NAVY.

ATTORNEY GENERAL AND DISTRICT ATTORNEYS.

It is not the duty of the Attorney General to instruct district attorneys in the discharge of their duties; nor can the Secretary of the Treasury, under his privilege of consulting that officer, properly require him to draw pleas, or to indicate the course to be pursued in particular suits depending in the district and circuit courts.

The Attorney General will give his advice and opinion on questions of law, when requested by the heads of any of the departments, touching any matters that may officially concern their departments, but not on matters that do not. The averment that the particular suits, in which opinions are desired, may come before the Supreme Court, affords no excuse for expressions of opinion by the Attorney General anterior to their coming before it. If it did, it would apply with equal force to every case depending in district and circuit courts throughout the United States.

ATTORNEY GENERAL'S OFFICE,

April 11, 1823.

SIR: I have the honor to acknowledge your letter of this date, submitting for my opinion the papers therein enclosed, and requesting my early attention to the subject.

The papers therein enclosed are—1st. A letter from Mr. Pleasonton, agent of the Treasury, addressed to you, of date the

Attorney General and District Attorneys.

20th ultimo, concerning certain pleas filed in the district court of the United States for the western district of Virginia, in the case of the United States *vs.* Salathiel Curtis and sureties, transmitted to him by the district attorney there, who is stated to be desirous of receiving the suggestions of the Attorney General as to the issues he shall take upon them; "particularly as these cases will, in all probability, be carried to the Supreme Court, where it will be his (the Attorney General's) duty to assert and defend the rights of the United States involved in them."

2d. A copy of the record of the United States *vs.* Curtis and his sureties, setting out *twenty* pleas and demurrers, which stand for answer.

3d. A copy of the record in another case *vs.* Curtis and sureties, on another bond, setting out *thirty* pleas and demurrers, which stand for answer.

4th. A copy of a record in chancery in the first case, comprising a bill for injunction against the United States, answers, and documents.

5th. The copy of another record in chancery, in the second case, comprising a bill for injunction, answers, and documents.

The object of the application I understand to be, that I shall instruct and direct the district attorney as to the answers which he shall give to these multifarious pleas and demurrers; that is, that I shall either prepare the pleadings for him, or give specific instructions as to their substance, with regard to each separate plea and demurrer; and, also, indicate the course which should be pursued with regard to the cases in chancery.

I regret extremely that I am not sufficiently at leisure to attend to these subjects; because, if I were so, I would cheerfully do what is asked of me, without regard to the unusual complication of the cases, or the labor they would necessarily impose upon me. I should do it, however, as a private member of the profession of law, and not as the Attorney General of the United States, for the augmentation of whose duties, already sufficiently laborious, I should not feel myself at liberty to set a precedent by the voluntary assumption of others, which I respectfully conceive do not belong to his office.

What is asked of me is, to instruct and direct the district

Attorney General and District Attorneys.

attorney in the discharge of his duties. If I am bound to perform this duty with regard to this district attorney, I am equally bound to give the like instruction and direction to all the other district attorneys in the United States, in all other cases, in which, for their own ease, they may call for such aid; and it is but to state such a proposition, and look to the number of district attorneys in the United States, to show the impossibility of performing such duties. It is, in effect, calling upon the Attorney General to perform, not only his own duties, but those also of all the district attorneys in the Union, whenever the latter may choose to call upon him to do so. *Lex non requirit impossibilia*; and it would be strange, indeed, if there were any law which imposed upon the Attorney General the impossibilities now in question.

That there is no such law, is very manifest. The act of Congress separates the duties of these officers by a perfectly clear and distinct line of demarcation. With regard to district attorneys, it provides that "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," &c., "*whose duty it shall be to prosecute in such district all delinquents for crimes*," &c., "*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.*"

As to the Attorney General, the provision is—"and there shall be appointed a meet person, learned in the law, to act as Attorney General for the United States, who shall be sworn," &c., "*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 required by the heads of any of the departments *touching any matters that may concern their departments.*"

* You may observe that it is not his duty to give his advice and opinion to the district attorneys touching any matters that may concern their departments. Yet this is the thing which is here proposed; for the application having passed through one of the departments does not change its essential character; it

Attorney General and District Attorneys.

is still an application from the district attorney for advice and instruction touching his own peculiar and appropriate duties.

It is made the duty of the Attorney General to give his advice and opinion on questions of law, when requested by the heads of any of the departments, *touching any matters that may concern their departments*; that is to say, that when, in the course of discharging the duties of their departments, a question of law shall arise, whose solution is a prerequisite to the discharge of those duties, the head of any department has a right to request the opinion of the Attorney General on such question of law, and he is bound by his oath to answer it. Now, if it be one of the duties of the Secretary of the Treasury to instruct the district attorneys in the discharge of duties *merely professional*, then this case is properly referred to me, and I am bound to give the opinion. But I apprehend no such duty is devolved by our laws on the head of the Treasury Department. The Treasury Department sends to the district attorneys all orders for suits, and puts them in possession of all the facts and evidence necessary for the prosecution of those suits. But here, I apprehend, the duties of the department stop; and it is no part of those duties to prescribe to the district attorney *the form of the action, or the form of the pleadings*: these are referred exclusively to his own learning; and it is for this reason that he is required to be a person *learned in the law*. The Secretary of the Treasury is not necessarily a lawyer by profession. One very eminent gentleman who has held the office, we know was not so. It could never have been considered, therefore, as among the duties of that officer, that he should instruct and direct the district attorneys *as to the mere technicalities of their profession*. But we are not driven to inference for the ascertainment of the duties of the Secretary of the Treasury. His duties are prescribed by law, and this duty is not among them. The Comptroller of the Treasury was charged with the collection of debts due to the United States; and the law stops with making it his duty to direct prosecutions for all delinquencies of officers of the revenue, and for debts that are or shall be due to the United States; leaving the form of the prosecution, and all the pleadings connected with it, to the care of the law-officer intrusted with that peculiar duty. The Secretary of the

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Treasury is, indeed, required to superintend the collection of the public revenue. How to superintend? Certainly, to see that each officer concerned in the collection shall do his duty with vigilance, industry, and integrity; but not to descend to the details of law pleadings in all the courts in the Union, and to dictate to the district attorneys the forms of actions and all the varieties of special pleadings to which such actions may lead. This would be to impose on the Secretary of the Treasury impracticable duties, to confound and amalgamate duties which are separated by our laws, and to shift to the Secretary of the Treasury the responsibilities which properly belong to the district attorneys.

The act of the 15th May, 1820, providing for the better organization of the Treasury Department, creates a new officer, called the agent of the treasury. It directs that it shall be the duty of such officer of the Treasury Department, as the President shall, from time to time, designate as the agent of the Treasury Department, to direct and superintend all orders, suits, and proceedings in law or equity, for the recovery of money, chattels, &c., in the name of the United States; and it directs the district attorneys to conform to such directions and instructions as shall, from time to time, be given them by such agent.

What kind of *direction* or *superintendence* was intended by this law to be thrown on the agent of the treasury? To what kind of *directions* and *instructions* from such agent is it the intention of this law that the district attorneys shall conform? Can it be conceived to have been the intention of the law to throw on the agent the duty of directing and instructing the district attorney *as to the forms of the actions and the forms of the special pleadings*? Who are the officers in the Treasury Department to whose designation by the President this law looked? Are they lawyers by profession? We know that they are not. To what kind of *direction* and *instruction*, then, would the law have looked as being made the duty of the agent on the one hand to give, or the duty of the district attorneys on the other to obey, but directions and instructions when, and against whom, and for what amount, to institute suits; when to press the collection, and when to indulge; when, and

under what circumstances of additional security, to renew the debts; what substitution, what commutations, what partial payments, what compromises to accept; when to acquiesce in the decisions of the courts below; and when to appeal, &c.; always leaving to the learning of the law-officer the direction of all measures merely technical and professional?

This is my construction of the act organizing the Treasury Department, and of the act of the session of 1820, creating this agency for the collection of debts. In neither of them can I see that it is made one of the duties of the Secretary of the Treasury to instruct the district attorneys in the performance of duties *merely* and *strictly technical* and *professional*. The solution of these questions, then, is not necessary to the discharge of any duty properly belonging to the Treasury Department; and they are, therefore, no questions of law on which it is made the duty of the Attorney General to give his opinion.

It is true, as Mr. Pleasonton suggests, that these cases may come before the Supreme Court; and it is true, also, that when they do come, then it will be the duty of the Attorney General to attend to them; but not until they do come there.

The same thing may be said of every case of the United States now depending before any district or circuit court in the Union. They may all come before the Supreme Court; and, because they may do so, it becomes the duty of the Attorney General, according to this argument, to anticipate his duties, and enter upon the direction of all these suits while they are yet depending in the inferior courts. The thing is impossible; and fortunately the law does not require it.

As I am not only willing, but desirous, to perform all the duties which properly belong to my office according to the best of my judgment; and, on the other hand, very unwilling to create a precedent which shall encumber this burdensome office with duties foreign to it, and which seem to me to surpass the power of any human being to perform; and as I have been conducted by the best lights of my own understanding to the conclusion that these duties are, under our laws, foreign to the office of the Attorney General, I shall hold myself much obliged to you, if you differ with me in this opinion, to make any suggestions which you think lead fairly to the opposite

Appeals and Writs of Error.

result. I will weigh them with all the candor of which I am capable, and cheerfully and respectfully reconsider the opinion now expressed.

I have the honor to remain, with great respect, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

APPEALS AND WRITS OF ERROR.

Appeals and writs of error to the Supreme Court of the United States are founded only upon errors in points of law properly raised in the courts below for decision.

OFFICE OF THE ATTORNEY GENERAL,

April 12, 1823.

SIR: My official engagements during the Supreme Court, and since, have prevented earlier attention to your communication concerning the cases of the United States *vs.* James Johnson, and Ward and Johnson, before the circuit court of Kentucky.

The question which you propound for my opinion is, whether there be any ground in those proceedings on which the cases can be carried to the Supreme Court? As I am not furnished with copies of the record in those cases, I must, of necessity, rely on the report of the district attorney which accompanied your letter. According to this report, these were cases at common law, in which all the questions of law and fact were submitted to the jury, and their verdict is against the United States. The district attorney states expressly that *no question of law was reserved for appeal or writ of error*. Now, as appeals and writs of error to carry causes to the Supreme Court of the United States can be founded *only on errors in point of law*, and as the record in this case exhibits no such error, because no question of law was raised for the decision of the court, there is no possible ground on which these cases can be carried before the Supreme Court.

I remain, sir, very respectfully, your obedient servant,

WM. WIRT.

STEPHEN PLEASANTON, Esq.,

Treasury Department.

The President and the City of Washington.

THE PRESIDENT AND THE CITY OF WASHINGTON.

No authority has been given to the President to cause any of the public lots to be filled up, nor to require the stagnant waters thereon to be removed.

The Corporation of the city of Washington has power to establish a board of health, to make regulations for the preservation of health, to open all necessary drains, and to do every act which the health of the city may require, and to lay taxes, &c., for the purpose of defraying the expenses.

Besides, the act of May 7, 1822, specially authorized the draining and filling of the low grounds near Tiber creek and the canal, and appropriated funds for that purpose.

The deed from the mayor and commissioner of certain rooms in the City Hall contains unauthorized provisions. The powers of the grantors should be enlarged, and a new deed given.

OFFICE OF THE ATTORNEY GENERAL,

May 31, 1823.

SIR: I have, according to your request, examined the several acts of Congress involving the powers of the President relative to the city and the public property in it; and I cannot discover that any authority has been given to him to fill up the public lots, or any of them, or to remove stagnant water, and thereby prevent disease. The corporation is vested, by their act of incorporation, with express power to establish a board of health, with competent authority to enforce its regulations; to establish such other regulations as may be necessary to prevent the introduction of contagious disease, and *for the preservation of the health of the city; to prevent and remove nuisances; to open all necessary drains and sewers, &c.*—in short, to do any and every thing which the health of the city may require: powers amply sufficient to effect every purpose which the present application can have in view. To provide funds for these purposes, the corporation is authorized to lay and collect taxes upon the real and personal property within the district; and to draw lotteries to carry into effect any important improvement which their ordinary revenue will not accomplish. Besides these powers given by their charter, there was a special act of May 7, 1822, (chap. 96,) directed to the purpose of authorizing and enabling the corporation to drain and dry the low grounds lying on the borders of the Tiber creek, and filling up the low grounds on the borders of the canal, for which purpose a rich provision of funds was made by that act; whereas

Priority of United States over other Creditors.

I cannot discover that either authority or funds have been given to the President for either of these purposes.

With respect to the other subject of your note—the sufficiency of the deed from the mayor and commissioner appointed to superintend the erection of the city hall, to the United States, for certain rooms in that building: the act of the corporate body which authorizes those officers to sell and convey, limits their power expressly to the sale and conveyance of one room for court and six rooms for the marshal, clerk, and jurors, and the books, papers and records of the court; whereas this deed, besides these seven rooms, professes to grant to the United States the free and full use of so much of the basement story of said hall, under the said court-room, as shall be necessary for the safe and convenient keeping of fuel for the use of the court and offices, &c. This part of the deed, though for a subject manifestly necessary to the comfortable enjoyment of the rooms conveyed, exceeds the power of the grantors, under the law of the corporation which confers their powers. It will be necessary either to enlarge their powers, that they may give a new deed, or that the corporation should ratify this deed as it stands. The former course would be preferable, in order that the grant of a place of deposite for the fuel may be to the *exclusive* use of the court room and offices.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

PRIORITY OF UNITED STATES OVER OTHER CREDITORS.

A prior lien on a policy for the premium of an insurance is overreached by the right of preference of the United States, even though the preference be founded on a subsequent act of insolvency.

See the case of Thelluson and Smith, reported in 2 Wheaton, deciding that the United States have preference over a prior judgment on the lands of a debtor in case of subsequent insolvency.

OFFICE OF THE ATTORNEY GENERAL,

June 2, 1823.

SIR: Your reference of Mr. Pearce's claim found me in Baltimore, where I had an opportunity of informing myself more

Sureties of Pursers in the Navy.

fully of the circumstances of the case, by an interview with Mr. Pearce himself. Mr. Pearce had a lien on the policy for the premium of the insurance effected by him as agent for Watson; and this lien having attached two days before Watson's assignment of his effects, (which last transaction created the priority of the United States,) there was strong ground to doubt whether the case did not form an exception to the case of ordinary debts. But the case of Thelluson and Smith (2 Wheaton, 396) has settled the principle; that even a prior lien on the lands of an individual, by judgment, is overreached by the right of preference given to the United States, although this preference be founded on a subsequent act of insolvency. It appears, too, that Mr. Pearce had voluntarily parted with the possession of the policy before the assignment of his effects made by Watson; and this parting with the possession was a release of the lien. The case is certainly a hard one; but I cannot discover any satisfactory ground, in strict law, for preferring the debt to that of the United States.

I remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

SURETIES OF PURSERS IN THE NAVY.

Sureties to pursers in the navy are not liable to have their compensation stopped on account of any balances found due the government from their principals.

OFFICE OF THE ATTORNEY GENERAL,

June 30, 1823.

SIR: On my return from Annapolis on Saturday night, I had the honor of your letter of that date, (28th instant,) submitting, for my opinion, the question proposed by the Second Comptroller of the Treasury, to wit: "Whether sureties to pursers in the navy are liable to have their own compensation stopped on account of balances found due against their *principals*, under the proviso to the second section of the act of Congress of the 3d of March, 1823, entitled 'An act making appropriations for the support of the navy of the United States for the year 1823?'"

Forfeiture of Vessels in the Slave Trade.

I am, respectfully, of the opinion, that that proviso contemplates only the *principal*—the party who is “in arrears,” who had “received the public money to be expended by him in the public service;” and if there could be a doubt on this subject in the body of the proviso, it seems to me to be effectually removed by the closing sentence of the proviso, where, with the same person (the defaulter himself) still in view on whom the penal provision had been exhausted, it is provided that, in the event specified, suit shall be “commenced against such delinquent and his sureties,”—sureties being here, for the first time, brought into view.

I have the honor to remain, &c., &c.,

WM. WIRT.

To the SECRETARY OF THE NAVY.

COMPENSATION OF A JUDGE ADVOCATE.

A judge advocate is entitled to compensation for extra expenses in travelling and sitting as judge advocate, and to special compensation for clerical services, under the 21st and 22d sections of the act of 16th March, 1802.

OFFICE OF THE ATTORNEY GENERAL,

August 20, 1823.

SIR: I am of opinion that the 22d section of the act of 16th March, 1802, fixing the military peace establishment of the United States, extends to a judge advocate, as well as to other officers essential to the organization of a court-martial; and that he is, consequently, entitled to the compensation for extra expenses in travelling, and sitting as judge advocate to the court, allowed by that section, as well as to the special compensation for clerical services allowed by the 21st section.

I have the honor to remain, &c.,

WM. WIRT.

To the SECRETARY OF WAR.

FORFEITURE OF VESSELS IN THE SLAVE TRADE.

A vessel under forfeiture for having violated the laws prohibiting the slave trade remains subject to the taint in the hands of subsequent purchasers, and the President will not interpose in any suit brought against the vessel on that account.

Forfeiture of Vessels in the Slave Trade.

If the matter set forth in the memorial constitutes a legal defence, it will avail the owners on the trial of the libel.

OFFICE OF THE ATTORNEY GENERAL,

August 20, 1823.

SIR: The *Malvina*, the property of Matthew Pascal, was, in the year 1819, fitted out, equipped, and caused to sail from Baltimore, for the purpose of being engaged in the slave trade, in violation of our laws; in the prosecution of which purpose, she went, first to the Matanzas, thence to the coast of Africa, where she took in a cargo of slaves, and returned with them to the Matanzas, where she finished her voyage. By this conduct she became forfeited to the United States; and under the forfeiture thus attached to her, she was purchased by Blaise, Aspuna, & Co., of Havana, by whom she was sent to Baltimore for a cargo. On her arrival at Baltimore, she was seized for the violation of our slave laws; and the prosecution is now going on. In this posture of things, the agent and consignee of the owners has petitioned the President in their behalf, praying that the prosecution may be stayed, and the vessel restored, on the ground that he verily believes that the present owners of the *Malvina* purchased her in total ignorance of the illegal voyage in which she had been engaged.

My opinion is, that there is no sufficient ground alleged for the interference of the President, and that the prosecution ought to go on. If the matter set forth in the memorial constitutes a legal defence, it will avail the owners on the trial of the libel; and if it does not, their remedy is against Pascal for the fraud which he has committed on them in the sale of forfeited property. Our laws against the slave trade demand a rigid enforcement, and ought not to be permitted to be eluded by such a contrivance as this. *Caveat emptor* is the maxim which I would strictly apply to every case of this kind, and let the law take its course.

I have the honor to remain, &c.,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

Advances to Ministers Going Abroad.

RIGHT TO TAX GOVERNMENT PROPERTY.

Grounds purchased in any State with the consent of its legislature for the site of forts, magazines, arsenals, dock-yards, and other needful buildings, can neither be taxed by the State nor by the municipality in which they are situated.

OFFICE OF THE ATTORNEY GENERAL,

September 8, 1823.

SIR: The constitution of the United States provides that Congress shall have exclusive legislation in all cases whatsoever 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.

If, therefore, the ground in Philadelphia to which you allude in your letter of the 4th, was purchased with the consent of the legislature of the State of Pennsylvania for either of these purposes, and has been ceded for such purpose, my opinion is, that neither the State of Pennsylvania, nor the corporation, (whose powers are merely derivative from the State,) possess the power to impose and collect taxes from this property.

I remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE NAVY.

ADVANCES TO MINISTERS GOING ABROAD.

The President of the United States, having the foreign intercourse fund under his direction, may advance to a minister going from the United States to Chili such part of his salary as he shall deem necessary to the proper fulfilment of public engagements in respect to him.

OFFICE OF THE ATTORNEY GENERAL,

October 14, 1823.

SIR: I understand that you wish my opinion whether the act of Congress of the 31st January, 1823, "concerning the disbursement of public money," prohibits you from making an advance to the minister of the United States to Chili, beyond the amount of his outfit? As connected with this question, I understand that such advances have been usual heretofore;

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and that in this case there is a peculiar necessity for it, from the distance and unfrequency of intercourse with Chili, and from the circumstance that there do not exist in that quarter of the world the means of effecting a regular discharge of the minister's salary as it may fall due. The foreign intercourse fund has, from its first establishment, been placed under the peculiar direction of the President of the United States. The language of the act of July 1st, 1790, (the first on this subject,) is, "*Be it enacted*, That the President of the United States shall be, and he hereby is, authorized *to draw from the treasury of the United States* a sum not exceeding forty thousand dollars annually, to be paid, &c., for the support of such persons as he shall commission to serve the United States in foreign parts," &c.; and it then proceeds to limit the amount of the outfit and salary which the President may allow. The act of the 8th May, 1792, "making certain appropriations," by the 3d section appropriates an additional sum of fifty thousand dollars to the same purpose, "to be applied under the direction of the President of the United States." The act of the 9th of February, 1793, continues that of the 1st July, 1790. The act of March 20th, 1794, appropriates an additional sum of one million of dollars to the same purpose, "to be applied under the direction of the President of the United States." The act of May 30th, 1796, continues these acts, and appropriates an additional sum. The act of May 19, 1798, again authorizes the President "*to draw from the treasury of the United States* a sum not exceeding forty thousand dollars annually, for the support of such persons as he shall commission to serve the United States in foreign parts," &c. The act of the 10th of May, 1800, and that of the 1st of May, 1810, again limit the outfit and salary which *the President may allow*, and which he shall not exceed; and although the last act, after declaring in the first part of the section that the President shall not allow to a foreign minister a greater sum than at the rate of nine thousand dollars per annum as a compensation for all his services and expenses, annexes a proviso, that it shall be lawful for the President to allow to a minister, on going from the United States to any foreign country, an outfit; yet I understand that the construction which has already been put in

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uniform and uncensured practice on this proviso is, that it was merely introduced to authorize the outfit, which had been omitted in the previous part of the section, and not to restrain the President from advancing any part of the salary itself, which the circumstances of the case might, in his judgment, demand.

I have cited this series of acts for the purpose of showing that, as to the foreign intercourse fund, the President is emphatically the disbursing officer of the government; and I have cited the practice, as it has been reported to me, for the purpose of showing that, in the exercise of the discretion which the law has given him over this fund, he has advanced, both as to salary and outfit, just as much as he thought the case made just and proper.

With these principles in view, let us turn to the act of the last session which is now under consideration. The first enactment is in these words: "that, from and after the passing of this act, no advance of public money shall be made in any case whatever; *but in all cases of contracts, &c.*, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment." This is the whole prohibition; and it is by no means clear that Congress had in view anything more than cases of *contract*, in the ordinary acceptance of this term. This enactment is, however, immediately qualified by two provisos: the first is, "that it shall be lawful, under the special direction of the President of the United States, to make such advances to the disbursing officers of the government as may be necessary to the faithful and prompt discharge of their respective duties, and the fulfilment of the public engagements;" the second is, "that the President of the United States may direct such advances as he may deem necessary and proper to such persons in the military and naval service as may be employed on distant stations, where the discharge of the pay and emoluments to which they may be entitled cannot be regularly effected." The first reflection which strikes the mind on reading this act is, that, so far from being intended to limit the exercise of the President's discretion over that fund, (of which the law had all along made him exclusively the disbursing officer,) it has given him a dispensing power over the act itself with regard to other disbursing

officers. The next is this: that, if the act did intend to embrace within its prohibition the application of the foreign intercourse fund, yet if, in the opinion of the President, an advance from that fund were necessary to the fulfilment of the public engagements with regard to this mission to Chili, or with regard to the minister, who, accepting the public engagement, has relinquished his private pursuits, and is now prepared to set out on his mission, the first proviso of the act would authorize the President to order such advance to such disbursing officer. But the President is himself the disbursing officer of this fund. He has, in the language of the act, a public duty to perform—the faithful and prompt discharge of which has become necessary. He has a public engagement to fulfil. Can there be any doubt but what, under such circumstances, he might order another to do, he might do himself? The letter of the proviso does not, indeed, cover the case, but its spirit and reason do cover it; and the act, I presume, should be construed by its reason and spirit, and not by its letter.

Again: the second provision is, in its terms, confined to the case of persons engaged in the military and naval service; but the case in which advances may be made to them furnishes a safe and fair criterion for the exercise of the President's discretion under the first proviso. That case is, when they are "employed on distant stations, where the discharge of the pay and emoluments to which they are entitled cannot be regularly effected;" which I understand to be exactly the case of the minister to Chili.

Besides, if this proviso stood alone, although confined in terms to the case of persons employed in the military and naval service, yet it would be easy to show that British statutes, as much restricted in their terms, have been, by judicial interpretation, extended to other cases, because the reason of their provision extended to them. Not to multiply cases, I will merely cite the familiar one of the statute, "*circumspectè agatis de episcopo*;" which, although confined in terms to the bishop of Norwich, has been extended to other bishops, because the reason and spirit of its enactment equally extended to them.

Upon the whole view of the subject, I am of opinion, that if, in your judgment, the discharge of the public engagements

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with regard to this minister renders this advance necessary, it may be made in perfect harmony with the spirit and reason of this act of Congress; and, estimating the views of Congress by this spirit and reason, I cannot but suppose that, if this case had been anticipated, we should have been relieved from the necessity of construction by an express provision to cover it.

I have now the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the PRESIDENT.

THE PRESIDENT AND ACCOUNTING OFFICERS.

The laws regulating the settlement of the public accounts under which the Treasury Department is organized, require the Auditors to receive and examine accounts, and to certify them to the Comptrollers, who also examine and pass upon them, and certify the balances thereon to the Register; and give no power of appeal to the President, except in particular instances, like that of the accounts of Daniel D. Tompkins, where the power of revision and final decision by the President was expressly conferred by the act.

Although it is the duty of the President to take care that the laws be faithfully executed, he is not required to execute them himself. He is not required to audit and allow public accounts, but to see that the officers assigned to that duty perform it faithfully. The Auditors and Comptrollers are assigned to that duty. They constitute the accounting department; and so long as they continue to discharge their duties faithfully, the President has no authority to interfere.

The settlement of an account by the proper accounting officers is FINAL AND CONCLUSIVE, so far as concerns the Executive department of the government. If the individual whose account has been thus settled conceives himself injured by such settlement, his recourse must be to the judiciary or to Congress.

If a balance be found against him by the disallowance of credits which he deems just, he may refuse payment and abide a suit; in which case he will have the benefit of the opinion of a court and jury.

If a balance be found in his favor, but smaller than he thinks himself entitled to, his appeal is to Congress, where the representatives can pass upon his claim.

OFFICE OF THE ATTORNEY GENERAL,

October 20, 1823.

SIR: I have examined the case of Major Joseph Wheaton, submitted by you for my opinion; and would proceed at once to the expression of an opinion on the merits of his claims, but

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that there is a preliminary inquiry which must be first made, and as to which I beg leave to ask your direction; and that is, whether it is proper for you to interfere in this case at all? I will suggest the considerations which strike me as rendering it improper.

I. It appears to me that you have no power to interfere.

The constitution of the United States requires the President, in general terms, to take care that the laws be faithfully executed; that is, it places the officers engaged in the execution of the laws under his general superintendence: he is to see that they do their duty faithfully; and on their failure, to cause them to be displaced, prosecuted, or impeached, according to the nature of the case. In case of forcible resistance to the laws, too, so as to require the interposition of the power of the government to overcome the illegal resistance, he is to see that that power be furnished. But it could never have been the intention of the constitution, in assigning this general power to the President to take care that the laws be executed, that he should in person execute the laws himself. For example: if a marshal should either refuse to serve process altogether, or serve it irregularly, that the President should correct the irregularity, or supply the omission, by executing the process in person. To interpret this clause of the constitution so as to throw upon the President the duty of a personal interference in every specific case of an alleged or defective execution of the laws, and to call upon him to perform such duties himself, would be not only to require him to perform an impossibility himself, but to take upon himself the responsibility of all the subordinate executive officers of the government—a construction too absurd to be seriously contended for. But the requisition of the constitution is, that he shall *take care* that the *laws* be executed. If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself. The constitution assigns to Congress the power of designating the duties of particular officers: the President is only required to take care that

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they execute them faithfully. For example: our laws provide that there be established at the seat of government a General Post Office, under the direction of a Postmaster General; and they direct that he (the Postmaster General) "shall establish post offices, and appoint postmasters, at all such places as appear to him expedient on the post roads that are or may be established by law." Suppose that the Postmaster General should fail to appoint a postmaster at some place where an office is established by law: can the President make such appointment? I apprehend not; for there is no law that authorizes it. The power of appointment is given by law exclusively to the Postmaster General; and the constitutional charge to the President to take care that the laws be faithfully executed, goes no farther, in this instance, than to require him to see that the Postmaster General makes the appointment. He is not to perform the duty, but to see that the officer assigned by law performs his duty *faithfully*—that is, *honestly*: not with perfect correctness of judgment, but *honestly*. If the postmaster shall appoint one applicant while the President prefers another, the President cannot interfere with the appointment; because the selection is referred by law to the judgment of the postmaster alone, without any reference to any controlling power in the President. If, indeed, the postmaster should make a corrupt appointment, the President is constitutionally bound to look to the case; for the laws in such a case have not been faithfully executed. Yet, in this case, the power of correction which the President holds is not to supersede such appointment by one made by himself; for the law gives him no such power of appointment. He is to take care, in such a case, that the Postmaster General be punished for this violation of the law: he has power to remove him—to appoint a successor; and through the medium of such successor, and by his instrumentality, to remove the deputy, and to see that his place be honestly supplied.

Let us carry this principle to the laws which regulate the settlement of public accounts. In the original organization of the Treasury Department (vol. 2, Laws U. S., p. 48,) the duties of the officers are designated specifically. There was one Auditor and one Comptroller. The duty of the Auditor is declared to be to receive all public accounts; and, after examina-

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tion, to certify the balance, and transmit the accounts, with the vouchers and certificate, to the Comptroller, for his decision thereon; with this *proviso*: that if any person be dissatisfied therewith, he may within six months appeal to the Comptroller against such settlement. Here the right of appeal stops; there is no proviso for an appeal to the President. With regard to the Comptroller, it directs that it shall be his duty to superintend the adjustment and preservation of all public accounts; to examine all accounts settled by the Auditor, and certify the balances arising thereon to the Register: no right of appeal from his decision to the President. With regard to the Register, it directs him "to receive from the Comptroller the accounts which shall have been *finally* adjusted, and to preserve such accounts with their vouchers and certificates." So the act of the 3d March, 1809, (vol. 4, Laws U. S., p. 221, sec. 2,) makes it the duty of the Comptroller to direct the Auditor and accountants forthwith to audit and settle any particular account; and to report such settlement for his revision and *final decision*. So also the act of 3d March, 1817, which introduces the present organization of the Treasury Department, and under which Major Wheaton's accounts have been settled, assigns to the Third Auditor the duty of receiving all accounts relative to the subsistence of the army, the Quartermaster's Department, and generally all accounts of the War Department, other than those provided for by the act. It makes it the duty of the Second Comptroller to examine all accounts settled by the Third Auditor; and it makes it the duty of the Third Auditor "to keep the accounts which shall have been *finally* adjusted, and to preserve such accounts." Thus, in every instance the decision of the Comptroller is declared to be *final*; and it is manifest that the law contemplates no farther examination by any officer, after such decision. Were it the intention of Congress to subject these accounts to the farther revision and decision of the President, that intention would have been expressed. The truth of this position is illustrated by the act of the last session, "to provide for the settlement of the accounts of Daniel D. Tompkins, late governor of the State of New York." This act expressly provides that the proper accounting officers of the Treasury be authorized to adjust and settle the accounts and

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claims of Daniel D. Tompkins on principles of equity and justice, "*subject to the revision and final decision of the President of the United States.*" Where was the necessity of this express provision, if all the accounts settled by these officers were already subject to the revision and final decision of the President of the United States? Let this act be compared with that which specially provides for the settlement of Major Wheaton's accounts, and under which they have been settled—the act of the 3d March, 1819. This act simply authorizes "*the accounting officers of the Treasury Department to settle and adjust the account of Joseph Wheaton while acting in the Quartermaster's Department, upon the principles of justice and equity;*" not as in Governor Tompkins's case, *subject to the revision and final decision of the President.* The authority is confined to *the accounting officers of the Treasury Department.* Who are these accounting officers? The proper Auditors and Comptroller. So that, whether you look to this particular law under which Major Wheaton's accounts have been settled, or to the general organization of the accounting department, it is, in my judgment, equally clear that the power ends with the accounting officers, and that the President has no authority to interfere.

It would be strange, indeed, if it were otherwise. The office of President is ordained for very different purposes than that of settling individual accounts. The constitution has committed to him the care of the great interests of the nation, in all its foreign and domestic relations. He is the commander-in-chief of the army and navy of the United States. He is to exercise the important power of reprieve and pardon throughout all our States and Territories. The great power of selecting ambassadors and making treaties is committed to him. The selection of consuls, judges of the Supreme Court, and all other officers whose appointment is not otherwise provided for, and the filling himself all vacancies in the recess of the Senate, are among his great duties. He is required to watch over the state of the Union; to give Congress information upon this subject; to recommend such public measures as he shall deem necessary and expedient; to convene Congress on extraordinary occasions; to receive foreign ambassadors and other public ministers; to take care that the laws generally be faithfully executed,

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&c. How will it be possible for the President to perform these great duties, if he is also to exercise the appellate power of revising and correcting the settlement of all the individual accounts which pass through the hands of the accounting officers? Let it be remembered that, out of the vast multitude of these accounts which are annually settled by these officers, there are very few which are settled to the entire satisfaction of the claimants; and if every dissatisfied claimant has a right to appeal to the President, and call upon him to revise and correct the settlement, the President would be constrained to abandon the great national objects which are committed to his peculiar care, and become the accountant general of the government. Nor, if he should devote himself exclusively to this minor object, would he be able to accomplish it; for the whole duties of the five Auditors and two Comptrollers would be accumulated upon him in the last resort, together with all their responsibility for the correctness of the settlements; and under this responsibility he would have to perform, single-handed and alone, the whole work which the legislature has found it necessary to partition out among those seven officers, aided by their respective retinues of clerks.

My opinion is, that the settlement made of the accounts of individuals by the accounting officers appointed by law is final and conclusive, so far as the executive department of the government is concerned. If an individual conceives himself injured by such settlement, his recourse must be one of the other two branches of government—the legislative or judicial. If a balance be found against him, by the disallowance of credits which he deems just, he may refuse payment and abide a suit; in which case, he will have the benefit of the opinion of a court and jury. If a balance be found in his favor, but smaller than he thinks himself entitled to, his appeal is to Congress, where the representatives of the people will pass upon his claim.

II. If you do possess the power of revising and correcting the settlements made by the accounting officers of the government, this is not a proper case for the exercise of that power.

1. Because, of the four items which constitute his claim, one only of them has been submitted to the proper accounting officers. The first, third, and fourth, have not been submitted

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to those officers, but were presented for the first time in his petition to Congress. It is true that, in answer to a committee of Congress, one of these officers (the Third Auditor) has given his view of those claims, and that this view is unfavorable to them. But the Second Comptroller has never been called upon to express an opinion upon these items, nor has there been any formal rejection of them by the accounting officers. Now, the power imputed to you in this case, is a power to revise and decide upon claims which have been rejected by the accounting officers. The case therefore is not ripe for the exercise of this imputed power, even if it existed.

2. This claim is still before Congress. It was presented at the session of 1820, when a committee of the Senate reported that Major Wheaton had already received more than he was entitled to; and their report, recommending a rejection of the claim, was on the 3d of January, 1821, confirmed by the Senate. In the House of Representatives, at the three successive sessions of 1820, 1821, and 1822, there have been similar reports of committees; the last is among the unfinished business of the House, and will be called up whenever Major Wheaton chooses to have it done—for such, I understand, is the practice of the House. So that, in one branch of the legislature the claim has been decisively and rather indignantly rejected; in the other, it remains (to use a technical phrase) still *sub judice*. In these circumstances, it would seem to me peculiarly indecorous for the President to intercept the decision of the tribunal to which the party has submitted his claim, and take the decision to himself, even if he had the power.

My opinion, however, is, that he has not the power; and until you shall decide otherwise, it seems to me unnecessary, and even improper, for you, and consequently for me, to express an opinion on the merits of the claim. Under these impressions, I shall await your further instructions.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

TO THE PRESIDENT OF THE UNITED STATES.

Executive Authority to Fill Vacancies.

EXECUTIVE AUTHORITY TO FILL VACANCIES.

The President has power to fill, during a recess of the Senate, by temporary commission, a vacancy that occurred by expiration of commission during a previous session of that body; the term in the constitution "may happen during the recess" being equivalent to "may happen to exist during the recess," without which interpretation it could not be executed in its spirit, reason, and purpose.

OFFICE OF THE ATTORNEY GENERAL,

October 22, 1823.

SIR: Under the act of the 15th May, 1820, "to limit the term of office of certain officers therein named," &c., I find that General Swartwout's commission, as navy agent at New York, expired during the last session of the Senate. Your nomination of another person to fill that vacancy was not confirmed by the Senate, and the vacancy still exists.

It is the case, then, of a vacancy which arose during the session of the Senate, but which, from the circumstance that has been mentioned, continues to exist in the recess. The question on which you ask my opinion, is, "whether, under the constitution, you can fill the vacancy by a commission to expire at the end of the next session?"

The provisions of the constitution on this subject are—

1. That the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint all officers, &c.
2. That 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."

Had this vacancy *first occurred* during the recess of the Senate, no doubt would have arisen as to the President's power to fill it. The doubt arises from the circumstance of its having *first occurred* during the session of the Senate. But the expression used by the constitution is "*happen*:" "all vacancies that may *happen* during the recess of the Senate." The most natural sense of this term is "*to chance*—to fall out—to take place by accident." But the expression seems not perfectly clear. It may mean "*happen to take place*:" that is, "*to originate*:" under which sense, the President would not have the

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power to fill the vacancy. It may mean, also, without violence to the sense, "happen to exist;" under which sense, the President would have the right to fill it by his temporary commission. Which of these two senses is to be preferred? The first seems to me most accordant with the letter of the constitution; the second, most accordant with its reason and spirit.

The meaning of the constitution seems to me to result in this: that the President *alone* cannot make a *permanent appointment* to those offices; that, to render the appointment *permanent*, it must receive the consent of the Senate; but that, whensoever a vacancy shall exist which the public interests require to be immediately filled, and in filling which, the advice and consent of the Senate cannot be immediately asked, because of their recess, the President shall have the power of filling it by an appointment to continue only until the Senate shall have passed upon it; or, in the language of the constitution, till the end of the next session.

The substantial purpose of the constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed. But if the President shall not have the power to fill a vacancy thus circumstanced, the powers are inadequate to the purpose, and the substance of the constitution will be sacrificed to a dubious construction of its letter.

Put the case of a vacancy occurring in an office, held in a distant part of the country, on the last day of the Senate's session. Before the vacancy is made known to the President, the Senate rises. The office may be an important one; the vacancy may paralyze a whole line of action in some essential branch of our internal police; the public interests may imperiously demand that it shall be immediately filled. But the vacancy happened to occur during the session of the Senate; and if the President's power is to be limited to such vacancies only as happen to occur during the recess of the Senate, the vacancy in the case put must continue, however ruinous the consequences may be to the public. Cases of this character might be easily multiplied; and it would seem to me highly desirable to avoid a construction which would produce effects so extensively pernicious, if it can be done with a just respect to the language of the constitution.

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Now, if we interpret the word "*happen*" as being merely equivalent to "happen to exist," (as I think we may legitimately do,) then all vacancies which, from any casualty, happen to exist at a time when the Senate cannot be consulted as to filling them, may be temporarily filled by the President; and the whole purpose of the constitution is completely accomplished.

The casualty which has prevented the co-operation of the Senate may be such as in the case hypothetically stated above. It may arise from various other causes: the sudden dissolution of that body by some convulsion of nature; the falling of the building in which they held their sessions; a sudden and destructive pestilence, disabling or destroying a quorum of that body; such an invasion of the enemy as renders their re-assemblage elsewhere impracticable or inexpedient; and a thousand other causes which cannot be foreseen. It may arise, too, from their rejecting a nomination by the President in the last hour of their session, and inadvertently rising before a re-nomination can be made. In all these cases there is no guilt, either on the part of the Senate or of the President; but, by some casualty, the vacancy happens to continue and to exist in the recess; and the public good, nay, even the safety of the nation, may require it to be forthwith filled. Looking to the reason of the case, why should not the President have the power to fill it? In reason, it seems to me perfectly immaterial when the vacancy first arose; for, whether it arose during the session of the Senate, or during their recess, it equally requires to be filled. The constitution does not look to the moment of the origin of the vacancy, but to the state of things at the point of time at which the President is called on to act. Is the Senate in session? Then he must make a nomination to that body. Is it in recess? Then the President must fill the vacancy by a temporary commission.

This seems to me the only construction of the constitution which is compatible with its spirit, reason, and purpose; while, at the same time, it offers no violence to its language. And these, I think, are the governing points to which all sound construction looks.

The opposite construction is, perhaps, more strictly conso-

The Practice in respect to Letters Testamentary.

nant with the mere letter. But it overlooks the spirit, reason, and purpose; and, like all constructions merely literal, its tendency is to defeat the substantial meaning of the instrument, and to produce the most embarrassing inconveniences.

The construction which I prefer is perfectly innocent. It cannot possibly produce mischief, without imputing to the President a degree of turpitude entirely inconsistent with the character which his office implies, as well as with the high responsibility and short tenure annexed to that office; while, at the same time, it insures to the public the accomplishment of the object to which the constitution so sedulously looks—that the offices connected with their peace and safety be regularly filled.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

THE PRACTICE IN RESPECT TO LETTERS TESTAMENTARY.

It is the settled practice to admit the authority of letters testamentary regularly issued by courts of probate in the several States, in adjusting demands upon the government.

OFFICE OF THE ATTORNEY GENERAL,
December 2, 1823.

SIR: I understand that the legal point involved in the case which you have done me the honor to submit for my opinion, is, whether the last will and testament of Thomas Scan has been so established as to authorize payment of the arrears of wages due to Scan to George Tilly, to whom letters of administration with the will annexed have been granted by the proper tribunal in Pennsylvania. Tilly could not maintain an action under this grant of administration in any other State than Pennsylvania; not from any invalidity in the will or its probate, because the same legal result would follow, however indisputable the will might be. An administrator cannot sue in any jurisdiction foreign to that from which he receives his authority, but must qualify anew.

But I understand that the government has not been in the

The Executive and the Circuit Court of Georgia.

habit of requiring such new qualifications; it has, on the contrary, been satisfied with a regular grant of administration in any State or Territory of the United States. Nor is it clear that the principle to which I have alluded could be applied to the case; for the government of the United States has no peculiar locality in any one State or Territory; it pervades the whole Union; and it might, therefore, well be questioned whether it could be considered as *foreign* to any one State or Territory. The practice, however, seems to be settled to admit the authority of letters testamentary in all demands on the government, in whatsoever State or Territory such grant may have been made. And this point being settled, I do not think that the government has any authority to look beyond the letters testamentary into the propriety of the grant, unless in a case of manifest fraud.

Whatever, therefore, we might be disposed to think of the sufficiency or insufficiency of the proof by which the lost will of Scan was set up, if it has been set up by the competent and regular tribunal, and administration granted under it, I think that such grant must be respected, and the administrator regarded as rightfully in the possession of his authority.

The documents are returned.

I remain, sir, with very great respect, your obedient servant,
WM. WIRT.

To the SECRETARY OF THE NAVY.

THE EXECUTIVE AND THE CIRCUIT COURT OF GEORGIA.

There is no law which renders the decision of the circuit court of Georgia, upon a claim of the marshal of that State for supporting negroes taken from a vessel brought in for adjudication under the laws prohibiting the slave-trade, binding on the Executive department, so as to make it the duty of that department to pass an account which it considers unreasonable and unjust.

OFFICE OF THE ATTORNEY GENERAL,

December 30, 1823.

SIR: I received yesterday your letter of the 29th instant, with its accompanying documents, to wit: the copy of a record from the circuit court of Georgia, presenting a claim of the marshal of that State for the support of negroes, constituting the cargo

The President and the Comptroller.

of the Spanish vessel *Ramirez*, and brought in for adjudication under our laws prohibiting the slave-trade; and the draught of a report on the merits of that claim, prepared by you, to be submitted to the President. The question which you submit for my opinion is, whether there be any law of the United States which renders the decision of the circuit court on that claim binding on this government, so as to make it the duty of the Executive to pass an account which it considers unreasonable and unjust? In reply to which, I have the honor to state that there is no such law. The 4th section of the act of the 8th May, 1792, for regulating processes, &c., (2d vol. Laws U. S., page 301,) does not reach the case; and the 2d section of the act of the 3d March, 1819, "in addition to the acts prohibiting the slave-trade," (under which act I understand the proceedings in this case to be going on,) seems to place the support of the slaves under the peculiar direction of the President.

I have the honor to remain, sir, with great respect, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE NAVY.

THE PRESIDENT AND THE COMPTROLLER.

The President cannot interpose in the settlement of accounts before the Comptroller, and require that officer to allow a credit to an individual in the settlement, for reasons given ante, p. 624.

OFFICE OF THE ATTORNEY GENERAL,

January 13, 1824.

SIR: The petition of Joshua Wingate prays that you will direct the Comptroller of the Treasury to allow him a credit in the settlement of his accounts for his proportion of a fine incurred by one Phineas Varney, for which suit was instituted by the petitioner, as collector of the district of Bath, Maine; judgment obtained in May, 1809; the defendant arrested and committed to jail under execution on that judgment; and the fine afterwards remitted by the President. He contends that the President had no constitutional or legal power to remit his proportion of the fine; the right to which had vested by the in-

Sureties of an Officer appointed during a Recess.

stitution of the suit. I presume that it is unnecessary to express an opinion upon the correctness of this position: 1. Because, if it be correct, the act of remission by the President being wholly inoperative as to that portion of the fine claimed by the collector, his legal right to recover it remained in full force, notwithstanding the remission; and it is his own fault if he has not enforced his right at law. 2. If his position be wrong, and the remission acted upon the whole fine, the act of remission has done him no injury. 3. Whether his position be right or wrong, my opinion is, that the President has no right to interpose in the settlement of accounts, for the reasons detailed at large in my opinion in the case of Major Wheaton, of the 20th October last.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

SURETIES OF AN OFFICER APPOINTED DURING A RECESS.

The Supreme Court having decided that the sureties of a collector of taxes and duties appointed during a recess of the Senate are bound only for acts done under the President's commission, the opinion heretofore given by the Attorney General is reconsidered, and the decision of the court formally communicated.

The subsequent nomination to and confirmation by the Senate of an appointee during a recess is not a continuation of the first commission, but is a new appointment, and requires a new bond for the performance of its duties.

Where an officer appointed by the President during a recess of the Senate falls in arrear with the government during his first commission, but after his nomination to and confirmation by the Senate makes payments into the treasury, yet continues in arrear for current dues to the government, for which a suit is brought, it is competent for the jury to apply the payments in exoneration of the balances for which the sureties under the first commission were bound.

ATTORNEY GENERAL'S OFFICE,

March 24, 1824.

SIR: The Supreme Court decided a case yesterday, in which certain principles were established that may affect the interests of the United States in relation to other individuals, and may require measures to be immediately taken to guard against extensive mischief.

Sureties of an Officer appointed during a Recess.

In a case against Kirkpatrick and others, sureties of Samuel M. Read, deceased, a collector of direct taxes and internal duties in the 18th collection district of Pennsylvania, it has been settled by the Supreme Court, that when an official bond with surety has been given on an appointment made by the President in the recess of the Senate, the sureties are bound only for acts done under the President's commission—that is, till the end of the next session of the Senate, and no longer; and that, although the same person shall be nominated to the Senate, and appointed by them, that this is not a confirmation and continuation of the first commission; but that a new commission, issued by and with the advice and consent of the Senate, is an original and separate commission, with which the sureties on the former bond have no manner of connexion, nor with the acts of the office done under it.

They have decided also, in the same case, that where an officer circumstanced as Read was has gone on to make quarterly payments, leaving, nevertheless, a balance against him at the end of every quarter, it is competent in the jury to apply the subsequent payments in exoneration of the balances for which the sureties stand bound. Read was appointed in the recess of the Senate, and on the 4th December gave bond, with surety, the condition of which referred to his commission and appointment by the President, and that commission was on its face to continue (as usual in such cases) until the end of the next session of the Senate. He was nominated to the Senate at its next session; was appointed by them; and on the 24th January, 1814, received a new commission, by and with the advice and consent of the Senate. No new bond was taken from him under this new commission. He went on to act till 1818. Balances were found against him at the end of every quarter; these balances were transferred at the end of every quarter to the account of the next quarter, the delinquencies added to it, and the payment for the new quarter deducted from the aggregate amount. The court decided that, although when a debtor made general payments, without directing the application, it was competent to the creditor to make the application, yet this privilege in behalf of the creditor ceased on the institution of suit; at least that the application made of these payments by

Case of the late Collector at Savannah.

the United States was no discriminating application to any especial balance; and that in this case, therefore, it was competent to the jury to apply the payments to any balance that might have arisen against the collector for the *twenty-four days* during which alone they held the collector's sureties liable under this bond; because the laws laying the taxes and duties took effect only on the 1st January, 1814, and on the 24th day of that month the commission, under which alone the sureties were bound, was superseded by the new commission, by and with the advice and consent of the Senate, under which the sureties were not bound.

I remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

CASE OF THE LATE COLLECTOR AT SAVANNAH.

The late collector at Savannah being indebted to the government, and the amount of such indebtedness being reported by the district attorney below that standing against him on the treasury books, an action at law should be brought against him for the apparent balance due.

OFFICE OF THE ATTORNEY GENERAL,

March 31, 1824.

SIR: I have examined with attention the documents transmitted from your department, by direction of the President, in relation to the case of A. S. Bullock, late collector of Savannah, for the purpose of obtaining my opinion whether it be necessary and proper to bring a suit in order to investigate and recover any sum that may be found legally due from the collector by the decision of the court.

The sum reported by Mr. Habersham, the district attorney of Georgia, being avowedly founded on an imperfect view of the case, from his want of many documents material to a full and conclusive settlement, and that sum being, in the estimation of the Comptroller, below the sum probably due from Mr. Bullock—certainly far below the sum appearing due from him on the treasury books—I can see no other course which can be pursued, consistently with justice either to the government

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or to Mr. Bullock, but that which you have suggested in your letter to the President of the 24th February last, to wit: the institution of an action at law against Mr. Bullock for the apparent balance; on the trial of which he will be allowed all credits which have been refused at the Treasury Department, and which he can support by satisfactory proof.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

SALES OF PUBLIC LANDS IN OHIO.

It is competent for the Secretary of the Treasury to deduct the expenses of surveys of the lands of the United States lying within the State of Ohio, before computing the three per cent. to which that State is entitled under the act of 3d March, 1803, and to calculate the per centage for Ohio on the balance.

Although the act of 3d March, 1803, was the affirmance of a compact between the United States and the State of Ohio, it must have been within the contemplation of the contracting parties at the time, that Congress should retain the power of regulating the terms of the sales to be made.

Compacts are to be construed in reference to the subject-matter and the nature of the cases on which they are to operate.

OFFICE OF THE ATTORNEY GENERAL,

March 31, 1824.

SIR: I have, according to your directions, examined the report of a committee of the legislature of Ohio; appointed to examine into the state of the three per cent. fund, and complaining of a decision of the Secretary of the Treasury, by which the expenses of surveying the public lands are deducted from the amount of sales, and the three per cent. calculated on the *net* balance then remaining.

The facts are these: By the act of the 3d March, 1803, it is enacted, "that the Secretary of the Treasury shall, from time to time, and whenever the quarterly accounts of the receivers of public moneys of the several land offices shall be settled, pay three per cent. of the *net* proceeds of the lands of the United States lying within the State of Ohio, which, since the 30th of June last, have been, or hereafter may be, sold by the United States, *after deducting all expenses incidental to the*

same, to such person or persons as may be authorized by the legislature of the said State to receive the same," &c. At the date of the passage of this law, the legislative regulations then in force for the sale of the public lands charged the expenses of surveying on the purchaser; but, by the act of the 26th March, 1804, it was enacted that "the fees payable by former laws for surveying expenses, shall, after the first day of July next, be no longer demandable from, and paid by, the purchaser;" so that, after this last law, the surveying expenses fell on the United States.

The question is, whether, after the passage of the act of the 26th March, 1804, the surveying expenses are to be deducted from the amount of sales, and the three per cent. to be paid to Ohio is to be calculated on what will remain after such deduction? or whether the three per cent. is to be calculated on the amount of sales, without such deduction?

The Secretary of the Treasury has adopted the former opinion; the report of the committee of Ohio adopts the latter. The report vindicates this latter opinion, on the ground that the act of the 3d March, 1803, is a *compact* between the United States and the State of Ohio; that this compact was founded on the state of things *existing at the time*; that, according to the state of things existing at that time, the expenses of surveying constituted no charge upon the funds on which the three per cent. was to be calculated; that neither of the parties to the compact can change the terms of it without the consent of the other party; that the act of the 26th March, 1804, exempting the purchasers from the payments of the expenses of surveying, was the act of the United States, one of the parties to the compact only, which can have no effect on the other party; and, consequently, that the State of Ohio has the right to insist that the three per cent. shall be calculated now, as it was calculated at the date of the compact—to wit, on the amount of sales, without deducting the expenses of surveying.

That the act of the 3d March, 1803, was a compact, or the affirmation of a compact, between the United States and the State of Ohio, seems to be unquestionable; and the argument is conclusive, if the other proposition on which it rests be true—that this compact was founded on the existing state of things,

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and contemplated that this state of things should remain immutable. But if, on the other hand, it was within the contemplation of the contracting parties at the time, that the power to regulate the terms of sale should remain in Congress, then the parties will be considered as contracting with reference to the exercise of this continuing power, and its exercise can work no breach of the contract.

On the supposition that the existing state of things was to remain immutable, so far as this compact was concerned, then Congress had no power to introduce any change into the existing regulations for the sale of the public lands in Ohio.

If, for example, the organization of the offices engaged in those sales should have been found so wholly insufficient as to put a total stop to those sales, Congress could not introduce another system somewhat more expensive, without a violation of the compact with Ohio. So, again, at the time of the compact the *minimum* price of the public lands was two dollars per acre; if it should have been found that the individual owners of land in that State had it in their power to offer terms so much more attractive to purchasers as to put an entire stop to the sale of the public lands, Congress could not reduce the terms without a violation of the compact with Ohio. But this thing has been done, and it is not understood that Ohio has complained. And if Congress had the power to reduce the price, and thus to diminish the proceeds of sales by nearly one-half, I cannot see what reason any other modification, for which the public good called, should be charged as a breach of the compact, and made a ground of complaint.

The great object in view was the sale of the public lands. The interests of the United States and Ohio coincided in the advancement of this object. Ohio was interested not only in the three per cent., but in the general fund to be raised by these sales. As a member of the Union, she had a voice in devising the means of promoting the sales. The supposition that the system of land sales which was in force at the time of the compact was to remain inflexible, and to yield to no change in the condition of the country, and to no light which future experience might throw upon the subject, does not appear to me to be rational. It would have been at war with the interest of

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both the parties to the compact, and, therefore, cannot be believed to have been within their contemplation. It seems to me that it must have been expected on both sides that this power of altering the terms of sale should remain in Congress, and that, in exercising it, they should be governed by the fluctuating circumstances of the country, and guided by the lights of experience. On this principle Congress has acted: relieving the purchasers, from time to time, of previous burdens which might have impeded the sales; altering the terms of payment; and, finally, reducing the *minimum* price from two dollars to one dollar and twenty-five cents. And in all these alterations Ohio has had a voice. It was in the course of this process of holding out stronger inducements to purchasers, and thereby accelerating the sales, that the act of 1804 was passed, which relieved the purchasers from the expenses of surveying; so that these expenses, which, at the time of the compact, did not constitute a part of the individual expenses of the sales of public lands, did, thereafter, constitute a part of such individual expenses, and, therefore, by the terms of the compact, were to be deducted before the three per cent. was to be calculated and paid to Ohio. This, I presume, is the view of the subject on which the Secretary of the Treasury founded his opinion; and his opinion is certainly correct, if the parties be supposed to have contracted with reference to a continuing power in Congress to control, alter, and modify the terms of sale at pleasure; and, from the nature of the case, it appears to me that they must have contracted with reference to this continuing power in Congress. The report relies on the contemporaneous construction of the contract, and the constant practice of the Treasury Department, from the date of the compact down to January, 1823, to allow the three per cent., without deducting the expenses of surveying. Admitting the report to be accurate as to matter of fact, the argument, although entitled to great respect and consideration, is not, in my opinion, conclusive. With regard to the contemporaneous construction, the expenses of surveying at the time of the compact formed no charge on the fund; and the forms of settlement adopted at that point of time legally and properly excluded those expenses

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from the estimate of the three per cent.: and the forms of settlement having been then adopted, and the attention of the head of the department not having been particularly called to the change which had been introduced by the incidental provision of the act of 1804, it is very reasonable to believe that the accounting officers continued to pursue the old forms, because they found them in use, without advertg, themselves, to the propriety of a new deduction under the act of 1804. Thus, the practice which had commenced rightfully, might, and probably was, continued through mere inadvertence, and from that mechanical attention to forms which is so naturally to be expected in subordinate officers. But the question has now become a question of right; and in order to settle it, we must go back to the compact, and construe that with reference to the intention of the parties.

The compact stipulates for three per cent. on the net proceeds of the future sales of the public lands, *after deducting all expenses incidental to the same*. There is nothing in the terms of the compact which limits its operation to the existing regulations for the sale of the public lands—nothing in those terms which indicates an intention that those regulations should remain unchanged. The power of Congress over the future sales is entirely untouched by the terms of the compact. This compact, like all others, is to be construed in reference to the subject-matter and the nature of the case on which it is to operate; and, construing it in this way, the decision of the Secretary of the Treasury appears to me to be correct. If, however, you should have any doubt on the subject, I would submit it whether the respect which is due to the legislature of Ohio would not render it proper to report the case to Congress, in order that, if they should differ in opinion with the Secretary of the Treasury, they may pass a short explanatory act, giving their construction of the act of 1804.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

THE PRESIDENT OF THE UNITED STATES.

Right of the Cherokees to Impose Taxes on Traders.

RIGHT OF THE CHEROKEES TO IMPOSE TAXES ON TRADERS.

The Cherokee nation of Indians have not the right to impose taxes on persons trading among them under the authority of the United States.

Neither the history and condition of the Indians, the relations which the United States bear towards them, nor the treaties which subsist between them and our government, permits the power of taxation to be considered as one between equal sovereigns.

Trade with the Cherokees has been provided for by treaty stipulations, giving to Congress the sole and exclusive right of regulating trade with them and managing their affairs as shall be deemed proper. The right thus conferred on the United States is sole and exclusive; wherefore neither the Cherokees nor any other nation had the right thereafter to touch the subject which was thus solely and exclusively given to the United States.

OFFICE OF THE ATTORNEY GENERAL,*April 2, 1824.*

SIR: The question on which you request my opinion is, whether the Cherokee nation of Indians have a right to impose a tax on persons trading among them under the authority of the United States?

If the Cherokee nation is to be considered as an independent sovereign nation, and this question is to be answered by an appeal to the natural law of nations, there can be no doubt of their right to pass what laws they please, and to enforce whatsoever laws they may choose to pass within the limits of their proper sovereignty. But it appears to me that it would be fallacious to view the subject in this light. The history and condition of those people, the relations which we have borne and still bear towards them, and the treaties which subsist between them and the United States, will not permit us to regard the question as one between equal sovereigns, to be decided by the laws of nature as applied to nations. Whatsoever philosophy or philanthropy might, in the abstract, dictate upon this subject, we are constrained to look at things as they are, and to decide this question upon narrower grounds. Still, however, it is not to be decided by our arbitrary pleasure. The time has passed away in which it would be tolerated to treat these people as we please, because we are Christians and they are heathens. If the tax is to be resisted, we must find some solid ground for that resistance, which law and reason will support, and which we can justify both towards God and man. If, by

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the treaties into which they have entered with us, they have debarred themselves from imposing this tax, they cannot justly complain if we insist on the fulfilment of these treaties, and the withdrawal of the tax as far as it shall be found in conflict with their own stipulations. The only reason for which I have alluded to their political condition, and their past relations towards us, is, because I think that these considerations enter properly into the construction of the treaties which they have from time to time made with us.

The first treaty was that of November 28, 1785. At that time the nation was in the first stage of society—the hunter state; and, consequently, government, laws, and taxes were wholly unknown among them. The ninth article of that treaty stipulates that, “for the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States in Congress assembled *shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper.*” The tenth article provides that, “until the pleasure of Congress be known respecting the ninth article, all traders, citizens of the United States, shall have liberty to go to any of the tribes or towns of the Cherokees to trade with them; and they shall be protected in their persons and property, and kindly treated.” Again: by the sixth article of the treaty of the 2d July, 1791, “It is agreed on the part of the Cherokees, that the United States shall have the sole and exclusive right of regulating their trade.” Again: by the second article of the treaty of 2d October, 1798, it is stipulated that “the treaties subsisting between the present contracting parties are acknowledged to be of full and operative force, *together with the construction and usage under their respective articles, and so to continue.*” The treaties of the 25th October, 1805, and of 8th July, 1817, recognise those stipulations, and continue them in full force. I observe that, among the documents which you handed to me, there is a letter addressed to you by the delegation from the Cherokee nation now at Washington, bearing date on the 25th of February last, in which it is acknowledged that, by the treaties of 1785 and 1791, the Cherokees placed themselves under the protection of the United States, and of no other

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sovereign whatsoever, and gave to the United States the right of regulating trade with them. But in all this, they say, they cannot see that the Cherokees conceded their own right of making municipal regulations for themselves; and they add, that it cannot for a moment be believed that such were the intentions of the parties when those treaties were entered into. But it is to be remembered that, when those treaties were entered into, there were no such things as municipal regulations in the Cherokee nation; and the construction which those treaties are to bear in relation to the periods of 1785 and 1791, is the construction which they are to bear now. For the stipulations of treaties, so long as they remain unaltered, cannot fluctuate with the changing condition of the parties. They cannot mean one thing in one year, and another thing in another year. A change in the condition of the parties may be a very good reason for changing the stipulations themselves; but not for varying the construction of stipulations of a fixed character. The inquiry, then, is, what is the proper construction of these stipulations in reference to the condition of the Cherokees at the time they were entered into? because the construction which was the proper one then, is the proper one still.

Now the stipulation of the treaty of 1785 is, that "the United States in Congress assembled shall have the *sole and exclusive right of regulating* the trade with the Indians, and *managing all their affairs in such manner as they think proper.*" The right thus conferred on the United States is *sole and exclusive*; consequently, neither the Cherokees nor any other nation had the right thereafter to touch the subject which was thus solely and exclusively given to the United States. What was the right thus solely and exclusively given to the United States? The right of regulating the trade with the Indians. What does this mean? The right of regulating the conduct of the citizens of the United States in carrying on this trade? This cannot be the meaning, because this right the United States had before, and it required no treaty to give it to them. The treaty meant to give a right which did not exist before; and this could be only the right to prescribe the whole system of regulations, *on both sides*, under which the trade should be carried on. The

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Supreme Court of the United States has lately decided that a power to regulate commerce between the several States is an exclusive power, because commerce is *a unit*; and the power to regulate it is, from the force of the word "*regulate*" acting on such a subject, from the nature of the case, and the necessity of the thing, an exclusive power; and that such being the compact between the States, as expressed in the constitution of the United States, no State has a right, by any regulation of its own, to impede, clog, or in any manner to encumber, the action of any regulation ordained by Congress. Now, the constitution of the United States is no more a compact between the States than the treaties which we are considering are compacts between the Cherokee nation and the United States; the commerce between the States is no more a unit than the trade with the Indians is a unit. And with regard to the exclusiveness of the power to regulate it, the case which we are considering is far stronger; because, in the former case, that exclusiveness was matter of inference from the nature of the subject, and the force of the word "*regulate*;" whereas, here, the *sole and exclusive* power to regulate the trade is given to the United States *in express terms*.

With regard to the surprise which seems to be expressed at a construction which should impute to the Cherokees the intention of giving up the whole subject to the United States, and relinquishing this national right of making municipal regulations of their own in relation to this trade, it proceeds from a forgetfulness of the political condition of the Cherokees at the period of these treaties. What can more strongly mark this condition than the stipulation in the same sentence, by which the Cherokees give to the United States the sole and exclusive right of "*managing all their affairs in such manner as they think proper*?" All whose affairs? Surely not those of the United States, for this they had before: it would have been preposterous in the treaty to affect to give a right which already existed in full force; it can mean only the sole and exclusive right of managing all the affairs of the Cherokees in such manner as the United States shall think proper. And after this, I should think that all surprise might cease at their having given

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to Congress the sole and exclusive right of regulating the trade with the Indians under the construction which I have given to it.

If there could be any doubt whether the treaty of 1785 intended to give to Congress the power of making regulations which should go beyond the control of our own citizens and bind the Indians, it would seem to be removed by the sixth article of the treaty of 1791, by which "it is agreed on the part of the Cherokees that the United States shall have the sole and exclusive right of regulating their trade." Whose trade? Not the trade of the United States certainly; for it would be absurd to suppose that the Cherokees should give to the United States the sole and exclusive right of regulating the trade of the United States. It can mean only the trade of the Cherokees. So that by this article the Cherokees place the regulation of their own trade solely and exclusively in the hands of Congress—a stipulation not at all surprising, considering the geographical position, as well as the political state and condition, of the Indians when these treaties were made.

In the exercise of this power, Congress has, from time to time, gone on to regulate this trade by legislative enactments. From the year 1786 down to the present time, there have been continually subsisting regulations, under which citizens of the United States shall be *licensed* to trade with the Indians. The purport of the license is, that the party who bears it shall have liberty to trade with the Indians under the restrictions imposed by the laws of the United States. This is a regulation of trade strictly within the terms of the treaty, and it proceeds from the body to which the treaty concedes the sole and exclusive right to regulate this trade. The question is, whether a right on the part of the Cherokee nation to tax the traders thus licensed on the part of the United States be compatible with that sole and exclusive right to regulate the trade from which the authority of the license proceeds? The imposition of the tax on the traders is the imposition of a new condition, on which alone the Cherokees say that this trade shall be carried on. It is a new regulation of the trade instituted by them, while the sole and exclusive power to regulate it is acknowledged by the treaties to be in the Congress of the United States. Is this

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sole and exclusive power in Congress consistent with the existence of a like power in a separate and independent sovereign, directed by a different judgment and a different will? I apprehend not.

Again: if the Cherokee nation have the right to tax at all, the quantum of the tax rests in their own discretion. If they have a right to impose a tax of \$50, they have the same right to impose a tax of \$500, \$5,000, or \$50,000: If they may tax for revenue, they may tax for exclusion. If they have a right to superadd, at pleasure, a new burden on a regulation of trade ordained by Congress, they may impose such a burden as to defeat the regulation altogether. In the case of *McCullogh* against the State of Maryland, the Supreme Court of the United States decided, that although the State of Maryland was a sovereign and independent State, and consequently possessed the general power of taxation, yet they had no right to tax an institution which the constitution had given Congress the power to create; because a power to tax was a power to destroy, and was utterly inconsistent with the paramount power of Congress to create. The question which we are considering appears to me to turn on the same principle. The treaties having given to Congress the right to create these regulations of trade, a power to destroy them is a wholly incompatible power; and a power to tax, as the Supreme Court has said, is, virtually, a power to destroy.

One of the documents which you have handed to me takes the ground that the Cherokee nation may prohibit this trade altogether; and, as a consequence, that they may prescribe the terms and conditions on which they will tolerate it. A sovereign nation, unfettered by treaties, certainly has the right to do both these things. But under the treaties which subsist between the Cherokee nation and the United States, I cannot assent either to the premises or conclusion.

Under these treaties, I do not think that the Cherokee nation has the right to prohibit altogether a trade which Congress has declared to be open.

A sole and exclusive power to regulate trade between two States seems to me necessarily to involve, among other things, the right of saying when the trade shall be suspended, and

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when it shall be resumed. The embargo was a prohibition of trade; yet it was held to be a commercial regulation, and the power to institute it could be defended on no other ground. If, in the judgment of Congress, circumstances should arise which should make it advisable to discontinue the trade with the Cherokee nation, and to discontinue the trade on the part of the Cherokee nation, either with the United States or with any other foreign nation, the sole and exclusive power which that nation has given to Congress to regulate *their* trade would authorize and justify the measure. In my opinion, the treaties place the whole subject exclusively in the hands of Congress; and consequently, under the treaties, Congress alone has the right to say when this trade shall be open, and when it shall be shut; and this power having been expressly declared by treaty to be *sole and exclusive* in Congress, I think that the Cherokees have debarred themselves from all interference with it.

With regard to the right of Congress to keep the trade open, the treaty of 1785 appears to me to recognise it by a distinct article—I mean the tenth. The ninth article having given to Congress the general power which has been stated, the tenth provides that, “*until the pleasure of Congress be known respecting the ninth article*, all traders, citizens of the United States, shall have *liberty* to go to any of the tribes or towns of the Cherokees, to *trade* with them; and they shall be protected in their persons and property, and kindly treated.” This tenth article, then, only anticipates what it admits that Congress may thereafter do by virtue of the ninth article—that is, authorize the citizens of the United States to go and trade with the Cherokee nation. The existence of such a power as this on the part of Congress, seems to me utterly inconsistent with a power on the part of the Cherokee nation to say that, although our citizens may go, they shall not trade.

The treaty of 1793 also throws light upon this question. By the second article of that treaty, which has been quoted, “the treaties subsisting between the present contracting parties are acknowledged to be of full and operative force, *together with the construction and usage under their respective articles, and so to continue.*” What *were*, in 1793, the construction and usage under the articles which have been quoted? So

Right of the Cherokees to Impose Taxes on Traders.

far as I am informed, that construction and usage were—that persons licensed under the authority of the United States might *go and trade* with the nation, not only free from any let or molestation on the part of the Cherokees, but *free from any tax, imposition, or burden whatsoever, on the part of that nation*; and the stipulation here is, that this construction and usage *shall so continue*. But the tax in question is a departure from that usage; it is an *innovation* against which this article expressly stipulates.

But if it were conceded that the Cherokee nation might *prohibit* this trade *altogether*, it would not follow that they might, under these treaties, *tolerate it under such regulations as they might institute*; for, whether the power of entire prohibition has been given to Congress or not, the sole and exclusive power of regulation has been given to them; and, so long as these treaties remain in force, it seems manifest to me that the Indians have no power to interfere with these regulations, either by addition or subtraction: and what is a tax upon persons authorized by Congress to trade without it, but a new and distinct regulation superinduced upon the regulations provided by Congress? So that the principle affirmed by this tax is, not that the trade shall stop, but that it shall continue; and that it shall continue subject to such regulations as the Cherokees may make, although by their treaties they declare that the *sole* and *exclusive* power of making such regulations shall be in Congress; or, in other words, that Congress *alone* shall regulate this trade, but that the Indians shall regulate it *also*: which appears to me to be a political solecism.

Upon the whole, I am of the opinion that the Indians have no right to impose this tax on traders licensed under the authority of the United States.

Whether the United States, in enforcing their rights under these treaties, may not and will not have respect to the altered condition of the Cherokees, to the stage of civilization to which they have been now carried by the measures adopted by the United States to produce this very effect; whether Congress will not adapt their future regulations to this altered condition, so as to enable that nation to raise a revenue for the support of their government, by an equal tax upon our traders as well as

Brevets under the Act of July 6, 1812.

their own, are political considerations which, although it may not be improper for me to hint at them for your consideration, are foreign to the question of strict law, on which my opinion has been requested.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF WAR.

BREVETS UNDER THE ACT OF JULY 6, 1812.

The provisions of the act of July 6, 1812, authorizing the President to confer brevet rank on such officers of the army as shall have served ten years in any one grade, apply to brevet officers generally, and such as have been brevetted for gallant services.

The service actually rendered for ten years in any one grade being the ground of promotion, any officer performing it for that term, whether he holds the grade by commission or by brevet, is entitled to promotion.

OFFICE OF THE ATTORNEY GENERAL,
April 5, 1824.

SIR: A want of familiarity with the *minutiae* of the organization and usages of the army renders me very diffident of any opinion which I may express on the language of an act of Congress touching military matters. To a soldier, or the head of the War Department, conversant with all these *minutiae*, and with what may, without impropriety, be called the common law of the army, an act of Congress may present a very different meaning from that which it would present to the mere lawyer. Since you have requested my opinion, however, on the construction of the 4th section of the act of the 6th July, 1812, "making further provision for the army of the United States," &c., I am bound to give it; and I do it with the less reluctance, because your own knowledge and experience, and the counsel of military gentlemen which you have it in your power to command, will enable you readily to correct any error into which I may fall.

The specific question which you present for my opinion is, "Whether so much of this section as authorizes the President to confer brevet rank on such officers of the army as shall have

Brevets under the Act of July 6, 1812.

served ten years in any one grade, applies to brevet officers generally, or more particularly to the officers of the topographical engineers of the general staff, and such as have been brevetted under this act for gallant services?" The words of the section are: "That the President is hereby authorized to confer brevet rank on such officers of the army as shall distinguish themselves by gallant actions or meritorious conduct, or who shall have served ten years in any one grade." The act makes no distinction of corps. It operates on all the officers of the army; and the title, as well as the provisions of the act, shows that it was passed in relation to the whole army. If the matter were what lawyers call *res integra*, I should say that the intention was, in every branch of the section, to enable the President to anticipate a vacancy in the line, by conferring brevet rank on a commissioned officer; that here his authority under the act stopped; and that he could not confer a second brevet on the same officer, so long as he stood upon the same commission in the line on which the first brevet had been conferred. But I understand that the practice, sanctioned by Congress, has been to confer brevet upon brevet for gallant actions; and while there is nothing in the language of the law which forbids this construction, there are obvious motives of sound policy to indulge it.

The question, then, having been practically settled, that, under this law, brevet rank may be conferred on brevet rank, let us see how this principle will operate on the last branch of this section, which is, "that the President may confer brevet rank on such officers of the army as shall have *served* ten years in any one grade." In this branch of the law, *the service actually rendered* for ten years in any one grade, is the ground of the promotion; and, in my opinion, every officer who has performed *the appropriate duties of any one grade* for ten years, whether he holds that grade by commission or by brevet, is entitled to promotion. If, for example, an officer who holds the commission of captain in the line, holds also the brevet of a major, and has for ten years performed the duties only of a captain, he is not entitled to the brevet of a lieutenant colonel, because he has not been serving for those ten years in the grade of major—that is, he has not been performing during that time

Resurveys of Spanish and French Claims.

the appropriate duties of major. But if the same person had during those ten years been serving in the grade of major—that is, performing the appropriate duties of major—I should think it no objection to his claim of further promotion that he held that grade by brevet: because the promotion is the reward of services in a particular grade; and if the services be commensurate with that grade, the reason of the law is equally satisfied, whether he held that grade by brevet or by lineal commission.

This construction is formed upon the face of the law itself; and if there be anything in the practical effect which proves it erroneous, you will easily perceive it, and, I need not add, have the power to reject it.

I remain, very respectfully, sir, your obedient servant,

WM. WIRT.

To the SECRETARY OF WAR.

RESURVEYS OF SPANISH AND FRENCH CLAIMS.

Claimants are liable for the expenses of resurveys where there had been no survey of the claim under the French or Spanish governments previous to the delivery of possession of the territory, and where resurveys are deemed necessary by the commissioners to enable them to decide on the validity of the claims.

OFFICE OF THE ATTORNEY GENERAL,

April 8, 1824.

SIR: On a careful examination of all the acts of Congress touching the surveying of private land claims in Louisiana, it appears to me that the individual is responsible for those expenses in the following cases only:

First. Where there had been no survey of the claim under the French or Spanish governments previous to the cession of the territory and delivery of possession to us.

Second. Where, although there had been such survey, yet another survey was, in the estimation of the commissioners, necessary to decide on the validity of the claim.

Third. Where, under the second proviso of the act of 28th February, 1806, it was in any case judged necessary, by the

 Validity of Certain Concessions.

authority from which the patent was to flow, to resurvey the claim before patent. But this second proviso was superseded by the seventh section of the act of the 3d March, 1807, by which the commissioners were authorized to order a resurvey of a tract which had been previously surveyed under French or Spanish authority, whenever they might think it necessary; but such resurvey was to be executed at the expense of the United States. So that, since this last act, the only cases in which the claimants are liable for expenses of surveying are the two first above mentioned; in all other cases, the expenses are to be borne by the United States.

If the grounds of this opinion are desirable, they will be furnished. I will suggest, however, that I have had a full conference with the Commissioner of the Land Office, and have put him completely in possession of my view of the several acts of Congress out of which his questions have grown.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

 VALIDITY OF CERTAIN CONCESSIONS.

A concession confirmed by the 1st section of an act of March 1, 1805, where a survey had been made prior to October 1, 1800, is valid for the entire quantity contained in the survey.

A concession confirmed by the 4th section of the act of 3d March, 1807, where the commissioners issued a certificate for eight hundred arpens, according to the original plat, without ordering a resurvey under the 7th section, is good for the quantity contained in the plat, though it exceed the quantity specified.

The 1st section of the act of 12th April, 1814, confirmed the claim according to the survey, where a survey had been made. A mistake of the commissioners was immaterial, as the confirmation was effected by the act solely. The commissioners only reported upon, did not decide, the claims.

The 3d section required surveys only where none had been made by the foreign government.

OFFICE OF THE ATTORNEY GENERAL,

April 8, 1824.

SIR: I have examined the several cases stated by the Commissioner of the General Land Office, in his letter of the 30th

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March, which you have referred for my opinion; and proceed to give you the result of this examination.

First. The concession in favor of William Musick is, in my opinion, a valid claim, under the first section of the act of the 2d March, 1805, to the whole amount of the survey, dated the 10th April, 1796. The acts of the 28th February, 1806, and of the 3d March, 1807, are the only acts which authorize resurveys for the decision of the right of the claimant, or the correction of the quantity. No resurvey having been ordered under these acts, or either of them, with a view to the correction of quantity, the claim is, in my opinion, good, according to the old survey of 1796—as good, according to the language of the act of 2d March, 1805, “as if the title had been completed” by a grant from the crown before the cession of the territory to the United States.

Second. The concession to Elisha Harrington was confirmed under the fourth section of the act of the 3d March, 1807. The commissioners, in their certificate in this case, declare that the party is entitled to a patent for eight hundred arpens, situated, &c., as described in a plat of survey certified the 20th January, 1804. The seventh section of the act under which they confirmed this title authorized them, if they judged it necessary, to order a resurvey. It is to be presumed that, if they had thought it necessary to the purposes of public justice, they would have ordered a resurvey: instead of doing which, they confirm according to the original plat held by the complainant; and, therefore, the claim must stand upon that plat, and is good for the quantity therein given, although it may exceed the specified quantity by a few arpens.

Third. The concession to Jacques de St. Vrain and Antoine Soulard is confirmed by the act of the 12th April, 1814. The mistake of the commissioners upon the subject is irrational, because this class of claims had been submitted to their decision; they had been required to report such claims, with the documents connected with them, but not to pass sentence on them; the confirmation is solely the work of the act of Congress, to which I have alluded. And on reference to the first section of this act, it is manifest that the claim is confirmed according to the survey, where a survey had taken place; the

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provision of the third section of that law requiring a survey only where there had not been one made by a surveyor duly authorized by the government making the concession. The claim, therefore, is, in my opinion, good according to the Spanish survey.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

LIABILITY FOR DUTIES.

The consignment of a quantity of rum imported by the brig Hope in 1816, and afterwards sold, is liable for the duties within the case of the United States *vs.* Lyman, (1 Mason's Reports, 482,) and an action may be maintained against him for them.

OFFICE OF THE ATTORNEY GENERAL,

May 3, 1824.

SIR: I have examined the papers which have been transmitted to me from your department, with the petition of William Plympton, and the counter petition of Isaac McClellan, both of Boston; and am of the opinion that, on the principles established by the court of the United States for the first circuit, in the case of the United States *vs.* Lyman, (1 Mason's Reports, 482,) an action may be maintained by the United States against McClellan for the duties on the rum consigned to him by the brig Hope in 1816. I do not think either that the circumstances relied on by Mr. McClellan, or the feature of discrimination relied on by Mr. Blake, will take the case out of the principles settled by that case. Mr. McClellan was the *consignee* of the rum, which was *imported* before any part of it was sold to Lovejoy. According to the principle settled in the United States *vs.* Lyman, these facts fix the duties on Mr. McClellan; and neither the fairness of the sale to Lovejoy, nor the fairness of the bond and surety given by the latter for the duties, exonerate McClellan from that liability, according to the authority of that case.

The papers are herewith returned.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

Validity of the South Carolina Police Bill.

VALIDITY OF THE SOUTH CAROLINA POLICE BILL.

The act of South Carolina, authorizing the seizure and imprisonment of persons of color who may come into any of her ports from any other State or any foreign port, until the vessel to which they may be attached shall depart, is void, as being against the constitution, treaties, and laws of the United States, and is incompatible with the rights of all nations in amity with them.

OFFICE OF THE ATTORNEY GENERAL,

May 8, 1824.

SIR: The third section of the legislative act of South Carolina, entitled "An act for the better regulation and government of free negroes and persons of color, and for other purposes," which you submit for my opinion, is in the following words:

"And be it further enacted by the authority aforesaid, That if any vessel shall come into any port or harbor of this State, from any other State or foreign port, having on board any free negroes or persons of color, as cooks, stewards, mariners, or in any other employment on board such vessel, such free negroes or persons of color shall be liable to be seized, and confined in jail until said vessel shall clear out and depart from the State. And that when said vessel is ready to sail, the captain of the said vessel shall be bound to carry away the said free negro or person of color, and pay the expenses of his detention; and in case of his neglect or refusal so to do, shall be liable to be indicted; and on conviction thereof, shall be fined in a sum not less than one thousand dollars, and imprisoned not less than two months. And such free negroes or persons of color shall be seized and taken as absolute slaves, and sold, in conformity to the provisions of the act passed on the twentieth day of December, one thousand eight hundred and twenty, aforesaid."

The question which you propound for my opinion on this section is, "Whether it is compatible with the rights of nations in amity with the United States, or with the national constitution?"

By the national constitution, the power of regulating commerce with foreign nations and among the States is given to Congress; and this power is, from its nature, exclusive. This power of regulating commerce, is the power of prescribing the terms on which the intercourse between foreign nations and

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the United States, and between the several States of the Union, shall be carried on. Congress has exercised this power; and among those terms there is no requisition that the vessels which are permitted to enter the ports of the several States shall be navigated wholly by white men. All foreign and domestic vessels complying with the requisitions prescribed by Congress have a right to enter any port of the United States, and a right to remain there, unmolested in vessel or crew, for the peaceful purposes of commerce. No State can interdict a vessel which is about to enter her ports in conformity with the laws of the United States; nor impose any restraint or embarrassment on such vessel, in consequence of her having entered in conformity with those laws. For the regulations of Congress on this subject being both supreme and exclusive, no State can add to them, vary them, obstruct them, or touch the subject in any shape whatever, without the concurrence and sanction of Congress. By the regulations of Congress, vessels navigated by black or colored men may enter any port of the Union for the purposes of commerce, without any molestation or restraint in consequence of having so entered; but the section of the law of South Carolina which we are considering declares, that if any vessel shall enter one of her ports, navigated in whole or in part by negroes or persons of color, the crew, so far as they are negroes or persons of color, shall be immediately seized and imprisoned, at the expense of the captain, with various other contingent and severe penalties, both on the captain and his imprisoned crew. Here is a regulation of commerce, of a highly penal character, by a State, superadding new restrictions to those which have been imposed by Congress; and declaring, in effect, that what Congress has ordained may be freely and safely done, shall not be done but under heavy penalties.

It seems very clear to me that this section of the law of South Carolina is incompatible with the national constitution and the laws passed under it, and is, therefore, void. All nations in amity with the United States have a right to enter the ports of the Union for the purposes of commerce, so long as, by the laws of the Union, commerce is permitted, and so far as it is permitted. And inasmuch as this section of the law of South Carolina is a restriction upon this commerce, it is incompatible

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with the rights of all nations which are in amity with the United States.

There is another view of this subject. By the national constitution, the power of making treaties with foreign nations is given to the general government: and the same constitution declares that all the treaties so made shall constitute a part of the law of the land. The national government has exercised this power, also, of making treaties. We have treaties subsisting with various nations, by which the commerce of such nations with the United States is expressly authorized, without any restriction as to the color of the crews by which it shall be carried on. We have such a treaty with Great Britain, as to which nation this question has arisen. This act of South Carolina forbids (or, what is the same thing, punishes) what this treaty authorizes.

I am of the opinion that the section of the law under consideration is void, as being against the constitution, treaties, and laws of the United States, and incompatible with the rights of all nations in amity with the United States.

I have the honor to remain, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF STATE.

DUTIES OF SURVEYOR IN ILLINOIS AND MISSOURI.

The surveyor of the public lands in the Territories of Illinois and Missouri, under the power conferred to engage surveyors as his deputies and to perform all and singular the duties which were required by law to be performed by the surveyor general, may let the work by contract.

It is his duty to fix the compensation of the deputy surveyors, chain-bearers, and axe-men; and it is not perceived how this can be done but by contract, for no deputy surveyor is under any obligation to accept or retain his place unless the compensation shall be satisfactory.

Fixing compensation by contract is doing all the law requires of the surveyor in that respect: he fixes the compensation.

The government will not complain of a practice which it has sanctioned, and which does not appear to have been attended with any injurious consequences.

OFFICE OF THE ATTORNEY GENERAL,

June 10, 1824.

SIR: Mr. David Barton, of the Senate of the United States, has preferred certain charges against General Rector, "the sur-

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veyor of the public lands in the Territories of Illinois and Missouri;" on which you require my opinion both as to the law and the facts.

As these charges import a series of violations of the laws which prescribe the duties of the surveyor, it seems to be proper, in the first place, to ascertain the true construction of those laws, so far as they relate to these charges.

General Rector received his appointment under the act of 29th April, 1816, "to provide for the appointment of a surveyor of the public lands in the Territories of Illinois and Missouri."

This act imposes on the surveyor the following duties:

1. To engage a sufficient number of skilful surveyors as his deputies.

2. To cause so much of the land as the President of the United States should direct, &c., to be surveyed, divided in the manner in which the surveyor general had been authorized to do, &c.

3. To do and perform all other acts which the surveyor general was authorized and directed to do, with regard to the lands under his charge.

4. To do and perform all and singular the duties required by law to be performed by the principal deputy surveyor for the Territory of Missouri.

5. To fix the compensation of the deputy surveyors, chain-carriers, and axe-men: Provided, that the whole expense of *surveying and marking the lines* should not exceed three dollars for every mile that should be run and surveyed.

This act having, by reference, devolved on the surveyor of Illinois and Missouri the same duties which had, by previous law, been prescribed for the surveyor general of the United States, and the principal deputy for the Territory of Missouri, it becomes necessary to turn to the laws which prescribe these duties.

The surveyor general.—This officer was appointed under the act of the 18th May, 1796, "providing for the sale of the lands of the United States in the territory northwest of the Ohio, and above the mouth of the Kentucky river." His duties prescribed by the law are—

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1. To engage a sufficient number of skilful surveyors as his deputies.
2. To *cause his deputies*, without delay, to survey and mark the unascertained outlines, &c., and to divide the same in the manner therein directed.
3. To frame regulations and instructions for the government of his deputies.
4. To *administer to his deputies the necessary oaths*, upon their appointment.
5. To remove those deputies for negligence or misconduct in office.
6. From the field-books returned to him by his deputies, to cause a description of the whole lands surveyed to be made out; a fair plat to be made of the townships, and fractional parts of townships, contained in the said lands, describing the subdivisions thereof, and the marks of the corners.
7. To cause the plat so made to be recorded in books to be kept for the purpose; a copy whereof is to be kept open, at the surveyor general's office, for public information, and other copies to be sent to the places of sale, and to the Secretary of the Treasury.

The principal deputy surveyor of Missouri.—The only duty of this officer which it is necessary to notice, on account of the reference made to those duties under the law under which General Rector was appointed, is that which requires this principal deputy to execute himself, or *cause to be executed* by his deputies, such surveys as may be authorized by law.

As the skilful deputies, so required by the law to be appointed by the surveyor in chief, are placed under his superintendence; as he is made responsible, in the first instance, for the judiciousness of the selection; and, by the power and duty of removing them for negligence or misconduct in office, is made responsible for the manner in which they perform their duties—it becomes necessary to inquire what those duties are.

The duties of the *deputies*, as prescribed by the act of the 18th May, 1796, are—

1. To proceed, without delay, to survey and mark the unascertained outlines, &c., and to divide the same in the manner directed by that act: that is, *the deputies themselves* are to do

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this work, and the surveyor general is expressly required to *cause them* to do it.

2. To cause to be marked on a tree, near each corner, within the section, the number of such section, and, over it, the number of the township within which such section may be.

3. "The said deputies shall carefully note, in their respective field-books, the names of the corner trees marked, and the number so made."

4. To divide the fractional parts of townships into sections in the manner required by law, and to annex the fractions of sections to the adjacent entire sections.

5. To mark all the lines plainly upon trees, and to measure those lines with chains containing two perches of sixteen and a half feet each, subdivided into twenty-five equal links; which chain shall be adjusted to a standard to be kept for that purpose.

6. Each deputy surveyor is ordered to note in his field-book the true situation of all mines, salt-licks, salt-springs, and mill-seats which shall come to his knowledge; and to note, also, in his field-book, all watercourses over which the lines run by him shall pass, and also the quality of the land.

7. To return the field-books so made out to the surveyor general, who shall, therefrom, cause a description of the whole lands surveyed to be made out and transmitted to the officers who may superintend the sales.

It is manifest, from this view of the laws, that the national legislature has confided the very important business of surveying the public lands to *deputy surveyors only*; with regard to whom it has provided the following guards:

1. That they shall be selected by the surveyor general for their skill.

2. That they shall be sworn by the surveyor general to the faithful performance of their duty.

3. That they shall act under regulations and instructions framed for their government by the surveyor general.

4. That they shall be removable, at the pleasure of the surveyor general, for negligence or misconduct in office.

It may not be amiss to notice, also, a species of latent check which the law has placed on the work thus to be done by the deputies; it arises from the duty imposed on the surveyor to

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cause to be deduced from the field-books returned by his deputies a fair plat of all the townships and fractional parts of townships contained in the land described in those field books—a process calculated to detect any inaccuracy in the work returned by the deputy; and much better calculated to detect it than if the deputy himself had been required to make the plat, and the surveyor general merely to examine the plat so made; because the first is a more severe process, and less liable to oversight and neglect than the latter.

The act of the 29th of April, 1816, under which General Rector was appointed, after fixing his salary at a thousand dollars, authorizes him to receive from individuals, “for recording the surveys *executed by any of his deputies*, at the rate of twenty-five cents for every mile of the boundary line of such survey;” which is further confirmation, if any were required, that the law contemplates no surveys but such as are executed *by the deputies themselves*.

The same law further provides that any plat of survey duly certified by the surveyor general should be admitted as evidence in any of the courts of the United States, or Territories thereof; a solemnity which would not have been attached to such plats but upon the supposition that they were the work of sworn officers, carefully selected for their skill and character, and acting at every step under the highest sanctions.

Before we leave these laws, it will be proper to call your attention to the 10th and 12th sections of the act of the 18th of May, 1796, under which the surveyor general of the United States was appointed, and his department organized.

The 10th section provides that the surveyor general shall receive for his compensation two thousand dollars *per annum*; “and the President of the United States may fix the compensation of the *assistant* surveyors, chain-carriers, and axe-men: *Provided, &c.*” The 12th section provides “that the *surveyor general*, *assistant* surveyors, and chain-carriers, shall, before they enter on the duties to be performed under this act, severally take an oath, or affirmation, faithfully to perform the same.” I call your attention to these sections on account of the introduction of the term *assistant* surveyors, in lieu of the

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term *deputy* surveyors, and for the purpose of showing you that they mean one and the same class of agents. This is manifest from the following considerations:

1. That the act nowhere contemplates any other scheme of surveying agents, except the surveyor general and his deputies. There are no *duties to be performed under the act*, except those which are specifically assigned by the act to the surveyor general and his deputies; and, consequently, no duties are left for any new and distinct class of character, under the name of assistant surveyors. When, therefore, this section speaks of "*the duties to be performed under the act*" by the assistant surveyors, it must, of necessity, mean the duties which had been assigned to the deputy surveyors.

2. Unless we suppose *assistant* and *deputy* surveyors to be synonymous, then no provision is made by the law for the compensation of *deputies*; for it speaks only of the compensation to the surveyor general, the *assistant* surveyors, chain-carriers, and axe-men.

3. Unless we make the same supposition, there is no prohibition on the deputies from proceeding to the discharge of their duties without oath; for the prohibition in the 12th section is only on the surveyor general, the *assistant* surveyors, and chain-carriers.

In truth, the deputies are the *assistants* of the surveyor general.

The great duty of the surveyor general is to effect a survey of the public lands committed to his charge, on a given plan; and his deputies are his *assistants* in the performance of that duty. It is to be borne in mind that the *assistants* mentioned in this law are the *assistants* of the *surveyor general*, not the assistants of the deputies. The law recognises no such officers as the *assistant surveyors of the deputy surveyors*; for it contemplates *the deputies themselves* as bound to perform, *in person*, the duties prescribed to them by the law.

Considering it as clear that the assistants spoken of in these sections are the *deputy* surveyors themselves, the 12th section requires that those *deputies* shall take an oath that *they* will

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perform the duties required by the act. What those duties are, we have already seen; and the oath binds *them* (the *deputies*) to *perform them*, not to *cause* them to be performed by others.

As bearing on another branch of this subject, it is proper to notice that, on the 3d April, 1818, Congress passed "An act allowing additional salary and clerk-hire to the surveyor for the Illinois and Missouri Territories, and for other purposes," by which the surveyor's salary was raised to two thousand dollars per annum; and he was allowed three clerks, whose compensation it was provided should not exceed two thousand dollars per annum. The second section of the same act directed the accounting officers of the Treasury Department to settle the accounts of this officer, and to allow him, in addition to his salary as *fixed* by the law, the following fees: that is to say—for examining and recording the surveys *executed by any of his deputies* at the rate of twenty-five cents for every mile of the boundary-line of the surveys executed under his direction in the offices aforesaid.

On the 3d March, 1823, on the application of General Rector, Congress passed an act, whereby the proper accounting officers of the Treasury were authorized to audit and settle the accounts of the surveyor of the public lands in the States of Illinois and Missouri, and the Territory of Arkansas, for extra clerk-hire in his office, for surveying executed before the first day of January, 1823, and for which provision is not made by an allowance of mileage on the surveys of the public lands under the act of Congress of the 3d April, 1818; and "make him an allowance therefor, not exceeding the rate of clerk-hire now allowed by law in the offices of the surveyor general, proportioned to the quantity of work done in each."

With this view of the law before us, let us next proceed to a general view of the facts. A knowledge of General Rector's mode of executing the laws will enable us to understand the charges more readily, and to test their truth with more ease.

General Rector's practice was to let out the work by contract: this he does not deny; and in this simple fact I see

Duties of Surveyor in Illinois and Missouri.

nothing exceptionable. The law made it the duty of General Rector to fix the compensation of the deputy surveyors, chain-carriers, and axe-men; and it is not perceived how this could have been done but by contract, for no deputy surveyor was under any legal obligation to have accepted his office in the first instance, or to have retained it afterwards, unless the compensation was such as should be satisfactory to him. Hence an understanding and agreement between the surveyor general and his deputies was unavoidable in practice; and I perceive nothing in the law to forbid it. Fixing the compensation by contract, was *fixing the compensation*; which is all that the law requires. The mode of doing it was left to the surveyor general. There was, indeed, an advantage to the government in these contracts; they bound the surveyor to execute the whole work which he undertook, whether, upon the experiment, he should be pleased or not; whereas a deputy not bound by contract would have been at liberty to resign at any time in the course of his proceedings, if he should find the work more arduous and less profitable than he had expected, and thus to produce great delay and inconvenience to the government. Again: fixing the compensation by contract was expressly authorized by the government itself, from the first foundation of the surveyor general's office. We have seen that, according to the laws, the *President of the United States* was to fix the compensation of the assistant surveyors, chain-carriers, and axe-men, under the limitation of three dollars per mile. On the 25th March, 1797, General Putnam, the first surveyor general, wrote to Mr. Wolcott, then Secretary of the Treasury, as follows: "I am ready to enter on the business as soon as the necessary arrangements can be made. But, before I proceed to engage with any deputy surveyor, I expect to be instructed in regard to the compensation to be allowed assistant surveyors, chain-carriers, and axe-men, &c." Mr. Wolcott answers, on the 14th March, 1797: "The President of the United States directs that it be submitted to your discretion to contract for the compensation to be allowed to the assistant surveyors, chain carriers, and axe-men, on the best terms that may be practicable; provided that the whole ex-

Duties of Surveyor in Illinois and Missouri.

pense of surveying, &c., do not exceed three dollars per mile," &c.

Both the law and this letter of Mr. Wolcott seem to contemplate that the compensation of the assistant surveyors, of the chain-carriers, and of the axe-men, should be fixed *separately*; and that the contract should not be with the deputy alone, for the work *in solido*. By pursuing the law under this construction, the chain-carriers and axe-men would not have been so entirely in the power of the deputy surveyor. But, on the other hand, there are manifest advantages in permitting the deputies to choose their chain-carriers and axe-men, and the latter to choose the deputy with whom they would prefer to serve; since, on the harmonious co-operation and equal industry of the whole corps would depend the despatch of the work, and the consequent profits to each. Being a matter of voluntary arrangement on the part of the chain-carriers and axe-men, they could not with any propriety complain of it; and the contract with the deputy alone, is certainly the most convenient form of contracting for the government. Be this as it may, the first contract returned by General Putnam was a contract *with the deputy for the entire work*; and this course has been pursued ever since, by all the surveyors general, without objection from the government. The government, therefore, could not with any justice complain of a course which it has sanctioned, and which, in this aspect of it simply, does not appear to have been followed with any injurious consequences.

In contracting, therefore, with the deputy for the whole work, there would have been no ground of censure against General Rector, if his conduct had been in other respects conformable with the law. To this examination let us now proceed.

[Here follows an elaborate and very long examination of the matters of *fact*, which it is not deemed necessary to insert.]

I have the honor, &c.,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

 Signature of Secretary of the Treasury.

SIGNATURE OF SECRETARY OF THE TREASURY.

If the Secretary of the Treasury is capable of seeing what he does, so that one paper cannot be passed upon him for another, he may impress his name with a stamp or copperplate instead of a pen, provided he keep the stamp or copperplate in his own possession and apply it himself, or cause it to be applied in his presence.

OFFICE OF THE ATTORNEY GENERAL,

July 5, 1824.

SIR: The question which you propound for my opinion is, Whether, in cases in which the law requires that public documents shall be *signed* by the Secretary of the Treasury, that officer having been rendered by sickness unable to write his name in the usual manner, may impress his name by the use of a stamp or copperplate, instead of pen and ink; and whether instruments so signed are valid in law.

For example: the second section of the act of September 2, 1789, to establish the Treasury Department, makes it the duty of the Secretary, among other things, to grant all warrants for moneys to be issued from the Treasury in pursuance of appropriations by law, under the limitations in that act established; the third section of that act makes it the duty of the Comptroller to *countersign* all warrants drawn by the Secretary of the Treasury, which shall be warranted by law; the fourth section makes it the duty of the Treasurer to disburse the moneys of the United States upon warrants *drawn* by the Secretary of the Treasury, *countersigned* by the Comptroller, *recorded by the Register*, and not otherwise; and further provides that the Treasurer shall take receipts for all moneys paid by him, and all receipts for moneys received by him shall be endorsed upon warrants *signed by the Secretary of the Treasury*; without which warrant *so signed*, no acknowledgment for money received into the public treasury shall be valid.

The question is, whether the act of the Secretary, in impressing his name with a copperplate at the foot of the warrant, is a *drawing* and *signing* of the warrant, within the intention of this law?

The question is a new one—at least, I have been able to find no direct decision upon the point. It must rest, therefore, upon analogy and the general reasoning of the law.

Signature of Secretary of the Treasury.

Laws are generally construed with reference to the usages of the country in which they are passed. Thus, although Lord Coke defines a *seal* to be *an impression on wax*, it has been decided, on the custom of the country, that a scroll made with a pen, *loco sigilli*, is as effectual as an impression on wax; (per Judge Ellsworth, in the circuit court of South Carolina, in the case of the United States *vs.* Coffin, Bee's Reports, 140.) Such, also, is the doctrine in Virginia, (Jones and Temple *vs.* Logwood, 1 Washington's Reports, 42;) and in Pennsylvania, as we learn from the case of McDill's lessee *vs.* McDill, (1 Dallas, 63;) and Meredith *vs.* Hinsdale, (2 Caines's New York Term Reports, 362;) in which case Judge Livingston, delivering the opinion of the court, intimates the same opinion: though a different opinion has been since expressed in that State, in the case of Warren *vs.* Lynch, (5 Johnson's Reports, 239.) In the case of Adam and wife, exec., *vs.* Kerr, the instrument on which the action was brought was an instrument sealed with a scroll, and at the trial *at nisi prius* evidence was admitted to prove that this was the custom of Jamaica, where the bond was given. On a rule to show cause why the verdict in favor of the plaintiff should not be set aside, and a non-suit entered, the case was compromised on a recommendation from the court to the defendant to let the plaintiff take a judgment without costs. (1 Bosanquet and Puller, 360.) Phillips, however, in his Law of Evidence, considers this case as warranting the principle which he lays down in his text—that where the instrument on being produced appears not to have a seal, but, instead of it, a pen-mark of a particular kind, evidence is admissible to show that it is the custom of the country to execute bonds in this manner.—(1 Phillips, 361.) There is, however, so much diversity of opinion on this subject of a legal seal, that one may take either side of the question, and find himself in very high and enlightened company; but the preponderance of authority (in this country at least) seems to be in favor of the doctrine laid down by Phillips, which subjects the mode of *sealing* to the custom of the country.

With regard to *signing*—the only source of analogy which I can find, is in the interpretations given by courts to that provision of the statute of frauds which requires that a will shall

Signature of Secretary of the Treasury.

be signed by the testator, or by some one in his presence, and by his authority. Under this statute it has been decided, that if the testator merely *seal* the instrument, it is a *signing* within the statute.—(Warniford *vs.* Warniford, 2 Strange, 764, by Lord Raymond; Lee and Libb, 1 Shower's Reps. 69, by Holt; Lemaigh *vs.* Stanley, 3 Levinz. 1.) This position has been controverted, (see 1 Phillips, 379, and the cases there cited;) but it seems not to have been overruled; and Blackstone (vol. 2, page 306) quotes the decision without any censure. According to the report of the case of Lemaigh *vs.* Stanley, by Freeman, page 538, the court said: "It is not necessary *to write*; for some cannot write, and *their mark* is then enough." I have seen no case in which these propositions, although merely *obiter dicta*, have been controverted. With regard to the *mark* of an illiterate testator, in lieu of the name, it has been always received as a sufficient *signing*, within the statute: so that the name even is not essential to *signing*, within the statute. With regard to the signing being done *propria manu* of the person to be affected by it, it has been always decided that this is unnecessary—not only in wills, where the law expressly tolerates the agency of another, but in all other instruments where the law is silent—except as it speaks in the maxim that *qui facit, &c.*

The adoption and acknowledgment of the *signature*, though written by another, makes it a man's own. As to usage, and even official usage, I believe that by far the greater part of our judicial records are not signed by the clerk of the court himself, but are signed by deputies, who use the name of the clerk on a mere general verbal authority.

There would be great difficulty in maintaining the proposition as a legal one, that when the law required *signing*, it means that it must be done with pen and ink. No book has laid down the proposition, or even given color to it. I believe that a signature made with straw dipped in blood, would be equally valid and obligatory; and if so, where is the legal restriction on the implement which the signer may use? If he may use one pen, why may he not use several?—a polygraph, for example, or types—or a *stamp*, which the court, in Lemaigh *vs.* Stanley, said would be a sufficient satisfaction of the statutory

Signature of Secretary of the Treasury.

requisition of *signing*. The law requires *signing* merely as an indication and proof of the parties' assent. It places the treasury of the United States under the guardianship of the Secretary. It requires that no money shall be drawn from the treasury without his authority. The evidence which it demands of his authority is, that the warrants shall be *signed* by him; but as to the method of *signing*, that is left entirely to himself. He may write his name in full, or he may write his initials; or he may print his initials with a pen: that pen may be made of a goose quill, or of metal; and I see no *legal* objection to its being made in the form of a stamp or copperplate. It is still his act; it flows from his assent, and is the evidence of that assent. It is merely directory to the officers who are to act after him—to the Comptroller, who is to countersign; the Register, who is to record; and the Treasurer, who is to pay. Being recognised by the Secretary himself, and known to the officers who are to act after him, the treasury has all the guards placed over it which the law has provided. It is true, that the stamp may be forged; but so also may the autograph of the Secretary. There would, perhaps, be more difficulty in the latter case than in the former; and the superior facility of forging a stamp, or a copperplate, may be a very good reason why the legislature should, by a positive law, prohibit the use of it, and define *the manner* in which the *signing* shall be done. They have not yet defined it; and the word *signing* does not, as we have seen, necessarily imply, *ex vi termini*, the use of pen and ink, held and guided by the hand of the Secretary himself: it does not imply it in *legal* acceptation, at least.

Upon the whole, while I admit the force of the presumption that Congress, in requiring these instruments to be *signed* by the Secretary, had in view his autograph executed in the usual mode; and while I admit that this ought always to be preferred when it can be done; yet I am not prepared to say that his *signing* with a stamp or copperplate, instead of a pen, is illegal, or that it leaves the instrument so signed invalid. On the contrary, if he keep the stamp or copperplate in his own possession, and either apply it himself, or cause it to be applied by another in his presence, and by his authority, I am of opin-

Signature of Secretary of the Treasury.

ion that the instrument is as valid, in strict law, as if he had written his name with a pen. It might otherwise happen that the public might lose the services of an able officer, from a mere temporary disability in his right hand.

• This opinion, however, proceeds upon the postulate that the Secretary has not been so far disabled by disease but that he is capable of seeing what is done, so that one paper cannot be passed upon him for another. For if, unfortunately, he has so far lost his sight, that one paper may be passed upon him for another, then, however lamentable it might be, I should hold that the public security required an application of the provisions of the 8th section of the act of the 8th May, 1792, to the case. That section is in the following words: "That in case of the death, absence from the seat of government, or *sickness*, of the Secretary of State, Secretary of the Treasury, or of the Secretary of the War Department, or any officer of either of the said departments, whose appointment is not in the head thereof, *whereby they cannot perform the duties of their said respective offices*, it shall be lawful for the President of the United States, *in case he shall think it necessary*, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed, or until such *absence or inability by sickness shall cease*."

But while the Secretary so far possesses his vision as to be able to superintend the application of the stamp or copperplate, and prevent imposition in its use—his mental faculties being, in the estimation of the President, competent to the discharge of the duties of his office—I should hold the use of the stamp or copperplate signature, under such superintendence, a legitimate exercise of his power of signing the instruments which are to flow from his authority.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

Liability of Administrators.

SALVAGE.

The officers and crew of a United States vessel are not entitled to salvage as against the government for saving the property of the United States wrecked on the Florida reef.

OFFICE OF THE ATTORNEY GENERAL,

July 22, 1824.

SIR: I am of opinion that the officers and crew of the United States schooner Terrier, in saving the property of the United States wrecked in the schooner Richard and Charles, on the Florida reef, have done no more than their duty, and are not entitled to salvage against the United States.

I remain, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE NAVY.

LIABILITY OF ADMINISTRATORS.

The pay of an officer in the navy cannot be stopped on account of a balance due to the government from an estate of which that officer is the administrator.

OFFICE OF THE ATTORNEY GENERAL,

July 22, 1824.

SIR: The question raised in the case of Major Gamble, is, whether the pay of an officer in the navy can be stopped on account of a balance due to the government, from an estate of which that officer is the administrator?

I am of opinion that it cannot. It could never have been the intention of the law to carry the law of set-off to such an unjust extent as to authorize a debt due *from* a man only in the *representative* character of an administrator, to set off against a debt due *to* him *individually*.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE NAVY.

Purchasing Debts against Public Officers.

PURCHASING DEBTS AGAINST PUBLIC OFFICERS.

It is not consistent with the relation between the government and its officers for the former to make itself a creditor of the latter without their consent, and to detain their salaries in the discharge of debts so acquired.

OFFICE OF THE ATTORNEY GENERAL,

July 22, 1824.

SIR: You ask my opinion on the following questions:

First. Is it consistent with the relation between government and its officers, for the former to make itself a creditor of the latter, without their consent; and to detain their salaries, in the discharge of debts so acquired?

Second. Can the salaries of officers be detained by the government in discharge of debts so acquired?

The questions have grown out of a proposition of a person, not an officer of the government, who is a public debtor, to assign to the government a claim which he has on one of the officers of the government, in discharge of that debt, with the view that its amount may be retained out of the growing salary of that officer.

These questions both depend on a fair construction of the provisions of the second section of the act making appropriation for the support of the government, &c., which is in the following words: "*Provided, however, That no money appropriated by this act shall be paid to any person for his compensation, who is in arrears to the United States, until such person shall have accounted for, and paid into the treasury, all sums for which he may be liable.*" The phrase "*who is in arrears to the United States,*" seems to me to apply naturally and properly only to persons who, having previous transactions of a pecuniary nature with the government, are found, upon a settlement of those transactions, to be *in arrears* to the government, by holding in their hands *public moneys* which they are bound to refund.

This construction, arising from the force of the language used in this proviso, receives additional confirmation from the example stated by way of exception in the second proviso: which is, "That nothing in this section shall extend to balances arising solely from the depreciation of treasury notes,

Accounts of a Purser.

received by such person *to be expended in the public service*, or to the appropriation for compensation to the Vice President of the United States," &c., &c.

These examples serve as illustrations of the meaning of the first proviso; the whole policy of which seems to be, to draw from public defaulters the public money which remain in their hands, and for which, upon the settlement of their *accounts*, *they may be found liable*.

It would seem to be entirely foreign to the policy of this law, for the government to speculate in the private debts of its officers, and set off the debts so acquired against the salaries of those officers. Great injustice might arise to the officers from such a course of proceeding; for the government might thus acquire a disputed debt, and the officer would be stripped of the defence which he might have urged successfully against the individual.

On the other hand, the government might lose the services of faithful and able officers, who, depending on their salaries for the subsistence of themselves and families, would be compelled to resign their offices, when the salaries came to be withheld under the pressure of a claim probably false and unjust.

I have no hesitation, therefore, in answering both questions in the negative.

The documents are returned.

I remain, with great respect, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

ACCOUNTS OF A PURSER.

The claim of John Darby for full pay for ten years as purser, after resignation made and refused to compel him to settle his accounts, should be referred to Congress.

OFFICE OF THE ATTORNEY GENERAL,

July 23, 1824.

SIR: I see no reason to alter the opinion formerly given by me in the case of John Darby. If Mr. Darby is dissatisfied, it would, I conceive, be much better for him to carry his claim

The President and Accounting Officers.

before Congress, than that it should be allowed by the executive branch of the government. As the case presents itself here, his claim for full pay for eight or ten years, merely because he would not or could not settle his account as purser while he was rendering no service to the United States, but pursuing his private affairs, and while his resignation was refused simply to compel him to settle his accounts, strikes me as so unreasonable upon its face, that I certainly cannot recommend its allowance. Congress may possibly see the subject in a different light, and to that body I think the petitioner ought to be referred.

The documents are returned; and

I remain, sir, most respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE NAVY.

THE PRESIDENT AND ACCOUNTING OFFICERS.

The accounts of an army contractor should be settled by the accounting officers. If they have any doubts on questions of law, arising in the course of the settlement, they will state them to the head of the department, who, if he please, may call for the opinion of the Attorney General.

The interference of the President in any form with the settlement would be illegal. He has no official connexion with the settlement of such accounts; and so far from being called upon to interpose any directions to the accounting officers, it would be an unauthorized assumption of authority for him to interfere at all.

OFFICE OF THE ATTORNEY GENERAL,

July 27, 1824.

SIR: Mr. Elbert Anderson has handed me your letter of the 20th instant, from Oak Hill, relative to a question which has arisen between him and the accounting officers of the government in the settlement of his accounts as an army contractor during the late war. The question is, whether Mr. Anderson is entitled to a credit for the casks in which the supplies were furnished? and in support of his claim he relies, among other documents, upon a letter from you (while you were acting in the Department of War) to Mr. Lear, bearing date 13th October, 1814, and giving some directions upon the subject of the settlement of the accounts of Mr. Byers.

The President and Accounting Officers.

In your letter to me, you say that you have no recollection whatever of the transaction, or of the motives which led to the letter to Mr. Lear. You submit the subject to my consideration on a view of the contract with Mr. Anderson and of the contracts of the same period; of the construction given them, and settlements therewith; and of the motives which induced the letter concerning Mr. Byers, to be derived from its import; and any other circumstances which may be considered as fairly connected with it; and you request that I will communicate to the accounting officers of the government the opinion which I may form, on full consideration of the whole subject.

In reply, I beg leave to call your attention to an elaborate opinion which I had the honor to address to you on the 20th October last, in the case of Major Joseph Wheaton, who sought to draw from you some instructions to the accounting officers relative to the settlement of his accounts. In that case, after reviewing fully the organization of the accounting department; after scanning with care the language of our laws in relation to the operations of that department; after looking at the nature of the office of the President of the United States, the character of the duties devolved upon him, and the utter impossibility of his sitting in appeal over the accounting officers of the government, or superintending and directing their operations,—I gave it as my opinion, that he had nothing to do with the settlement of public accounts, either in the form of direction to the accounting officers *a priori*, or revision and reversal *a posteriori*; that his interference with this business, so far from being required by law, would be a usurpation on the part of the President which the accounting officers would not be bound to respect, except it were (as in the case of Governor Tompkins) expressly ordered by the particular law to act under the direction and orders of the President. I concluded that opinion by saying, that if Major Wheaton had been injured by the accounting officers of the government, his only resort was to Congress, who, alone, under the laws and constitution, had the power of redressing his wrongs. It must be unnecessary to trouble you with a repetition of the arguments urged in that opinion, which I presume is still in your possession. I understood that they

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The President and Accounting Officers.

were satisfactory to you at the time, and that in that case you acted upon that opinion. I cannot perceive how the case of Mr. Anderson can be withdrawn from the principle in that case; nor how your interference with the accounting officers in this case can be reconciled with the principle on which you refused to interfere in Major Wheaton's.

Your letter to Mr. Lear in Byer's case, on which Mr. Anderson relies, does not change the organization nor the responsibility of the accounting department, nor the office and functions of the President. That letter, written by you as Secretary of War, can give you no right to interfere, as President, with the accounting department, which the law has separated from your authority. The settlement of Mr. Anderson's accounts belongs *exclusively* to the officers of the government, before whom he will be at liberty to show and use your letter, *valere quantum valeat*.

The effect of that letter is to be settled by those accounting officers. If they have any doubts on questions of law, arising in the course of the settlement, they will state these doubts to the head of the department, who, if he pleases, may call for the opinion of the Attorney General. But the interference of the *President* in any form would, in my opinion, be illegal. If you could, from your recollection, add anything to the documents which proceeded from you while Secretary of War, there would be no impropriety in your adding such explanation as a witness; but as you have no recollection upon the subject, those documents must speak for themselves; and the accounting officers must receive them, as they would any other documents which Mr. Anderson may offer in support of his claim. Even if the officers were to call upon you directly, as a *witness*, to interpret those letters, yet, as you have no recollection or knowledge of the subject, other than those documents themselves express, you could say nothing as a witness, but would find it necessary to say what I have already said—to wit, that, having no recollection upon the subject, other than what the documents themselves import, they must speak for themselves.

These are the reasons which induce me to think that neither you nor the Attorney General are called upon to say or to do

The Judiciary and the Executive.

anything upon this subject; that you have no manner of official connexion with the settlement of these accounts; and that, so far from being called upon by your duty to interpose any directions to the accounting officers, it would be an unauthorized assumption of authority for you to interfere in the case in any manner whatever.

If, however, upon your own reconsideration of this subject, and your review of my letter in Major Wheaton's case, you should be of a different opinion, further direction to me shall be promptly obeyed.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

The PRESIDENT OF THE UNITED STATES.

THE JUDICIARY AND THE EXECUTIVE.

The judiciary cannot arrest the executive business of the government, specially devolved on it by the legislature or by the constitution.

The judiciary has no more power over the executive branch of the government than it has over the legislative.

There are instances in which the courts are found to be a useful auxiliary to the Executive, and promotive of the purposes of justice.

Where the government becomes, by the circumstances of any particular case, a stakeholder, and several individuals are claiming the benefit of a fund, (with regard to which it is immaterial to the government whether it be due to one, the other, or to several,) the officers of the treasury may, in the exercise of a sound discretion, refer the claimants to the courts for a decision of their respective rights.

In the case submitted for this opinion, it is expedient to respect the injunction to the extent mentioned.

OFFICE OF THE ATTORNEY GENERAL,

July 27, 1824.

SIR: I have examined the case of James L. Cathcart, which you have submitted for my opinion. The case is, that the commissioners under the Spanish treaty have allowed to Mr. Cathcart a sum of money which, according to his memorial, he alone was authorized to receive. It now appears that there are other claimants on this fund, under titles derived, or alleged to be derived, from Mr. Cathcart, to wit: 1. John Woodside,

as trustee for Mrs. Cathcart; 2. Richard Smith, cashier of the office of discount and deposite of the United States, as assignee of J. Woodside; and, 3. William Robertson, holding a special lien on this Spanish claim from Mr. Cathcart, as additional security for the payment of certain bonds given by Mr. Cathcart to Mr. Robertson, for the purchase of a tract of land in Virginia, &c. Mr. Robertson has filed a bill in the chancery side of the court of the United States for the District of Columbia, by which he seeks to enforce this lien thus created in his favor by Mr. Cathcart. He controverts the claims of Mr. Woodside, Mrs. Cathcart, and Mr. Smith; and asks that the officers of the government may be enjoined from paying the sum so awarded, to either of the other parties, &c. An injunction has been granted in conformity with this prayer. And the questions which you propound to me are—

1. Whether, in any case, an injunction is binding on the executive department of the government? 2. If so, whether the injunction stated is binding on the officers of the treasury? 3. Whether the case submitted is such as to render it expedient to respect the injunction in this instance? 4. If not, in whose name, (according to the state of the case as presented by the documents accompanying your letter,) can a warrant legally issue? On the first and second questions, I am of the opinion that it is not in the power of the judicial branch of our government to enjoin the executive from any duty specially devolved on it by the legislative branch of the government, or by the constitution of the United States. If it were otherwise, it would be in the power of the judicial branch of the government to arrest the whole action of the other two branches.

My opinion is, that the judiciary can no more arrest the executive in the execution of a constitutional law, than they can arrest the legislature itself in passing the law. It would be easy to show that the existence of such a power in the judiciary would place the existence, not only of the government, but of the nation itself, at the mercy of that body, in every crisis both of war and peace. It is, therefore, in my opinion, essential to the government itself to assert, for the executive branch, this independence of action. Yet, nevertheless, I am of the opinion that there are cases in which the

courts will be found a useful auxiliary to the executive, and promotive of the purposes of justice, to abide the decision of a court. Where a law, for example, is so formed, or the evidences of rival claims are so poised, as to render it doubtful which, of several individuals, is entitled to the benefit of a private law, and the parties have commenced a litigation before a court by which their relative rights are to be adjusted, I can perceive no inconvenience; but, on the contrary, much convenience which would result to the executive department from their accepting the aid of a court in adjusting the relative rights of the parties.

The forms of proceeding in courts give them advantages for the fair settlement of these controversies which are not enjoyed by the Executive. The permitting a judicial tribunal, therefore, to draw such subjects to its arbitrament is calculated to relieve the Executive from a very onerous burden, which the judiciary can bear to more advantage: it is calculated to promote the purposes of private justice; and, at the same time, leaves the Executive in full possession of the principle of independence which I have mentioned, whenever the public good shall call for its exercise. I am, therefore, of the opinion, that in all cases in which the government is a mere stakeholder, and several individuals are claiming the benefit of a fund, with regard to which it is immaterial to the government and the essential purposes of the law whether it be ascertained to be due to the one individual or the other, the officers of the treasury would exercise a sound discretion in referring them to the courts for the decision of their respective rights; or, if persons so circumstanced shall have spontaneously commenced the litigation of their rights before a court, and the officers of the treasury shall have notice of the suit, by an injunction or otherwise, I should think it expedient for them to suspend their action under the law, until the court shall have decided on the subject. I would not advise those officers to acknowledge the jurisdiction of the court, by appearing to the suit as parties: this might involve them in expense and trouble. All that I would recommend, in such a case, is a forbearance to act until the court shall have decided; and a payment according to the decision, when the decision shall be finally made.

The Judiciary and the Executive.

To your third question, therefore, I answer that the case submitted is such a one as to render it expedient to respect the injunction to the extent that I have mentioned. All the preliminary steps in the adjustment of the accounts to the time of issuing the warrant may be gone through, without prejudice to any one; but I would recommend that the warrant be withheld until the court shall have decided who is entitled to the money, and then issued to the individual so decided to be entitled. There are peculiar reasons which render this course especially proper at the present instance. Those may be found in the statement made by Mr. Cathcart in his memorial to the commissioners, that *he alone* was entitled to receive the money, compared with his deed in favor of Mrs. Cathcart, and his agreement with Mr. Robertson; and in the extract which you furnished me from the report of the commissioners. But I forbear to press these peculiar circumstances, because, under the general rule which I have already stated, I should think this a proper case to abide the decision of a court.

This answer to your third question renders it unnecessary to answer your fourth.

The documents are returned; and

I have the honor to remain, very respectfully, your obedient servant,

WM. WIRT.

JOSEPH ANDERSON, Esq.,

First Comptroller Treasury Department.

THE JUDICIARY AND THE EXECUTIVE.

The judiciary, whether acting as a court of law or equity, cannot arrest the proper business of the executive departments.

But there are instances in which it may be expedient for the Executive to respect the process of the courts so far as to suspend action upon matters that courts ought to pass upon.

The preceding opinion is explained by a note to this, written by Mr. Wirt himself, in the following words: "In my opinion to the First Comptroller of the Treasury, on Mr. Cathcart's case, I say—'All the preliminary steps in the adjustment of the accounts to the time of issuing the warrant, may be gone through without prejudice to any one; but I would recommend that the warrant be withheld until the court shall have decided who is entitled to the money, and then issued to the individual so decided to be entitled.' The meaning

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of this passage is, that, when the case on which the injunction comes to act is one of complicated accounts, which must be equally settled whether that balance will have to be paid to the one individual or the other, then, as the settlement does not tend to decide the right of the one party or the other, and consequently does not prejudice the one party or the other, there can be no impropriety in the accounting officer's going through the settlement, so as to ascertain the balance which will have to await the decision of a court; but where such settlement is not called for by the purpose that I have indicated, but is a direct action on the question of right, which it is the very purpose of the injunction to prevent, then it would be improper; because it would interfere with the very object for which, according to my opinion, the injunction ought to be respected. In a case like this, the whole movement ought to be suspended until the court shall have decided; and, indeed, I perceive no useful, fair, or legitimate purpose, which can be effected by the movements going on."

OFFICE OF THE ATTORNEY GENERAL,

July 31, 1824.

SIR: I have examined the papers which you submitted for my opinion on the 29th current, relative to the claims of the assignees and legal representatives of John H. Piatt, deceased, under the act of Congress of the 24th May last.

Your first question is, whether the Department of War is bound by the injunction issued by the court of equity in this District?

To this I beg leave to answer by enclosing the copy of my opinion to the Comptroller of the Treasury, on the same point, and dated the 27th instant.

Your second question is, whether, under all the circumstances of this case, the final adjustment of the claim under the act ought to be suspended until an investigation and decision be had in the court of equity?

My opinion is, it ought to be suspended—so far, at least, as concerns the claim preferred by General Parker. There can be no doubt but that Mr. Walker and General Clement Smith were the assignees, or a part of them, at least, contemplated by the act; because it was on the memorial of Mr. Walker, supported by the consent of Piatt's administrators, that the law was passed. It was unquestionably the assent of the administrators which induced Congress to adopt the unusual course of paying the assignees first; and the assignees, who were before Congress, and in relation to whom this assent of the administrators was expressed, must clearly have been those

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who were within the contemplation of Congress when the act was passed. To the extent, therefore, to which the administrators admit these claims, there can, I conceive, be no objection to paying them; but, as the disputed claim of General Parker stands before that of Mr. Walker, and if his claim shall be decided to be genuine and within the law, he would be entitled, if not to priority, yet to payment *pari passu* with the other assignees, enough ought to be retained to meet a successful decision in his favor.

With regard to General Parker's claim, my opinion is, that a court ought to pass upon it, on full and fair hearing, before it ought to be allowed by the department. That claim differs from the others in all the circumstances which bring them clearly within the intendment of the law; but, as it is a pending claim, on which a court has to act, I deem it improper to go farther, at this time, in the expression of my opinion upon it.

I have the honor to remain, sir, most respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF WAR.

N. B.—The documents are all returned.

SALARY OF THE SURVEYOR OF PETERSBURG.

The surveyor of Petersburg is entitled to the salary fixed by law, he having been duly commissioned as a surveyor, having been called on to perform, and having performed faithfully, the duties of the office, even though he did not reside there.

OFFICE OF THE ATTORNEY GENERAL,
August 10, 1824.

SIR: I have, according to your request, examined Mr. Peterson's claim to the salary of the surveyor of the district of Petersburg, and proceed to give you my opinion on that claim. At the first organization of the United States into districts and ports for the collection of duties, by the act of 31st July, 1789, Bermuda Hundred and City Point were constituted a district; and that act directed that a collector and surveyor should be appointed to reside at Bermuda Hundred or City Point, which

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it directed should be the sole port of entry; also surveyor for Petersburg, to reside thereat; and a surveyor for Richmond and Manchester, to reside at Richmond. Thus there were three surveyors to be established in the district of Bermuda Hundred and City Point. All of them taking their designation from the district to which they belonged, were surveyors of Bermuda Hundred and City Point; the only discrimination between them arising from their place of residence. Thus, the first surveyor must have been commissioned as a surveyor of the district of Bermuda Hundred and City Point, to reside at Bermuda Hundred or City Point; the second, as a surveyor of the district of Bermuda Hundred and City Point, to reside at Petersburg, &c. The same organization as to this district, and the surveyors who were to do duty within it, was kept up by the act of the 4th August, 1790, which repealed the former act; and by that of the 2d March, 1799, by which the act of 4th August was repealed. But, by the act of the 10th May, 1800, the district of Bermuda Hundred and City Point was divided into two districts, called the district of Petersburg, and the district of Richmond; (the district of Petersburg was to include City Point, and the district of Richmond to include Bermuda Hundred.) Thus the old designation of the district of Bermuda Hundred and City Point was at an end. There was no longer any such district; it was lost in the two new districts of Petersburg and Richmond. The law, however, which produced this change in the district, still required that the surveyors within the two districts should continue to reside at the places established by law; that is, one surveyor at Bermuda Hundred or City Point, one at Petersburg, and one at Richmond. The surveyor who had resided at Bermuda Hundred or City Point was still to perform the duties of surveyor for both these places, (Bermuda Hundred and City Point,) as he had always done. But how was he to be commissioned? Whilst Bermuda Hundred and City Point belonged to the same district to which they gave name, there was no difficulty in the case; he was commissioned as a surveyor of the district of Bermuda Hundred and City Point, to reside at Bermuda Hundred or City Point. But, by the new arrangement, these places were thrown into different districts—the one into the

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district of Petersburg, and the other into the district of Richmond: still the new law required that a surveyor should reside at the one or the other of these places, and to perform the duties of both. He must necessarily, therefore, have an authority to act in both districts; and I do not perceive how it was possible to do this in any other way than that which was adopted in the commission which was given to Mr. Peterson in 1811, and by which he was appointed "a surveyor for the districts of Petersburg and Richmond, to reside at City Point or Bermuda Hundred." The manifest object of the commission was the object of the law—to enable the surveyor to act both at Bermuda Hundred and City Point, as he had all along acted while the district was the district of Bermuda Hundred and City Point. In 1821 Mr. Peterson was again commissioned as "a surveyor for the port of Petersburg and Richmond;" no residence is prescribed in the commission, and Petersburg and Richmond are treated as one port; whereas the act of the 10th May, 1800, after dividing the old district into the district of Petersburg and the district of Richmond, declares that the port for the district of Petersburg shall extend from Petersburg to City Point, and that the port for the district of Richmond shall extend from Richmond and Manchester to Bermuda Hundred. The last commission is therefore irregular, in treating both these places as one. Had it run "for the *ports* of Petersburg and Richmond"—in the plural, instead of the singular—it would have been so far correct, and, according to the sense of the word "port," as defined in the law, would have been applicable to the harbors of Bermuda Hundred and City Point, and the waters leading to them, and would have authorized him to do the duty as formerly at both these places. Its only remaining defect would then have been in not designating the place of his residence; but this would have been inferrible from his commission, compared with the past legal history of this surveying establishment. Thus connected, his commission would have manifestly pointed to a residence at Bermuda Hundred or City Point, for the purpose of enabling him to do duty at both places, according to the original and continued design of all the laws upon this subject.

It is very clear that the last commission was filled up with-

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out attending to the language of the former commission, the reasons out of which that language grew, or the series of laws which made that language not only proper but necessary.

It does not appear to me, however, that the last commission intended to alter the situation of Mr. Peterson. This commission was no doubt produced by the act of the 15th May, 1820, which put an end to his former commission on the 30th September of that year, and consequently made it necessary to commission him anew. The single purpose, therefore, of the commission of March, 1821, was to restore Mr. Peterson to the same place which he held under the commission of 1811. It should be read as if the word "port" were "ports," and as if his residence at Bermuda Hundred or City Point were again inserted. Mr. Peterson had so understood it. He has continued to reside at City Point, and to do the duties of surveyor both for City Point and Bermuda Hundred, as formerly; in which, in my opinion, he has done right.

But all the former laws, as well as the present law, have ever contemplated, and still continue to contemplate, a separate surveyor to reside at Petersburg, for whom a separate salary has all along been provided, and is still provided. Thus, by the compensation law of the 8th of May, 1792, in addition to the fees and emoluments fixed by law, it was enacted that a salary of fifty dollars per annum should be paid to the surveyor at Petersburg. By the act of 21st February, 1795, this salary was raised to one hundred and fifty dollars; by that of 3d March, 1797, it was again raised to two hundred and fifty dollars, at which sum it was continued by the act of 2d March, 1799. By the act of 7th May, 1822, this salary was reduced to two hundred dollars, at which it now stands.

It is stated that, although the law has thus all along contemplated, and still contemplates, a distinct and separate surveyor at Petersburg, and has provided for him a distinct and separate salary, yet that no surveyor has ever been appointed to reside at Petersburg. In considering the causes which might have led to this omission, it occurred to me, from the geographical relation of Petersburg to Bermuda Hundred and City Point, that there were possibly no official duties which called for the residence of a distinct and separate surveyor at Petersburg, but

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that all such duties had been presumed to have been practically anticipated by the performance of those duties appropriated by law to the surveyor required to reside at Bermuda Hundred or City Point. Yet it seemed strange to me that an office thus proven to be unnecessary and a mere *sinecure*, should have been continued by law; and that so late as May, 1822, the salary of that officer should have been modified. I took the liberty, therefore, to put the question to you, whether there were any duties other than those devolved on the surveyor at City Point and Bermuda Hundred, which called for the action of a surveyor between City Point and Petersburg, and at the town of Petersburg. The documents which have been furnished to me, in answer to this call, show that there are such duties; duties which do not belong to the surveyor at City Point or Bermuda Hundred, but which belong exclusively to the surveyor assigned by law to Petersburg, as his place of residence. It appears also, by these documents, that John H. Peterson, the surveyor at City Point and Bermuda Hundred, has, in addition to his proper duties, been required by the government to perform the duties of the surveyor at Petersburg, and that he has performed them all with fidelity. The question is, whether he is entitled to the salary which the law has given for the performance of the duties which he has performed? The question seems to me to be a very simple one. I am decidedly of opinion that he is entitled to this salary. The objections to it are merely technical.

The first is, that his commission does not authorize the performance of these duties. If this were so, the objection would seem to me to come very ungraciously from the government, which has required him to perform them. But I am of opinion that the objection is not well founded. The commission of 1811 authorizes him to perform the duties of surveyor within the district of Bermuda Hundred and City Point, and Petersburg and the whole Appomattox river were within that district. His commission of 1821 authorizes him to perform the duties of surveyor for the port of Petersburg; and this port extends from Petersburg to City Point, within which limits all the duties of the surveyor to reside at Petersburg have arisen and have been performed. His commission, therefore, did authorize him to perform these duties.

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The second objection is, that the law requires the surveyor who is to draw the Petersburg salary to reside at Petersburg. It does so. But the government has dispensed with this residence in the case of Mr. Peterson. The law seemed to consider the residence of the surveyor at Petersburg necessary to the performance of those duties; but the government has found, and experience has shown, that it is not necessary; because it is proven that these duties may be, and have been, faithfully performed by an officer who resided at City Point. If there has been anything irregular in this case, it has been an irregularity imputable to the government, and not to Mr. Peterson: and after having required this service at his hands, and received it too, it would not strike me as very just to object to its regularity. But I have never understood that the failure of an officer to fix his residence where the law has required it to be fixed, either vitiates his official acts, or impairs his claim for the compensation given by the law for the performance of those acts. The case very often occurs with regard to county court clerks, who are required to reside at the court-house of the county, or to fix their offices there. Clerks have frequently failed to comply with this requisition; yet this failure has never been supposed either to invalidate their official acts, or to destroy their right to their fees. And the argument is *a fortiori* where the employer (as the government have) has itself waived the residence, and called for the performance of the duties.

Finally, I cannot perceive on what principle of equal justice the government can have paid Mr. Ryland Randolph for the performance of the duties of surveyor at Richmond the salary fixed by law, without having ever commissioned that gentleman to perform those duties; and yet refuse to pay Mr. Peterson for the performance of the duties of surveyor at Petersburg the salary fixed by law, after having commissioned that gentleman to perform those duties, and called upon him to perform them; and after it appears, too, by the evidence, that he has performed them faithfully. The documents are returned.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

JOSEPH ANDERSON, Esq.,

First Comptroller, Treasury Department.

 Payments to Assignees of Deceased Creditors.

PAYMENTS TO ASSIGNEES OF DECEASED CREDITORS.

Payment under the act of May 24, 1824, "for the relief of the assignees and legal representatives of John H. Piatt," may be made to the assignees to the amount of their assignment; and as the amount for which the claim was assigned was not fixed in the assignment, it having been given for advances "made and to be made," the accounting officers must examine into and ascertain the amount actually due the assignees thereon.

Notes of the assignor exhibited by the assignees are *prima facie* evidence of the debt, yet the administrators have the right to controvert it.

OFFICE OF THE ATTORNEY GENERAL,

August 13, 1824.

SIR: The questions which you refer for my opinion, at the request of the Second Comptroller, are—

1. Whether, under the act of May 24, 1824, "for the relief of the assignees and legal representatives of John H. Piatt," William M. Walker, one of those assignees, can claim more than the amount of his assignment?

2. Whether certain notes, presented by Mr. Walker in support of his claim, are legal evidences of debt from Piatt to him?

Under the first question, the Comptroller represents Mr. Walker's assignment as being for \$10,000; but, on turning to the assignment which you have sent me with the papers, I find that it purports to be to secure to Mr. Walker certain advances which he had then made to Mr. Piatt, and certain other advances intended to be made by him to Mr. Piatt, or for his use, *not expected* to exceed in the whole the sum of ten thousand dollars. So that the amount is not *fixed* by the assignment,—it is left open; and the object of the assignment is to secure to Mr. Walker the repayment, not only of what he had advanced, but also of what he should advance to Mr. Piatt—the sum of ten thousand dollars being stated only conjecturally. I am of the opinion that the assignment is good for all the advances made by Mr. Walker to Mr. Piatt, or to his use, by the authority of Mr. Piatt, on the credit of this fund, although the amount may exceed ten thousand dollars. But they must appear to have been advances made to Mr. Piatt, or to his use, by his authority, or with his concurrence. It was not the intention of the deed, for example, to authorize Mr. Walker to

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speculate on the debts of Mr. Piatt, after his death, and to claim the full nominal value of debts so brought in.

Mr. Piatt wanted money; he wished to raise it on the credit of this fund due to him from the United States. For all advances, then, made by Mr. Walker to Mr. Piatt, under this view, the assignment gives Mr. Walker a lien on this fund. The lien reaches and covers, not only all advances made directly to Mr. Piatt in person, but all advances, also, made to his use.

If, for example, Mr. Piatt should have drawn an order on Mr. Walker in favor of a third person, the payment made to such third person would be an advance to the use of Mr. Piatt. So, also, if Mr. Piatt should have indicated to Mr. Walker certain debts which he wished him to take up, and Mr. Walker, so directed, did take them up, either during the life or after the death of Mr. Piatt,—I should hold that such payment was an advance by Mr. Walker to the use of Mr. Piatt, within the meaning and operation of this assignment; and that for all sums actually paid by Mr. Walker under such direction and authority from Mr. Piatt, Mr. Walker would stand a creditor on this fund, by virtue of this assignment.

The act of Congress does not profess to settle the amounts due to the assignees. It directs *so much* to be paid to the person or persons holding Piatt's assignment of said claim, *as will satisfy the same*. The assignment, so far as Mr. Walker was concerned, being open as to the sum, Congress could not have intended that any certain sum should be paid to him; but intended to leave it open to him to show how much was due to him under the assignment. This he must show to the accounting officers, on the principle already stated; and it is only to the amount which he shall so show that he is entitled to payment of this fund by virtue of the assignment. Whatever is not payable to the assignees, is directed by the law to be paid to the administrators of Piatt; and, consequently, after payment of the assignees, the residue must be paid to those administrators, or to the person authorized by them to receive it.

If Mr. Walker holds a power from the administrators to receive the balance which under the law would be due to them, such balance must be paid to him, not as assignee, but as the

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agent of the administrators of Piatt. With regard to General Parker's claim as one of the assignees, I have already given an opinion as to the effect which should be allowed to the injunction, and which it is unnecessary to repeat.

On the 2d question, I can only say that the notes exhibited are *prima facie* evidence of debt from Piatt to Mr. Walker. The administrators, however, or any assignee standing after Mr. Walker, in case of the inadequacy of the fund to pay both Mr. Walker and such subsequent assignee, would have a right to controvert this evidence of debt, and put Mr. Walker to farther proof.

The accounting officers, also, who are required by the law to distribute this fund between the assignees and the administrators, in the order pointed out by the act, have a right, if they see cause, to call for farther proof from Mr. Walker; to require him, for example, to prove that the debts were actually paid by him, and that they were advances within the assignment; but if the proof be admitted by all who are interested to dispute—that is, by all subsequent assignees and by the administrators—the accounting officers would fulfil the purpose of the law by acting upon such admission, taking care to file the proof of such admission. Prior assignees have no interest in this discussion, because their claims will have been previously secured.

The documents are returned.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF WAR.

PROCEEDINGS ON INJUNCTION UNDER ACT OF MAY 15, 1820.

The proceedings to be had on an injunction granted by the district judge of Georgia against further proceedings upon a warrant of distress issued from the Treasury Department, under the act of Congress of the 15th May, 1820, should be the same as in other cases, except that no answer is necessary on the part of the United States.

OFFICE OF THE ATTORNEY GENERAL,

August 23, 1824.

SIR: I have to acknowledge your communication of the 21st instant, addressed to me in the absence of the head of your de-

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partment; and have only to regret that you have not propounded the specific questions of law on which you wish my opinion.

The case is one of an injunction granted by the district judge of Georgia against further proceedings upon a warrant of distress issued from the Treasury Department against Archibald S. Bulloch, under the act of Congress of the 15th May, 1820. The injunction was awarded under the power given to the district judge by the 4th section of that act; and, as I understand Mr. Habersham, the questions on which he wishes your instructions are—

1. Whether, for liquidation, the accounts between the United States and Mr. Bulloch are to be referred to auditors, according to the usual practice of chancery courts in such cases, or to a jury?

2. Whether, if referred to auditors, and the settlement of the accounts as made by them should be open to exceptions, such exceptions shall be filed?

3. Whether the decree of the district court will be final, subject only to an appeal to the circuit court?

The 4th section of the act of Congress seems to me to answer all these questions, by declaring that "the same proceedings shall be had on such injunction as in other cases, except that no answer shall be necessary on the part of the United States."

Whatever proceedings, therefore, would be had in such a controversy before a court of chancery, if two private individuals were the parties, are the proceedings which the law declares shall be had in this case, with the single exception—that no answer is necessary. These questions, therefore, and all others which may arise in the case, refer themselves to the rules of practice and the principles by which courts of equity are governed in the settlement of individual controversies.

1. A matter of complicated account in courts of chancery is always referred to auditors, never to a jury. This is a matter of complicated account, and the proper reference is therefore to auditors.

2. If the report of the auditors be open to exceptions, exceptions would be filed in an individual case; they would be proper, therefore, in this case.

3. The decree of the district court would be final between

Tenure of the Office of a Judge in Michigan.

individuals, subject only to appeal to the circuit court; and so it must be in this instance.

The case strikes me as so plain and simple a one, that I am disposed to suspect that I have either misapprehended Mr. Haversham's questions, or that there are difficulties in the questions which do not occur to me. If either of these should be the case, you will please communicate with me further.

I remain, sir, very respectfully, your obedient servant,

WM. WIRT.

S. PLEASANTON, Esq., *Agent of the Treasury.*

TENURE OF THE OFFICE OF A JUDGE IN MICHIGAN.

The act of 3d March, 1823, was a permanent and general amendment of the pre-existing judiciary system, affecting not only the judges then in office, but all who should thereafter come into office in the Territory of Michigan.

It may be expedient to send the subject to Congress for their consideration and sanction of the acts of the judge whose case is considered in this opinion, should they require it.

OFFICE OF THE ATTORNEY GENERAL,

September 21, 1824.

SIR: Judge Doty's letter of the 12th July, 1824, which you have submitted for my consideration, presents difficulties which I think can be removed in no other way than that which he suggests: that is, by an act of Congress. I think that the Executive has done right in considering the law of the 3d March, 1823, as a permanent and general amendment of the pre-existing system, affecting not only the judges then in office, but all who should thereafter come into office in the Territory of Michigan. And although, by the act of the 30th January, 1823, under which Judge Doty was appointed, he is called an additional judge, and his jurisdiction is limited to three counties, yet is he, by the same act, in its title as well as its enacting clause, called "a judge for the Michigan Territory;" and, notwithstanding the limitation of his jurisdiction to three counties, he is still a judge for the Michigan Territory; and is, I think, therefore, within the terms of the act of the 3d March, 1823.

Tenure of the Office of a Judge in Michigan.

It is highly probable that when Congress was passing this last act they had for the time lost sight of that of the 30th January preceding, under which Judge Doty was appointed, or they would have taken care to remove all doubt of their intention to include the additional judge in this new limitation upon the tenure of his office, as well as the judges antecedently appointed. No satisfactory reason is perceived for the distinction which is supposed by Judge Doty to exist between them; and the language of the act of the 3d March seems to me to be quite broad enough to cover the case. If it was the intention of Congress to include the additional judge under the provisions of the act of the 3d March, 1823, Judge Doty must be considered as one of the judges of the Michigan Territory, and as one whose commission would expire on the 1st January, 1824. The consequences would be those which he has himself indicated, to wit: that, not having taken the oath of office before the governor of the Territory, according to the ordinance, he was never duly qualified under his first commission; and that having held a court at Prairie du Chien, after the expiration of his first commission, and before his qualification under his second commission, (to wit: in May, 1824,) that court was held without authority, and all its acts are void.

If, on the contrary, Judge Doty is right in the opinion that the act of the 3d March, 1823, does not affect his appointment, and he is not to be considered as a judge within the intendment of the ordinance for the government of the Northwestern Territory, but as a judge created by a special act of Congress in the exercise of their power to erect inferior courts, then the first commission is still in force, and all that has been done under it is valid; the second commission being absolutely void.

But, entertaining the opinion of the case which I do, I submit it, whether it be not expedient to send the subject to Congress, for their consideration and sanction of the acts done by Judge Doty under his first commission, if they shall be of the opinion that they require such sanction.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

The PRESIDENT OF THE UNITED STATES.

Organization of General Courts-Martial.

ORGANIZATION OF GENERAL COURTS-MARTIAL.

Where a general court-martial has been ordered and the names of the officers and supernumeraries to compose it are set forth in the warrant, and, by reason of the non-attendance of one of the officers on the first day, a supernumerary takes his place, and the court, thus organized, proceeds to business, the absent member cannot properly, thereafter, be added to the court upon his arrival, until the case on trial has been disposed of, if at all.

There is nothing in the acts of Congress on this subject, nor in any of the analogies of the law in relation to civil tribunals, which authorizes a newly arrived member to be superadded at all to a court which has been once legally organized

OFFICE OF THE ATTORNEY GENERAL,

November 18, 1824.

SIR: I am of the opinion that the organization of the general court-martial, as constituted on the 15th instant at Brooklyn under the order of your department, cannot be changed. Your order was for a general court-martial to consist of seven members, who are detailed by name, and three supernumeraries, who are also detailed by name, or any five or more of them; and the court was authorized and ordered to assemble on board the United States ship Washington, 74, at the navy-yard at Brooklyn, in the State of New York, on Monday, the 15th instant, for the trial of Wm. A. Weaver, lieutenant, and others, for the offences with which they severally stood charged; which charges, (the warrant proceeds to state,) together with the testimony in support of them, will be laid before the court. One of the members detailed failed to attend, and one of the supernumeraries was put in his place; and the court, thus constituted, was qualified, and proceeded, on the day appointed by the warrant, and at the place appointed, to the discharge of the duties so committed to them. While they were engaged in the first case, the member who had been absent arrived. The question is, whether he can be placed on the court after the trial of that case is over, and before another commences? I think not. The court is a *general* court-martial. It is already regularly constituted and fully organized according to the warrant; and by the warrant, the court so organized is charged with all the cases. The authority of the department, so far as the constitution of the court and the subjects committed to them are concerned, was expended by the warrant; and there

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seems to me to be no authority to change the modification of the court, which is regularly formed according to the warrant. The 39th article of the rules and regulations for the government of the navy seems to me to contemplate the unity and immutability of a general court-martial, which shall have been once constituted and shall have commenced its session. The members whose absence is therein spoken of, are the members who shall have qualified as members of the court; not those who shall merely have been named in the warrant as members. I can discover nothing in any of the acts of Congress on the subject, nor in any of the analogies of the law in relation to civil tribunals, which authorizes the newly arrived member to be superadded to the court. Yet, if the practice has been otherwise, and has been acquiesced in, it may, I think, be safely followed.

I have the honor to remain, sir, most respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE NAVY.

 PATENTS FOR LANDS.

Land patents may and ought to be withheld where the confirmations have been obtained by fraud. If actually issued, the courts will cancel them.

OFFICE OF THE ATTORNEY GENERAL,

November 25, 1824.

SIR: On the question, "Whether patents can be withheld by government for lands where their confirmation has been obtained by fraud?" I entertain no doubt that they can and ought to be withheld. Nor have I any doubt that, if patents had been actually issued under such circumstances, the courts of the country might and would cancel and avoid them.

I have the honor to remain, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

Law of Set-off.

PAYMENT UNDER ACT OF MAY 24, 1824.

The government cannot legally retain out of the moneys directed by the act of Congress of May 24, 1824, to be paid to certain assignees and representatives, a bill against the creditor, assigned to the Treasurer under protest.

OFFICE OF THE ATTORNEY GENERAL,

December 15, 1824.

SIR: On the statement of facts submitted to me yesterday from your department, I am of the opinion that the government cannot legally retain out of the moneys directed by the act of Congress of May 24, 1824, to be paid to the assignees and representatives of John H. Piatt, the amount of the bill of John H. Piatt & Co., which had been assigned to the Treasurer under protest. The documents are returned.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

LAW OF SET-OFF.

The law of set-off is limited to mutual debts between the same parties. If it be departed from at the treasury, there will be no other definite rules for the regulation of its practice.

The accounting officers cannot set off against A's trustees a debt owing by A, to the assignees of B, who was a debtor to the United States.

OFFICE OF THE ATTORNEY GENERAL,

January 6, 1825.

SIR: On the case stated by you, I do not discover that there is any thing due from S. Smith & Buchanan to the United States, which can be set off against the claim which the trustees of S. S. & B. have on the United States under the award of the commissioners under the Florida treaty. If S. Smith & Buchanan were indebted to the United States, such debt might be set off against this claim. The statement, however, shows only that S. S. & B. are indebted to the assignees of George P. Stephenson, who was indebted to the United States. Can the United States set off against S. S. & B.'s trustees the debt which S. S. & B. owed to the assignees of George P. Stephenson, who was a debtor to the United States? This would be carrying the doctrine of set-off further than it has

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ever been carried. The priority which the United States have, is only as to the estate of George P. Stephenson: but this does not impart to George P. Stephenson's estate a prior right to be paid out of the effects of S. S. & B. If it had this effect, it might go further, and impart to the estate of S. S. & B. a prior right to be paid out of the effects of their debtors, and so on, *ad infinitum*.

I cannot discover any legal ground on which the United States can retain from the trustees of S. S. & B. the amount due by S. S. & B. to the assignees of George P. Stephenson; if they could, the effect would be to give to the assignees of G. P. S. a preference over the other creditors of S. S. & B., to which they are not entitled. If we once leave the limits within which the law of set-off acts, (*to wit: mutual debts between the same parties,*) there will be no drawing any other line; and the United States might retain against S. S. & B. the amount of a debt due by them to G. P. S., because he was indebted to somebody else, who was indebted to somebody else; and so on, until, in the chain of debtors, we come to one who is indebted to the United States, and as to whose effects the United States are entitled to prior payment. I am of the opinion that there is no rule of law by which the retainer in question can be made.

I am, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

PENSIONS.

By the term "until the end thereof," (*i. e.* the war of the Revolution,) contained in the pension act of the 18th March, 1818, is meant "until the treaty of peace was ratified."

The preliminary articles provided that there should be a peace when the terms of a peace should be agreed on between Great Britain and France, and his Britannic Majesty should be ready to conclude it; but as they were only preparatory to a peace, there was no peace, in contemplation of the law, until the war of the Revolution terminated, by the ratification of the treaty in 1783.

OFFICE OF THE ATTORNEY GENERAL,

February 12, 1825.

SIR: By the act of the 18th March, 1818, it is declared that every commissioned officer, private, &c., who served in the

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war of the Revolution until the end thereof, or for the term of nine months or longer, at any period of the war, shall receive a pension during life. The question which you propound for my opinion is, when the war of the Revolution terminated within the contemplation of this act—"whether at the period of the actual cessation of hostilities in November, 1782, when the preliminaries of peace were agreed on; or whether at the period of the ratification of the treaty of peace, in April, 1783?"

I apprehend that there must be an error in the statement of the first question: that is, in assuming the date of the preliminary articles as the period of the actual cessation of hostilities. Those articles themselves, in their title, provide that the treaty, into which they are to be introduced, is not to take effect until terms of peace shall be agreed on between Great Britain and France, and his Britannic Majesty shall be ready to conclude such treaty accordingly. The 7th provisional article stipulates "that there shall be a firm and perpetual peace between his Britannic Majesty and the States, and between the subjects of the one and the citizens of the other; wherefore all hostilities, both by sea and land, shall *then* immediately cease." When? When the terms of a peace shall be agreed on between Great Britain and France, and his Britannic Majesty shall be ready to conclude such treaty accordingly. On the 20th January, 1783, the preliminary articles of peace between France and Great Britain were signed; by the first article of which it is provided, that as soon as the preliminaries are signed *and ratified*, sincere friendship shall be re-established between his Most Christian Majesty and his Britannic Majesty, their kingdoms, &c. The 2d article provides what prizes taken in what parts of the world, respectively, within given times after the exchange of ratifications, shall be restored.

On the same day (20th January, 1783) an armistice, declaring a cessation of hostilities between the United States and Great Britain, was signed at Versailles. There had been no cessation thereof previously; and this instrument places the cessation on the same footing as the preliminary articles between Great Britain and France: that is to say, provides that the United States shall be included in the stipulation between the two

Intruders on the Public Lands.

Crowns and Great Britain and Spain; and "that they shall enjoy the benefit of the cessation of hostilities at the same epoch and in the same manner." Again: the articles signed on the 30th November do not, upon their face, import *present* peace—they are *provisional* merely, *preparatory to a peace*. These articles, too, were yet to be submitted to Congress for *ratification*; and they were not ratified until April, 1783.

Upon the whole, I am of the opinion that war existed until the treaty of peace was ratified; or, in other words, that the war of the Revolution did not terminate till April, 1783.

I remain, sir, very respectfully, your obedient servant,

W. WIRT.

To the SECRETARY OF WAR.

INTRUDERS ON THE PUBLIC LANDS.

Where individuals are in possession of lands under a Spanish title, which has been reported by the register of the proper land office to the Secretary of the Treasury, and are at law contesting their titles as against claimants, they are not intruders within the meaning of the act of 3d March, 1807, to prevent settlements being made on lands ceded to the United States until authorized by law.

OFFICE OF THE ATTORNEY GENERAL,

February 14, 1825.

SIR: I understand, from the letter of the Commissioner of the General Land Office, that Mr. Henderson, whom Mr. Poindexter calls upon the Executive to remove by force *as an intruder*, is in the possession of the lands in question under a Spanish title; that the register of the proper land office has made due report of this title to the Secretary of the Treasury, under the 4th section of the act of the 31st March, "concerning the sale of the lands of the United States, and for other purposes;" and I understand that Mr. Henderson and Mr. Poindexter are now contesting their titles by a suit at law.

Under these circumstances, I am of the opinion that Mr. Henderson is not an intruder, within the meaning of the act of the 3d March, 1807, "to prevent settlements being made on lands ceded to the United States until authorized by law;"

 Pay and Emoluments of Majors.

and, consequently, that it is not competent to the Executive to remove him by force under that law.

I have the honor to remain, sir, very respectfully, &c.,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

PAY AND EMOLUMENTS OF MAJORS.

The term "major" contained in the provision of the act of 24th April, 1806, regulating the pay of battalion and regimental paymasters, and providing that they shall receive the pay and emoluments of major, may be taken to mean a major of infantry.

OFFICE OF THE ATTORNEY GENERAL,

February 17, 1825.

SIR: The question in Major Satterlee Clark's case is one of those nice questions about which it is not surprising to find any two minds, however sound, to differ. The provision of the act of 24th April, 1806, out of which the question arises, is, "that battalion and regimental paymasters shall receive the pay and emoluments of *major*." The question is, What *major* is meant? Is it major of infantry, or major of cavalry?

The main body and basis of an army is the infantry: cavalry and artillery are appendages to it. When, therefore, any particular grade of military officer is spoken of, without more saying, the mind naturally refers it to the main body. If I say that "A. B. is a captain in the British army," I should naturally be understood to mean a captain in the main body of the army: that is, the infantry. If I mean to convey the idea that he is a *captain in the cavalry*, I should think it necessary to use that specific expression; and should not expect to convey the idea by stating, in general terms, that he was a *captain in the army*. This conclusion is, I admit, founded on the postulate that the infantry is the *substratum* and main body of the army, to which all general allusions to military grade are naturally referred. But this postulate must, I think, in all candor, be conceded. And if so, it settles the question; for the standard of compensation to the deputy paymasters being the pay and emoluments of *major*, generally, it must be held to mean a major of infantry.

The President and Accounting Officers.

The circumstance that, under all the pre-existing laws, the standard of compensation in the paymaster's department had uniformly been the pay and emoluments of a major of infantry, strongly fortifies this construction.

The circumstance that, at the time of the passage of this law, there was no cavalry, and consequently no such rank as that of major of cavalry, is, in my opinion, a strong one in favor of the same construction; and is not, I think, satisfactorily answered by the suggestion made by the Paymaster General. That there was such a thing as the pay of major of cavalry subsisting in legal contemplation, and subsisting for no other purpose than as giving the standard of pay of certain officers of the staff, affords very little probability that Congress meant to refer to that existence in legal contemplation, when there was a really existing rank of major in the army, which naturally and properly fitted the language of the law.

The 9th section of the act of the 24th April, 1816, has, in my opinion, nothing to do with the question. It is a provision for the pay of officers of the staff, for which there had been no previous provision in the act; and was not at all intended to affect those officers for whose pay the previous sections had provided.

Upon the whole, I think the opinion of the Second Comptroller the sounder opinion,—that the law means to take the standard of pay of major of infantry.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF WAR.

THE PRESIDENT AND ACCOUNTING OFFICERS.

The President cannot legally interfere with duties belonging to the accounting officers.

OFFICE OF THE ATTORNEY GENERAL,

February 19, 1825.

SIR: General Hull's case is matter of account, which belongs to the accounting officers of the government, and with which

Evidence against Prisoners.

the President of the United States has not, in my opinion, anything to do, for the reasons assigned at large in the case of Major Wheaton, and acted upon in every subsequent case.

The documents are returned.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

THE PRESIDENT AND ACCOUNTING OFFICERS.

The President cannot legally interfere with the accounting officers whilst in the discharge of their duties.

OFFICE OF THE ATTORNEY GENERAL,

February 19, 1825.

SIR: Colonel McKenney's claim is matter of account, which belongs exclusively to the accounting officers of the government, and with which the President of the United States has not, in my opinion, anything to do, for the reasons assigned at large in the case of Major Wheaton, and acted upon in every subsequent case.

The documents are returned.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the PRESIDENT OF THE UNITED STATES.

EVIDENCE AGAINST PRISONERS.

The rule of law that no evidence shall be given against a prisoner except in his presence, is a personal privilege which he may waive.

If consent be given that depositions of witnesses abroad may be used on a trial, the point of time at which the consent shall be expressed will not affect the competency of the testimony.

OFFICE OF THE ATTORNEY GENERAL,

March 15, 1825.

SIR: It is a settled rule of law, that no evidence is to be given against a prisoner but in his presence. This, however,

 Drawback under Act of March 3, 1825.

is a privilege for the benefit of the prisoner, which it is perfectly competent for him to waive; and, as I understand your letter of the 12th, it has been waived in the case therein stated, by the consent of the officer who is about to be put upon his trial, that the depositions of witnesses abroad, taken upon interrogatories and cross-interrogatories, should be used on the trial. I do not think that the point of time at which this consent was expressed will affect the competency of the testimony; yet, if no inconvenience will arise from it, it might be well to have it in writing, after the arrest, and after the order of the court.

I have the honor &c.,

WM. WIRT.

To the SECRETARY OF THE NAVY.

 DRAWBACK UNDER ACT OF MARCH 3, 1825.

The act of the 3d March, 1825, relative to the completion of entries for the benefit of drawback, must be construed as being prospective in its operation.

OFFICE OF THE ATTORNEY GENERAL,

March 23, 1825.

SIR: I have, according to your request, examined the act of the 3d March instant, relative to the completion of entries for the benefit of drawback. The law is one of a public and permanent nature, and is therefore to be construed by its language only, and not by reference to the particular occasion which may have produced it. Construed in this way, the law is, in my opinion, prospective only. The language, "*Be it enacted, That whenever the exporter, entering any goods for the benefit of drawback, shall not have completed such entry, &c., it shall be lawful for the Secretary of the Treasury to direct the entry to be completed,*" naturally leads the mind forward to further cases. One would certainly not be apt, of his own accord, to apply it to past cases—and that, too, with an unlimited extent in the retrospection. The most that can be said in favor of the opinion that the law is retrospective, is, that the language is ambiguous; and, in such a case, as the natural action of every law of a public and permanent nature is prospective, this consideration alone ought to cast the balance in favor of the pro-

Per Diem Allowance for Travelling Expenses.

spective construction. The *ex post facto* operation of a law of a general and permanent nature being an unusual operation, it is reasonable to suppose that, where the purpose to produce such an operation existed, that purpose would be marked by the most unambiguous and explicit language. This has not been done in the present instance; and, acting upon these established rules of interpretation, (which are the only safe rules,) I hold it better that the law be executed in its prospective sense only; leaving it to Congress to express their purpose in a future law, if this construction shall be in conflict with that purpose.

On the ground of expediency, if the law is to be considered as retrospective, there being no limit fixed to its action in this direction, it must look back to the foundation of the government: and is there no danger that such a construction would overwhelm the department with a flood of obsolete claims? Is it not reasonable to suppose that Congress would have thought it better to apply the relief to particular cases, than to expose the department to an inundation from all past claims, by a law of general and unlimited retroaction?

In every aspect, it seems to me that the only correct construction of the law is that which shall confine its operations to future cases.

I have the honor to be, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF TREASURY.

PER DIEM ALLOWANCE FOR TRAVELLING EXPENSES.

The per diem allowance made to officers for travelling expenses, by the act of 16th March, 1802, is confined to officers travelling to and from courts-martial, and is not authorized to be paid to those who are travelling on other business.

OFFICE OF THE ATTORNEY GENERAL,

March 23, 1825.

SIR: I am of the opinion that the *per diem* allowance made to officers for travelling expenses, by the 22d section of the act of 16th March, 1802, is confined to officers travelling to and

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from courts-martial, and is not by that section authorized to be paid to those who are travelling on other duties. If the language were even doubtful, I should hold that a uniform construction, acquiesced in for more than twenty years—and this, too, without any change of the provisions of the law by Congress, who are not to be presumed ignorant of the practical construction placed upon the law—should be regarded as removing all doubt, and putting the question at rest.

The documents are returned.

I remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF WAR.

NAVAL PENSIONS.

The widows and children of those who perished on board of public or private armed vessels, since the 18th day of June, 1812, and prior to the 22d day of January, 1825, are entitled to pensions.

In the case of a prize vessel having foundered or been lost at sea during the above period, having a crew transferred from a public or private armed vessel, the widows and children of those lost in the prize vessel are entitled to pensions.

So also if a boat has been despatched within that period, from a public or private armed vessel, on any duty, and those on board drowned, the widows and children of the persons lost are entitled to pensions.

OFFICE OF THE ATTORNEY GENERAL,

March 31, 1825.

SIR: The questions which you propound for my opinion on the subject of pensions are these:

1st. When a public or private armed vessel has foundered, or been lost at sea, since the 18th day of June, 1812, and previously to the passage of the act of the 22d January last, (as were the *Wasp*, *Epervier*, *Lynx*, and others,) are the widows and children of those who perished on board entitled to pensions?

2d. In the case of prize-vessels having foundered or been lost at sea, during the above period, having crews transferred from a public or private armed vessel, are the widows and children of those lost in the prize-vessels entitled to pensions?

3d. If a boat had been despatched, within the above period,

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on any duty, from a public or private armed vessel, and had been upset, and those on board drowned, would the widows and children of those so lost be entitled to pensions?

I will consider these questions—

I. With regard to public armed vessels;

II. With regard to private armed vessels.

I. With regard to public armed vessels.—The act of the 20th January, 1813, “providing navy pensions in certain cases,” enacts, “that if any *officer* of the navy or marines *shall be killed or die, by reason of a wound received in the line of his duty*, leaving a widow, or, if no widow, a child or children, under sixteen years of age, such widow, or if no widow, such child or children, shall be entitled to receive half the monthly pay,” &c. I have given the punctuation of this act as it stands printed in the 4th volume of the Laws of the United States, page 486; according to which punctuation, the construction of the law would seem to be, that, if any officer of the navy or marines should, 1st, be killed by reason of a wound received in the line of his duty, or, 2d, die by reason of a wound received in the line of his duty, his widow and children should have the provision made by the act. According to this construction, the only difference between the two cases consists in the officer’s being killed immediately upon the spot, or dying some time afterwards, in consequence of the wound. But, in both cases, the death is to be produced by a wound;—by a wound received how? The act answers, *in the line of his duty*. Does this mean a wound in battle, and does it mean such wound *only*? The act does not say so, unless he can be considered in the line of his duty *only* while he is engaged in battle. But *the line of his duty* is much more extensive and diversified. It extends to all the operations of the ship, whether civil or military; and takes in the whole of her navigation, during the entire cruise. The officer who is killed, or dies by reason of a wound received by the falling of a spar in a tempest, is as entirely within the description of being killed, or dying by reason of a wound received *in the line of his duty*, as the officer who is killed or dies by a wound in battle. But the punctuation is, in my opinion, erroneous, and throws a false construction upon the act. It should, I think, be thus: “If

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any officer of the navy or marines shall be killed, or die by reason of a wound received, in the line of his duty," &c.—that is, if any officer shall, 1st, be killed in the line of his duty; or, 2d, die by reason of a wound received in the line of his duty;—so as to embrace the case of all officers who are killed in the line of their duty, whether killed in battle or in storm, by wounds or drowning, or any other cause growing out of their duty, and inflicting death. Now, according to this construction, the widows and children of all *officers* who have perished by either of the causes set forth in the above three questions, would be entitled to the provisions prescribed by that act, because those questions do, one and all, put the case of persons killed in the line of their duty; unless it can be said, with truth, that a man who is drowned is not killed. If this act were to be considered in itself, and it were important, for the benefit of the widows and children of the officers of the navy, to insist upon this construction which I have indicated, I should have no hesitation in doing so; more especially when it is considered that the humane and liberal policy in which these acts originated justifies and demands a liberal interpretation of them. The next act upon the subject is that of the 4th March, 1814, "giving pensions to the widows and orphans of persons slain in the public and *private armed vessels* of the United States." The first section relates to *private armed vessels*, and embraces the case of *officers*, seamen, and marines, who shall die, or shall have died, since the 18th day of June, 1812. The second section, which alone relates to the navy, or public armed ships, is curiously constructed, and is in these words: "That if any seaman or marine belonging to the navy of the United States *shall* die; or, if any *officer, seaman, or marine*, shall have died since the 18th day of June, 1812, *by reason of a wound received in the line of his duty, leaving a widow*," &c. So that this act makes no provision for the case of *officers who should be slain thereafter*: the whole provision for the future being confined to the case of seamen and marines; while, with regard to the past, (back to the 18th day of June, 1812,) it provides for the case of *officers, seamen, and marines*, who had been *slain in the public vessels of the United States*, (according to the language of the title,) or who had died by reason of wounds received in

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the line of their duty. With regard to seamen and marines, this is the first act which provides for their widows and children; and the provision is clearly confined to the widows and children of such as had been, or should be, *slain in the public armed vessels of the United States*; or, according to the language of the enactment, such as had *died, or should die, by reason of wounds received in the line of their duty*;—language too precisely fixed by usage to embrace the cases put in the questions, of persons who had been *drowned*. By this law, therefore, no provision is made for the widows and children of seamen or marines who had been, or should be, drowned in the line of their duty. With regard to officers, I do not consider this act as altering their condition under the act of the 20th January, 1813, except so far as it looks back before that act, up to the 18th June, 1812. For the act of the 20th January, 1813, was entirely prospective, and consequently made no provision for the case of officers who had been killed theretofore since the day of the declaration of war, (the 18th June, 1812.) This omission is supplied by the act of the 4th March, 1814, so far as relates to officers who had died in that interval of wounds received in the line of their duty, but does not embrace the case of those who had been *drowned* in that interval. But after the 20th of January, 1813, the act of that date took effect in behalf of the widows and children of officers who had either been *killed in the line of their duty, or had died of wounds received in the line of their duty*. This act is not repealed by the act of the 4th March, 1814, either expressly or impliedly; for there is no express repeal, and no incompatibility between the provisions of the two acts—the act of the 4th March, 1814, only repealing one of the provisions of the act of the 20th January, 1813, leaving the other cases provided for by that act untouched; and the act of the 4th March, 1814, dealing only with the past cases of officers, and making no provision for future cases, but leaving the future to stand solely upon the provisions of the act of the 20th January, 1813. But whatever doubt may have existed as to the construction of the antecedent acts, seems to have been removed by the act of the 3d March, 1817, passed for the express purpose of amending and explaining the act of the 4th March, 1814, as its title de-

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clares; and produced, no doubt, by the case of the *Epervier*,—the recent knowledge of whose loss had awakened a strong feeling of sympathy in the community, as is evinced by the act of the same date, for the temporary relief of the widows and children of those who had been lost in that vessel.

The act now under consideration provides that if any officer, seaman, or marine, belonging to the navy of the United States, *shall die, or shall have died, since the 18th day of June, 1812, in consequence of disease contracted, or of casualties or injuries received, while in the line of his duty*, and which shall be satisfactorily proved to the commissioners of the navy pension fund, leaving a widow, &c.

The cases put in the three questions appear to me to be clearly and completely covered by this law, so far as officers, seamen, or marines, belonging to the navy of the United States, are concerned; for those are all cases of persons *who had died while in the line of their duty*, and who had died *in consequence of casualty* which had occurred while in the line of their duty.

If any doubt could fairly arise as to the intention of the legislature in the use of language so broad and general as this, it would seem to be removed by subsequent laws, where a different phraseology is adopted to express the understanding of Congress as to the effect of this law, and to continue this effect.

Thus the act of the 3d March, 1819, is entitled “An act extending the term of half pensions to the widows and children of certain officers, seamen, and marines, *who died in the public service.*” And the 1st section provides, that “in all cases where provision has been made by law for five years’ half pay to the widows and children of officers *who were killed in battle, or died of wounds received in battle, or who had died in the naval service of the United States during the late war*, the said provisions shall be continued,” &c.

So, also, the act of the 22d January, 1824, is entitled “An act further extending the term of half pay pensions to the widows and children of officers, seamen, and marines, *who died in the public service.*”

And the 1st section provides, “that in all cases where provision has been made by law for five years’ half-pay to the widows and children of officers, seamen, and marines who

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were killed in battle, or *who died in the naval service of the United States during the late war,*" &c.

This general language—"who died in the public service," and "*who died in the naval service of the United States,*"—more especially when taken in connexion with the other classifications contained in the act of the 3d March, 1819, can have no application to any antecedent act, except that of the 3d March, 1817, and may well be considered as a legislative exposition of that act: in which light it seems to me to place beyond controversy death from any species of casualty occurring in the line of their duty; and thus to present an affirmative answer to all the questions submitted for my opinion.

These questions are confined to the period between the 18th June, 1812, and the 22d January, 1824, the date of the last-mentioned act; which whole period is filled up by the operation of the act of the 3d March, 1817: that act operating retrospectively as well as prospectively. And although it is repealed by the 2d section of the act of 22d January, 1824, yet there is a saving of all pensions granted, and all rights which had accrued under it.

Let us now consider these questions.

II. With regard to private armed vessels.

The act of the 26th June, 1812, "concerning letters-of-marque and prize goods," sets apart (by the 17th section) two per cent. on the net amount of prize-money made by privateers "as a fund for the support and maintenance of the widows and orphans of such persons as may be wounded and disabled on board of the private armed vessels of the United States *in any engagement with the enemy*, to be assigned and distributed in such manner as shall hereafter by law be provided."

The next act which takes up the subject of such widows and children is that of the 4th March, 1814, entitled "An act giving pensions to the widows and orphans of persons *slain* in the public and *private* armed vessels of the United States."

The 1st section of which act is confined to the cases of officers, seamen, and marines, serving on board any private armed vessel bearing a commission of letter-of-marque, who "shall die, or shall have died, since the 18th day of June, 1812, by reason of a wound received in the line of his duty;" terms too

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precise and narrow, as already remarked, to cover the cases presented in the questions under consideration.

Then comes the act of the 3d March, 1817, which is entitled "An act to amend and explain an act giving pensions to the orphans and widows of persons in the public or private armed vessels of the United States;" but the provisions of which are confined to "*the officers, seamen, and marines belonging to the navy of the United States.*"

Congress, apparently aware that this language did not, strictly speaking, reach the case of private armed vessels, passed another act, in the following session, (16th April, 1818,) entitled "An act in addition to an act giving pensions to the orphans and widows of persons slain in the public and private armed vessels of the United States." By the 2d section of this law, it is enacted, "that if any officer, seaman, or marine *shall have died since the 18th day of June, 1812, in consequence of an accident or casualty which occurred while in the line of his duty on board any private armed vessel*, leaving a widow," &c.

It is by this law that the several questions submitted to me are to be answered, so far as concerns private armed vessels.

The case put by the first question is that of a private armed vessel foundered or lost at sea. And in this case it would seem to me that the officers, seamen, and marines who are lost in her, are clearly within every description of the act; *for they are persons who have died in consequence of an accident or casualty which occurred while in the line of their duty on board a private armed vessel.*

The case put by the second question is that of a prize-vessel ordered in for adjudication, but foundered or lost on her voyage in, with the prize-crew on board of her; and

The case put by the third question is that of a boat of a private armed vessel ordered on duty, but upset and lost, with the hands on board of her.

There can be no doubt that, in both these cases, the officers, seamen, and marines on board *have died in consequence of a casualty or accident which occurred while in the line of their duty*; the only doubt which, I presume, can possibly occur in either of these cases, must arise from the expression of the law—"on board a private armed vessel." But, to construe

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the law in the narrow way implied by this doubt, would be to sacrifice its spirit to a very narrow interpretation of its letter, and to give it an operation extremely partial and unjust to those who were equally the objects of legislative favor. According to this construction, if a mast should fall and kill one man on the deck of the privateer, and, by breaking over the gunwale of the vessel, kill two others in her boat alongside of her, the wife and children of the first would be within the benefit of the law; while those of the last would not, though they were all equally in the line of their duty, and were killed by the same accident.

It cannot possibly have been the intention of the law to create a difference so flagrantly unjust and revolting. If it was the policy of the law to stimulate seamen to the fearless encounter of all the perils attendant on that line of life, the same reason existed as strongly to apply the stimulus to those in either of the predicaments described by the questions, as to those who should remain on the deck of the privateer; since, I presume, there can be no doubt that the crew sent home in charge of a prize ship, and the men sent to do duty in all weathers and all situations, in the boats of the privateer, are as much exposed to casualties and accidents, whether of war or of the seas, as those who remain with the privateer. But the hypothetic opinion which I am opposing is not warranted even by the language of the law, but is founded on a misapprehension of it. That language is not "if any officer, &c., *shall have died on board any private armed vessel,*" &c.; nor is it "if any officer, &c., shall have died in consequence of any casualty or accident which occurred while on board any private armed vessel," &c. Had this been the language, there would have been some *color* for supposing that the person must die on board the privateer, or in consequence of some accident happening to him while he was personally on board of her, in order to entitle his wife and children to the provisions of the act. But the language is, "if any officer, &c., shall have died in consequence of an accident or casualty which occurred *while in the line of his duty on board a private armed vessel,*" so that the board of the private armed vessel is referred to for the purpose of giving the measure of the line of his duty.

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Now, the duty of every man on board a private armed vessel is to obey the orders of his commanding officer; it is his duty on board of such vessel to follow out those orders to whatsoever distance they may carry him from such vessel; and to whatsoever distance he may be carried in the execution of such orders, he is still in the *line of his duty on board of the privateer*—in the line of his duty as an *officer, seaman, or marine* on board of *such vessel*; that is, *attached to such vessel—belonging to such vessel*; which is the whole meaning of the law.

The British prize acts use the same form of expression. "Be it enacted by the King's most excellent Majesty, &c., that the flag-officers, commanders, and other officers, seamen, marines, and soldiers, *on board every ship and vessel of war in his Majesty's navy*, shall have the sole interest and property of and in all and every ship, vessel, goods, and merchandise which *they have taken, &c., or shall hereafter take*, during the continuance of hostilities," &c. Now, according to the strict literal construction of these words, none would have a right to participate in these prizes but those who were *on board of the capturing vessel at the time of the capture*. But what has been the judicial exposition of these acts? It has been decided that not only those *on board the capturing vessel*, but those on board *another vessel of war*, which was *in sight at the commencement of the chase*, though perhaps not so at the time of capture, are entitled to share in the prize; even vessels *out of sight* have, in various cases, been admitted to such participation. So those who were not on board the capturing vessel, but were in her tenders and boats, at the time of the capture, and those also who were at a distance, escorting a former prize into port, are still permitted to share in all prizes made by such ship of war, as those on board the ship share in all prizes made by her boats, and made by prize ships *in transitu* to the port of adjudication.

Upon the whole, I have no difficulty in answering the three questions propounded to me in the affirmative, in relation both to the public and private armed vessels of the United States.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE NAVY.

Right of Citizens to Copies of Papers Respecting Patents.

LAND PATENTS TO ASSIGNEE OF CERTIFICATE.

The third section of the act of 12th April, 1814, makes it the duty of the Commissioner of the General Land Office to examine whether the certificate of the recorder of land titles in Missouri was fairly issued to an assignee according to the true intent and meaning of that act; and if found not to have been, to withhold a patent.

Suspension recommended until trial of title under the act of 26th May, 1824; and in case the same is neglected, until the claim shall be barred by the fifth section of said act.

OFFICE OF THE ATTORNEY GENERAL,

April 12, 1825.

SIR: In relation to your questions, which have grown out of the claim of the assignees of Joseph Deputy and Shadrack Barnes, I am of the opinion that the third section of the act of the 12th April, 1814, makes it your duty to examine whether the certificate of the recorder of land titles in Missouri, in favor of the assignees of Deputy, was fairly obtained, according to the true intent and meaning of that act; and, if it does not appear to your satisfaction to have been a case which comes fairly within the proper construction and the true intent and meaning of the act, it is, in my opinion, within your power, and becomes your duty, to withhold the patent. On your second question, I am of the opinion that the land claimed by Deputy had better be rescued from public sale until he shall have had an opportunity of trying his title under the act of 26th May, 1824; or, in case of his neglecting that course, until the limitation prescribed by the 5th section of that act shall bar the assertion of his claim under it.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

GEORGE GRAHAM, Esq.,

Commissioner of the General Land Office.

RIGHT OF CITIZENS TO COPIES OF PAPERS RESPECTING PATENTS.

The 11th section of the patent law does not open to all the citizens of the United States indiscriminately, at pleasure, and for any purpose that may suit them, the right to demand copies of papers respecting patents for inventions granted to others.

Right of Citizens to Copies of Papers Respecting Patents.

Patentees, and persons holding under patentees, and persons sued for violations of patent rights, should, upon demand, and upon payment of twenty cents per folio for the copy, be furnished with copies of specifications.

OFFICE OF THE ATTORNEY GENERAL.

SIR: I have considered the two questions which you have done me the honor to submit for my opinion, on the 11th section of the patent law; and,

1. I do not consider the proviso to this section as opening to all the citizens of the United States, indiscriminately, at their pleasure, and for any purpose that may suit them, the right to demand copies of papers respecting patents granted to others. The proviso, considered with reference to the enactment which it was to qualify, and with reference also to the essential object of the whole law, might well receive the strict construction which the superintendent of the Patent Office has been disposed to place upon it; a construction which would limit the right to demand copies to the patentee, and those who should apply by his authority for such copies. The words, however, are susceptible, without violence, of a larger construction; and they have been accordingly construed to extend to persons who have been sued for a violation of a patent right: the law itself (6th section) having expressly authorized such persons to defend themselves on the ground of the imperfection of the specification filed in the office by the patentees, as well as on the ground that the patentee was not the first inventor; to the purpose of either of which defences, it seemed but fair that the persons so sued should be furnished with copies of such specifications. To this construction, so far as it concerns defendants in suits on patents, I have heretofore given my official sanction, by an opinion which I presume is on file in the Department of State. But while I should hold it proper to furnish copies for a purpose thus expressly authorized by the law, I should hold it equally proper to refuse them, not only where there was reason to suspect, or even fear, that the purpose might be fraudulent towards the patentee, but where, without such fraudulent purpose, the disclosure might be injurious to the fair interests of the patentee, as in the case of patent medicines put up by the superintendent. The 11th section is, in my opinion, so framed as to secure to the patentee, and those

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claiming under him, the right to demand copies of papers connected with his patent, *ex debito justitiæ*; and it is at the same time, in my opinion, so framed as to refer it to the sound discretion of the department to what other persons, and on what other occasions, such copies shall be furnished or refused: there being, manifestly, occasions on which such copies ought to be refused—as in a case of meditated fraud; and, as clearly, occasions on which such copies ought to be furnished—as for the purpose of a defence, expressly authorized by law. The words of the proviso are not to be considered by themselves. They are not to be considered as they might be considered if they formed a separate and substantive enactment, instead of forming a proviso. They are not to be considered as they might be considered if they related to a different subject;—to the proceedings of a court of justice, for example; all whose proceedings being open and public, there is nothing of which justice to individuals can require the concealment. Construing the proviso *secundum subjectum materiem*, and in the form and connexion in which it presents itself, I conceive that the only sound exposition is that which I have had the honor to submit.

2. On the second question, I am very clearly of the opinion that it is not lawful to allow copies of any such papers, official or unofficial, to be issued from the office, for any purpose, at a less rate of expense than twenty cents “for every copy sheet of one hundred words.” The law nowhere authorizes copies at any other rate, and it expressly requires that the sums accruing from this source “shall pass to the account of clerk-hire in the office of the Secretary of State.” The documents are returned.

I have the honor to remain, sir, with great respect, your obedient servant,

WM. WIRT.

To the SECRETARY OF STATE.

LOTTERIES IN WASHINGTON.

Although the corporation of Washington have the power, by their charter, with the approbation of the President of the United States, to draw lotteries, the amount to be thus raised cannot exceed ten thousand dollars in any one year.

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If the corporation have not improved this provision during any former years, the right to do so for those years has gone; for the President during those years only had the right to judge of the expediency of a lottery or lotteries by the circumstances then existing.

The power is a special and limited one, and can be exercised in no other manner, and at no other times, than those expressed in the charter.

OFFICE OF THE ATTORNEY GENERAL,

May 18, 1825.

SIR: The power given to the corporation of Washington, by their charter, to draw lotteries with the approbation of the President of the United States, is subject to the condition "that the amount authorized to be raised in each year shall not exceed ten thousand dollars." I am of the opinion that, according to the just construction of this condition, they have no power to raise by lottery more than ten thousand dollars in any one year; and that if they have passed several years without resorting to this means of raising money, they cannot accumulate upon any one year the privileges of the years that have gone by; and thus raise forty thousand dollars in one year, instead of the ten authorized to be raised by law.

By the resolutions accompanying your letter of yesterday, it is proposed that the President shall authorize a lottery now to raise ten thousand dollars, which the corporation state, in the body of their resolution, that they were authorized to raise for the year 1822; another ten thousand dollars, which they say they were authorized to raise in 1823; and so for 1824, and for the present year. But this position is founded in mistake; they were not authorized to raise by lottery ten thousand dollars in the year 1822; they were only authorized to raise that sum in that year *with the approbation of the President*. Of what President? The President who was then in office, to whose judgment the charter refers the expediency of the measure, and who could only judge of that expediency by the circumstances of the time. President Adams is now called upon to say that it was expedient for the corporation of Washington to have raised ten thousand dollars in 1822; and that President Monroe ought to have approved a resolution to that effect, if one had been presented to him. With the same propriety, they might have suspended all movements on this power under the

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charter of 1812, as well as under that of 1820, and now call upon President Adams to bring up the arrears by a solid resolution for one hundred and fifty thousand dollars. The individuals who compose the corporate body of the day, and the President of the day, are always best qualified to judge of the expediency of a resort to this mode of raising money in any and in each year. With what safety can the President of the day judge of that complex conclusion—the expediency of having raised money by lottery in each of the years that have gone by? The remedy is intended for the wants of each year. It is not of a moral character to recommend itself to extension beyond the plain import of the charter. The power is a special and limited one, and can be exercised in no other manner, and at no other times, than those presented by the charter. I find no precedent for the act which the President is now called on to perform; for he is called upon directly to authorize the corporation to raise by lottery forty thousand dollars in the present year. No former President has done anything analogous to this. The only thing that resembles it is the case of two resolutions, (the one in the spring, and the other in the fall of 1827,) each for ten thousand dollars; but it does not appear on the face of those resolutions, (as it does here,) that both those sums were to be raised in the same year; and even if it were to be inferred, it is but a single precedent, imputable perhaps to improvidence, and, I humbly think, not of sufficient authority to justify the stronger measure which is now required.

In answer to your question, then, I have the honor to express the opinion, that the President cannot, and ought not, to approve a resolution for raising more than ten thousand dollars in one year, either by one or more lotteries.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF THE NAVY.

PAYMENT OF INTEREST TO VIRGINIA.

The United States were bound to Virginia, by the relation which subsists between the general and State governments, to provide the means of carrying on the war; and failing to make such provision, and Virginia herself having made it from her own resources, the same became a debt against the United States,

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which they were bound to reimburse. The rule concerning interest has been, that where a State supplied the moneys for expenditure from her own treasury, no interest has been allowed; but where a State, from the condition of her own finances, was obliged to borrow the money, and to thus incur a debt on which she herself became obligated to pay interest, interest has been allowed to her for indemnity.

In the case of Virginia, there is a special act authorizing the payment of interest, and prescribing the rules for computing it. Interest may be computed upon loans, or money borrowed and actually expended for the use and benefit of the United States during the late war with Great Britain; but shall not be computed on any sum which Virginia has not expended for the use and benefit of the United States, as evidenced by the amount refunded; nor upon any sum on which she has not paid interest; nor upon any sums refunded or paid her subsequent to such refunding or payment.

It was the intention of Congress to reimburse to the State of Virginia all the interest which she had actually paid on account of loans made necessary by her having taken the place of the United States in meeting the expenditures of the war in that State; and although the money so borrowed may have been placed in the State treasury, and thereby blended with the State revenue, yet if, from the revenues thus blended, a sum equal in amount to the sum borrowed were expended for the use of the United States, the State is nevertheless entitled to interest, without proof that the very dollars borrowed were expended.

In like manner is she entitled to interest on loans made necessary by the exhaustion of the State treasury in taking up loans for the use of the United States.

OFFICE OF THE ATTORNEY GENERAL,

June 6, 1825.

SIR: The general terms in which the questions are put by the Third Auditor on the "act authorizing the payment of interest due to the State of Virginia," has rendered it necessary to have a personal interview with that officer, for the purpose of explanation, and also to examine the accounts and vouchers on which his difficulties arise. Having done this, I proceed to answer his questions, taking leave, for the sake of simplicity as well as brevity of investigation, to change their order in some degree.

I. Can interest be allowed on loans, in cases where neither the sums were borrowed nor the expenditures made till *after* the war had terminated, notwithstanding the expenses may have been incurred during the war?

The language of the law is, that the proper accounting officers be authorized to settle the claim of Virginia "for interest upon loans or money borrowed and actually expended by her

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for the use and benefit of the United States during the late war with Great Britain." Such is the 1st section of the law.

The 2d section gives the rules for examining the amount of the interest; they are—

1. That interest shall not be computed on any sum which Virginia has not expended for the use and benefit of the United States, as evidenced by the amount refunded or repaid to Virginia by the United States.

2. That no interest shall be paid on any sum on which she has not paid interest.

3. That when the principal, or any part of it, has been paid or refunded by the United States, or money placed in the hands of Virginia for that purpose, the interest on the sum or sums so paid or refunded shall cease, and not be considered as chargeable to the United States any longer than up to the time of the repayment aforesaid.

In construing this law, it is proper to advert to the principle on which it is founded, and to the object which it proposes to effect. The principle is this: The United States are bound by the relation which subsists between the general and State governments to provide the means of carrying on war; and, as a part of the business of war, to provide for the defence of the several States. When the United States fail to make such provision, and the States have to defend themselves by means of their own resources, the expenditure thus incurred forms a debt against the United States, which they are bound to reimburse. If the expenditures made for such purpose are supplied from the treasury of the State, the United States reimburse the principal without interest; but if, being itself unable, from the condition of its own finances, to meet the emergency, such State has been obliged to borrow money for the purpose, and thus to incur a debt on which she herself has had to pay interest, such debt is essentially a debt due by the United States; and both the principal and interest are to be paid by the United States. So that, whenever a State has had to pay interest, by reason of her taking the place of the United States in time of war, such interest forms a just charge against the United States. If a State borrows the money at once, on the first occurrence of the emergency, and expends the specific moneys so borrowed,—

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both the borrowing and the expenditure being *flagrante bello*, there seems to be no doubt that the claim, both for the principal and the interest, which she should have paid upon such loan, would be a fair charge against the United States on the principle of this law. But let us suppose that, not having the money in her treasury, nor being able to borrow it, she incurs a debt for military supplies and services, which is evidenced by certificates payable at the close of the war: when the certificates become due, neither having the funds herself, nor being able to procure them from the United States, she borrows, on interest, a sum sufficient to take up such outstanding certificates, and thus incurs a debt on which she is obliged to pay interest. Here is the case put in the question; on which it is doubted whether the case is within the law, because the borrowing and the application of the sum borrowed took place *after the war*, although the expense on account of which the loan was made was incurred during the war. Yet, surely, in principle there is no difference between this case and that first put; because, in this case, as well as in that, the State has had to pay the interest in consequence of having taken the place of the United States in meeting the expenses of the war. Again: let us suppose that a State, in meeting the emergencies of the war, exhausts all the revenues which she had raised for domestic purposes, and which it is indispensably necessary for her to replace forthwith: she can replace them in no other way than by a loan, which is negotiated the day after the proclamation of peace; on this loan she is obliged to pay interest. On which government does this claim of interest rest? I think there can be no doubt that, on the principle of the bill, it is a fair charge against the United States; because it is interest which the State has actually had to pay in consequence of her having taken the place of the United States in meeting the expenses of the war. Such is, in my opinion, the principle on which this act is founded; and its object, I think, is to reimburse to the State of Virginia all the interest which she has actually had to pay on all loans rendered necessary by her having taken the place of the United States in meeting the expenses of the late war with Great Britain, so far as the defence of that State was concerned. And whether the loans were made during the war, or after the

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war,—if they were to meet expenses which were incurred during the war, and by reason of the war, and the interest has been actually paid by the State of Virginia, the claim is, in my opinion, a fair claim within the law.

The terms of the question imply a doubt whether, in order to bring a claim for interest within the law, it is not necessary that the principal should have been both borrowed during the war and expended during the war. To give the law this construction, would be to exclude from its operation cases which are as perfectly within its reason as those which the question impliedly admits it to cover; as in the examples which have just been put. I would rather construe the words “during the late war with Great Britain” to relate to and qualify the antecedent member of the sentence “for the use and benefit of the United States;” so that, if the use for the money arose *during the war*,—if the supply was furnished *for the benefit of the United States during the war*, and, in order to meet *this use* and render *this benefit during the war*, the State had been under the necessity of incurring a loan, and paying interest on this loan, whether the loan was negotiated during the war, or after the war,—I should hold the claim for interest equally within the law. The terms of the question itself are not perfectly clear.

I do not, yet, clearly understand the Auditor's idea when he says, “where neither the sums were borrowed, nor the *expenditures* made, till after the war had terminated, notwithstanding the *expenses* may have been incurred during the war.” If the expenses have been incurred during the war, the *expenditures* have been made during the war; although the sum to meet those expenditures may not have been borrowed and disbursed until after the war. I do not mean this as a cavil at words; on the contrary, I am desirous of apprehending the real difficulty, and dealing fairly with it. I am of the opinion that no interest can be charged under this law, except for an expenditure made by the State of Virginia during the war, and in consequence of the war. It must be an expenditure which the war has made necessary; which the United States were bound to have met, but did not meet; which Virginia has met, *at the time*, for the use and benefit of the United States; and in

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consequence of her meeting which she has been obliged to borrow money upon interest, and to pay that interest. Such is the interest which, in my opinion, the law authorizes to be paid to the State of Virginia. It is not, in my opinion, necessary to the support of a claim for interest under this law, that the identical dollars which have been borrowed should be those which were specifically expended during the war. It would be a mockery of the *reason* and *equity* of the law to insist on such a construction. The rules for the ascertainment of the interest make it manifest to me that it was the intention of the United States, by this law, to reimburse to the State of Virginia all the interest which she has actually had to pay in consequence of her having met the expenses of the war in that State in the place of the United States. The first rule provides that interest shall not be computed on any *sum* which Virginia has not expended for the use and benefit of the United States, as evidenced by the amount referred or repaid to Virginia; the second provides that no interest shall be paid on any *sum* on which Virginia has not paid interest. What is the effect of these two rules, but to announce clearly the intention of Congress that, upon all *sums* expended by Virginia, for the use and benefit of the United States, during the late war, on account of which expenditure Virginia has had to pay interest, such interest be reimbursed to her? The leading idea is, manifestly, that Virginia has had to pay interest on moneys borrowed on account of her advances for the use and benefit of the United States during the late war; that, however reasonable it might be to refuse interest to a State who had made such advances out of her own treasury, and who, although she had lost the interest on such advances, had paid none; yet that where a State's advances for the United States had actually subjected her to the payment of interest on account of loans which she had been forced to make by reason of such advances, it was but reasonable that she should be reimbursed the interest which she had been thus obliged actually to pay. Let it be supposed, then, for the argument's sake, that it might be doubtful whether *the words* of the act, considered strictly and by themselves, would reach the case of interest paid by the State of Virginia on loans negotiated *after* the war, to meet debts which she had

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incurred during the war, for the use and benefit of the United States. What then? "The *words* of statutes are not to be considered *only*, but *rather* the *intent* of the matter is to be weighed," (Plowden, 364, a, b;) and "everything which is either the intent of the makers of the act, though not within the letter, is as strongly within the act as that which is within the letter and the intent also," (*ibid*, 366.) And again: "Constructions are to be made according to the intent of the makers; and so sometimes are to be expounded against the letter, to preserve the intent," (Shaw, 491;) and "the intent of the makers may be collected *from the cause or necessity of making the act*, or *by the words in other parts* of the act, or by *foreign circumstances*; and the construction should be consonant with *reason and discretion*." Applying these simple rules of construction to the case, and understanding "expenditures" in the question as incurring the disbursement of the specific sum borrowed, I am of the opinion that the State of Virginia is, under this law, entitled to the interest in the case put.

To test this point still farther: let us try the other construction of the act to which the question points, and inquire whether that can be supposed to fulfil any rational purpose of the act better, or even so well as that which has been already stated.

This other construction of the act would require both that the money should have been borrowed during the war, and that the very money so borrowed should have been expended during the war. Now, let us ask ourselves what merit there could have been in the *mere act of borrowing the money*, which could give Virginia any claim on the United States? A moment's consideration must satisfy us that there could have been no merit in that act alone; and it is to fix our minds upon the question for an instant, to perceive that it was the act of expenditure of money for the use and benefit of the United States during the war, which alone constituted the whole merit; it is on account of that act that she is to be reimbursed, not only the sum actually expended, but also all the actual damages to which she has been put, by reason of her having made that expenditure for the use and benefit of the United States during the war: the actual damage in the case being the interest which she has actually had to pay in consequence of her having

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made those expenditures. The act of borrowing, then, constituting no part of the merit in the case, of what possible consequence can it be when that act was performed—whether during the war, or after the war? Whether she borrowed the money before the expenditure, and paid interest upon the loan, or whether she borrowed the money after the expenditure, to cover the expenditure, and paid interest upon the loan, the act of merit is exactly the same; and the actual damage in consequence of that act of merit is exactly the same, in kind, in both instances. The two cases are precisely *in pari ratione*; and to suppose that Congress intended to refuse the interest in the one case, and to grant it in the other, is to impute an absurdity to that body not very consistent with the respect that is due to it.

But it may be said that, if the law is thus written, we have nothing to do with the reasons and motives which induced it. To which I answer, that when the substantial purpose of an act is manifest, and that purpose simple and consistent; and where two constructions are proposed, one of which will effect that purpose in full, and the other will effect it in part only, the language of the act must be strong, beyond the possibility of a doubt, to force upon us the latter construction in preference to the former. If there be two constructions, one of which will render the act consistent, and the other inconsistent—the one of which will render it rational, and the other absurd—the language must be *lucē clarius* which is to force upon us the inconsistent and absurd construction in preference to the consistent and rational one. Is the language which calls for the narrow construction of this act thus *clearer than light*? The very doubt of the Third Auditor proves that it is not, or that very acute and meritorious officer would not have found it necessary to propound this question. But let us look again, for a moment, at the language itself. It is, that the proper accounting officers shall settle the claim of Virginia “for interest upon loans or money borrowed and actually expended, for the use and benefit of the United States, during the late war with Great Britain.” To what do these last words “during the late war with Great Britain” refer? Do they refer to the borrowing the money, “to the expenditure of the money,” or

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to both of them; or to the immediately antecedent member of the sentence—"the use and benefit of the United States?" Is there fair room for a question upon the words themselves? Because, if there be room for a question upon the words themselves, we are authorized to look to the intent and reason of the law; and, on this reference, the question is immediately answered, I conceive, in the manner in which I have answered it. But suppose that these words, taken by themselves, should be supposed to indicate the purpose that both the borrowing and expenditure must have occurred during the war; yet, when you come to take these words in connexion with the rules given for the ascertainment of the amount of the interest—the first of which takes the amount refunded to the State of Virginia as the maximum of principal on which the interest may be calculated, and the second of which narrows down the foregoing to such sums as Virginia had herself paid interest on—then is there not room to say that there is at least room for doubt whether, upon a merely verbal construction of the act, Virginia is not entitled to all the interest which she has actually had to pay on account of loans, which she was constrained to make by reason of her expenditures for the use and benefit of the United States during the war? and, if this part be *questionable* upon all the *words of the two sections taken together*, we are authorized by this circumstance to look to the *spirit*, intent, and equity of the act—which I conceive gives the clear result before expressed. I am of the opinion that the *words themselves, taken altogether and fairly expounded*, give this result, and *a fortiori* that the *words and intent* united give it. But, admitting the *words* in themselves to be *dubious*; we are authorized by the mere circumstance of *their dubiety* to look to the *intent* for aid in the exposition—which I humbly conceive dispels all doubt.

2. To entitle the State, under this law, to interest on any sum, is it not necessary not only that the same should have been borrowed for the use and benefit of the United States, but that the particular sum so borrowed should have been actually expended for such use and benefit? Or, in other words, can interest be allowed on any money borrowed and placed in the State treasury during the war, provided that expenditures of as

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great amount were afterwards, during the war, made by the State for the use and benefit of the United States?

I have already expressed the opinion, that the intention of the act of Congress is to reimburse to the State of Virginia all the interest which she has actually had to pay on account of loans made necessary by her having taken the place of the United States, in meeting the expenditures of the war in that State; and although the money so borrowed may have been placed in the State treasury, and thereby blended with the State revenue, yet if, from the revenues thus blended, a sum equal in amount to the sum borrowed was expended for the use of the United States, I hold the State entitled to interest, under this law, without proof that the very dollars that had been borrowed were those that had been expended. Let us suppose the revenues of the State equal to her own domestic expenditures in time of peace; let us put these expenditures, for example's sake, at \$300,000 per annum; and suppose this sum to have proved continually sufficient for the domestic purposes of the State through a long course of years. The war finds her with this amount in her treasury; but, being obliged to meet the expenditures of the war, she borrows \$500,000 more, which she places in the treasury, and, in the course of the war expends, in purely war measures which properly belonged to the United States, \$500,000—on which she continually paid interest. I cannot conceive what farther proof can be requisite to show that the money thus expended in the war was the money which had been borrowed, and that it had been borrowed for that purpose—unless it should be required to show that the specific \$500,000 which had been borrowed were those which had been expended, which I understand from the office not to be required. But let us suppose another case, which I believe to be nearer the fact: The peace expenses of Virginia are proven by long experience to be \$300,000, which the peace rate of her taxes has regularly supplied. She raises her taxes to \$900,000 per annum, and borrows a million of dollars more; all of which are expended in supporting the war in that State, in the place of the United States. I presume there can be no doubt that the sum borrowed was borrowed for the war and expended in the war, for the use and benefit

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of the United States; and, consequently, that the interest which she has had to pay on the sum borrowed is a proper charge against the United States.

3. In cases where, independent of loans, expenditures were made by the State for the use and benefit of the United States during the war, is interest allowable on sums to a like amount borrowed subsequent to such expenditures, and either during or after the war?

This question is extremely general and not perfectly clear; but I suppose it to mean this: the State expended from her proper revenues, say \$300,000, which had been raised by her peace-taxes for the expenses of the domestic government. She expended this sum, we will say, in the first six months after the war entered the State; and being without resources for her domestic purposes, she was constrained to replace this sum by a loan on which she paid interest. Is such interest properly a charge to the United States under this law? The question may also cover such a case as the following: The State borrows for war purposes \$200,000, on which she pays interest; the next year she takes up this loan from her proper revenues, and thus stops the interest for the time; but she is soon obliged to renew the loan, in order to replace the sum drawn from her treasury to take up the former loan—on which new loan she again pays interest: is this interest chargeable to the United States? In both cases I hold the interest to be properly chargeable to the United States, because in both it was the case of interest which the State has actually had to pay on account of money borrowed to meet the sums expended by her for the use and benefit of the United States during the late war with Great Britain.

4. Is it the intention of the third rule, that when the United States refunded a sum of money to the State, such sum is to be considered as in payment, or part payment, of a loan or loans on which the State was, at the time, paying interest? Or, is the State to be considered as having been at liberty to apply the money so refunded to the reimbursing itself sums it had previously paid in the discharge of other loans, contended to have been obtained and expended for the use and benefit of the United States? The third rule is in these words: "That

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when the principal, or any part of it, has been paid or refunded by the United States, or money placed in the hands of Virginia for that purpose, the interest on the sum or sums so paid or refunded shall cease, and not be considered chargeable to the United States any longer than up to the time of the repayment as aforesaid."

One of the cases to which this rule is supposed by the question to apply (and the answer to which will, I understand, be deemed a full answer to the purpose of the question) is of the following kind: The State of Virginia having divers war loans outstanding, (all of which, had they remained undischarged, would have been covered by this bill, and have been debts due, both principal and interest, by the United States,) and, among others, having two loans of \$200,000 each, takes up these two loans about the close of the year 1815, out of her own funds, leaving other loans still standing out on interest.

She has thus taken up two debts of \$200,000 each, due by the United States, and thereby stopped the interest on them for the present; at the same time there are other debts for loans still outstanding, on interest, for which the United States are liable. In this posture of things, the United States pays to Virginia \$400,000, which she applies to reimburse herself for the two loans aforesaid which she had taken up. The question is, whether she was at liberty to have made this application of the payment; or whether, under the third rule just quoted, it is not to be considered as a payment of so much of the remaining loans as were standing out on interest, and as thereby throwing the payment of the future interest on that sum on the State of Virginia; or, in other words, whether Virginia is not worse off for having taken up those debts for the United States, and thereby diminished the quantum of the interest charged upon her, than if she had let them alone; for if she had let them alone, the United States would have had to pay those loans, as well as the rest, with all the accumulated interest upon them all. Yet, if such be the effect of this third rule, however urgent and absurd it may be thought, nothing remains for us but to follow it.

In my opinion, this third rule has nothing to do with a payment made by the United States under such circumstances.

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It may not be amiss that at the time the payment was made this third rule had no existence; it has been only recently enacted; and Virginia could not have been required to divine that, by possibility, the time might come when a rule would be enacted which would make it questionable whether she would be at liberty to apply to her own reimbursement a sum paid to her with that view; or whether she would not be required to apply it to another class of debts for which the United States were bound, without any existing direction to that effect.

But I do not think that the rule looks at all to a payment made under such circumstances. It contemplates *only the single case* of a loan obtained by Virginia for the use and benefit of the United States—of the principal, or any part of that loan, having been paid or refunded by the United States, or money placed in the hands of Virginia *for that purpose*; in which case the rule provides that the interest on the sum or sums so paid or refunded shall not be considered as chargeable to the United States any longer than up to the time of such repayment.

But the rule does not contemplate the case of a part of the loan having been already discharged by Virginia in behalf of the United States, and then money being paid to Virginia to an amount not equal to that which the State had already discharged of those loans, and paid—*not on account* of the balance of the outstanding loan—not *for the purpose* of paying off that balance—but paid to the State, *generally*, on account of her advances for the use and benefit of the United States during the war. It is not to such a case as this, that the rule looks at all; but to the case first mentioned. The rule, therefore, is inapplicable to the real case to which the question proposed to apply it, because it did not contemplate such a case. In truth, it was nothing more than to prevent the State from applying to its own private purposes moneys paid to it on account of the debts of the United States. It meant to protect the United States against the payment of interest upon loans after it had paid off the principal to the State; and ~~this protection~~ is effectually given when, for so much of the loan as the United States had refunded to Virginia on account of her having previously

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paid it for the United States, interest did cease, not only from the time at which it was so refunded by the United States, but from the time at which the State, in anticipation, had called it in, by the aid of its own funds, for the use and benefit of the United States.

I have the honor to be, sir, very respectfully, your obedient, humble servant,

WM. WIRT.

To the SECRETARY OF THE TREASURY.

INDEX

OF THE

PRINCIPAL MATTERS.

ACCOUNTS AND ACCOUNTING OFFICERS.

1. The accounting officers will not be justified in admitting as an offset to an amount due from an individual on a contract with the Navy Department, an amount found due to such individual by a jury in Kentucky. The finding of the jury is not *per se* such an establishment of a claim against the United States as to justify accounting officers in admitting it as a set-off. *United States vs. Ward & Johnson*, 589.
2. To allow a set-off is in effect to make payment of the claim set up against a debt due the United States; and unless the accounting officers would be justified in paying it as a separate and independent claim, they cannot properly allow it as a set-off. *Ibid.*
3. The Fourth Auditor is not authorized to consider security offered for a debt, however ample it may be, a payment of a debt due the government. *Gen. Swartwout's case*, 592.
4. The accounting officers have the right to adopt the report of a committee of Congress upon which a given law was reported and passed, for the principles which are to govern in the settlement of accounts under the law. The passage of a bill, accompanying a written report, may be considered the adoption of that report. *D. D. Tompkins's case*, 596.
5. The accounting officers may also receive depositions taken on notice, as proof of the items of an account. *Ibid.*
6. The accounts of the Vice President should be settled on principles of equity and good conscience, subject to the revision and final decision of the President. *Ibid.*
7. The accounting officers *must* act upon the accounts in the first instance. They must pass upon them, so that there shall be decisions to be approved or disapproved by the President, whose power is only appellate in its nature, to be exercised after the accounting officers shall have exercised their prerogatives in the matter. *Ibid.*
8. The report of a committee, accompanying a bill which has passed into a law, may be referred to, as well by the President whilst exercising his revising power, as by the accounting officers in their examination of the accounts submitted, for the principles to govern settlements under such law. *Ibid.*
9. Accounting officers may re-examine any case where judgment has been rendered by a court and jury before the passage of the act of 1st March, 1822, where the defendant, against whom the judgment has been rendered, has any solid ground on which to ask a court of law for a new trial. *Captain Staniford's case*, 598.
10. Where it shall appear to an accounting officer that there is newly-discovered evidence, of which the defendant was wholly and innocently ignorant at the time of the trial, and which, if he had had the benefit of it, would probably have produced a different result, and that it is such as may be given in courts of justice, he may open the matter and give the party the benefit of it. *Ibid.*
11. But accounting officers are to re-examine and admit no claims under said act where suits have been commenced, unless where new evidence is adduced other than that of the party interested. *Ibid.*
12. The laws regulating the settlement of the public accounts under which the Treasury Department is organized, require the Auditors to receive and examine accounts, and to certify them to the Comptrollers, who also examine

ACCOUNTS AND ACCOUNTING OFFICERS (*Continued.*)

- and pass upon them, and certify the balances thereon to the Register; and give no power of appeal to the President, except in particular instances, like that of the accounts of Daniel D. Tompkins, where the power of revision and final decision by the President was expressly conferred by the act. *Major Wheaton's case*, 624.
13. Although it is the duty of the President to take care that the laws be faithfully executed, he is not required to execute them himself. He is not required to audit and allow public accounts, but to see that the officers assigned to that duty perform it faithfully. The Auditors and Comptrollers are assigned to that duty. They constitute the accounting department; and so long as they continue to discharge their duties faithfully, the President has no authority to interfere. *Ibid.*
 14. The settlement of an account by the proper accounting officers is FINAL AND CONCLUSIVE, so far as concerns the executive department of the government. If the individual whose account has been thus settled conceives himself injured by such settlement, his recourse must be to the judiciary or to Congress. *Ibid.*
 15. If a balance be found against him by the disallowance of credits which he deems just, he may refuse payment and abide a suit; in which case he will have the benefit of the opinion of a court and jury. *Ibid.*
 16. If a balance be found in his favor, but smaller than he thinks himself entitled to, his appeal is to Congress, where the representatives can pass upon his claim. *Ibid.*
 17. The President cannot interpose in the settlement of accounts before the Comptroller, and require that officer to allow a credit to an individual in the settlement. *Joshua Wingate's case*, 636.
 18. It is not consistent with the relation between the government and its officers for the former to make itself a creditor of the latter without their consent, and to detain their salaries in the discharge of debts so acquired. *Advice*, 676.
 19. The accounts of an army contractor should be settled by the accounting officers. If they have any doubts on questions of law arising in the course of the settlement, they will state them to the head of the department, who, if he please, may call for the opinion of the Attorney General. *Anderson's case*, 678.
 20. The interference of the President in any form with the settlement would be illegal. He has no official connexion with the settlement of such accounts; and so far from being called upon to interpose any directions to the accounting officers, it would be an unauthorized assumption of authority for him to interfere at all. *Ibid.*
 21. The government cannot legally retain, out of the moneys directed by the act of Congress of May 24, 1824, to be paid to certain assignees and representatives, a bill against the creditor, assigned to the Treasurer under protest. *Case of assignees of Piatt*, 700.
 22. The law of set-off is limited to mutual debts between the same parties. If it be departed from at the treasury, there will be no other definite rules for the regulation of its practice. *Case of Smith & Buchanan, ibid.*
 23. The accounting officers cannot set off against A's trustees a debt owing by A to the assignees of B, who was a debtor to the United States. *Ibid.*
 24. The President cannot legally interfere with duties belonging to the accounting officers. *Gen. Hull's case*, 705.
 25. The President cannot legally interfere with the accounting officers whilst in the discharge of their duties. *Col. McKenney's case*, 706.
 26. The Secretary of the Treasury has no power to correct an alleged error of a court of the United States, and to refund a sum of money said to have been improperly paid in consequence of such alleged error. Redress in such a case can be made only by Congress. *Homer's case*, 405.
 27. The act of 24th April, 1816, authorizing certain charges for forage, for horses, servants, &c., for certain officers, is prospective in its operation, and refers only to the act of 3d March, 1813, for a standard to govern the subject in future. *Gen. Jackson's case*, 468.
 28. No claims for losses sustained by officers, volunteers, rangers, or others engaged in the campaign against the Seminole Indians, are to be allowed, except those which took place in consequence of the government of the United

ACCOUNTS AND ACCOUNTING OFFICERS (*Continued.*)

- States failing to supply sufficient forage, and to such claimants only as can furnish the evidence called for by the proviso of the act of May 4, 1822. *Advice*, 543.
29. Interest is in the nature of damages for withholding money which the party ought to pay, and would not or could not; but where the holder of a claim omits for a long space of time to make application for the payment, and the act of Congress directing payment is silent as to interest, he does not come within the reason of the rule. *Giles's case*, 268.
 30. Mrs. Charlotte Thornton, of London, formerly of Northumberland, widow of Colonel Presley Thornton, and devisee under his will of an annuity charged upon his estate in Northumberland and Culpeper—which estate, subject thereto, was devised to the testator's two sons in moieties—is entitled to certain arrears of such annuity, although she left this country in 1775, from political hostility to the principles of the American Revolution the estate has been partitioned among the heirs, and one moiety conveyed to another person or persons, and by him or them to the United States, and even though it may have been for the time suspended or extinguished by the confiscating and sequestrating laws of Virginia. *Thornton's case*, 494.
 31. Although the annuity is charged on the profits of the estate, it was clearly the testator's intent that it should be paid in any event, and be charged on the land; and as the deed of the moiety of one of the two sons to the person from whom the United States derived their title refers to the will creating such annuity, the latter must be considered as taking title with notice that they were charged therewith. *Ibid.*
 32. As to interest on arrears, it not appearing that the claimant had any known agent in this country to demand or receive payment prior to the time of the filing of her bill, there is nothing requiring its payment for time antecedent; yet, upon the filing of her bill, she became entitled to demand as well interest as the annuity withheld, until the period of her death. *Ibid.*

ACTIONS.

1. The late governor of Guadalupe, who had caused a vessel to be seized and condemned by authority assumed as such officer, being prosecuted in the court of Pennsylvania, whilst here as a prisoner of war on parole, is not more exempt than any other foreigner not a public minister from suit and arrest. *Collet's case*, 45.
2. If the circumstances attending the seizure were such as will constitute a defence, they must be pleaded in the action. If the seizure were an official act, done by the defendant under color of the powers vested in him as governor, they will be an answer, as the extent of the defendant's authority can be determined only by the constituted authorities of his own nation. *Ibid.*
3. The government will not interfere with a private action against a foreigner for receiving a negro on board his ship. *Capt. Cochran's case*, 49.
4. The defendant in such a case is on a footing with every other foreigner not a public minister, in respect to his suability, and he must answer or demur to the allegations against him. If he have a good defence under the treaty of peace, he must plead it in the usual course of judicial proceedings; and until the regular course of such proceedings shall have failed to do justice to a foreigner, there can be no just ground of complaint to the President. *Ibid.*
5. The term "prosecutions," employed in the sixth article of the treaty with Great Britain, imports a suit against another in a criminal cause; such prosecutions being conducted in the name of the public, the ground of them being distinctly known as soon as they are instituted, and being always under the control of the government. *Capt. Cochran's case*, 50.
6. The President will not interfere with judicial proceedings between an individual and the commissioner of a foreign nation where the controversy may have a legal trial. But a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission to any judicial tribunal in the United States. *Sinclair's case*, 81.
7. The United States may maintain an action of debt on the bond given by a marshal for misfeasance of himself or deputies, and a jury may assess the damages. Individuals injured by his official misconduct may use the name

ACTIONS (Continued.)

- of the United States in prosecuting a suit on the bond to recover satisfaction. *Advice*, 92.
- 8. If money has been fraudulently obtained from the United States, an action in the name of the United States will lie to recover it back. *Advice to Hs. of Rps.*, 210.
- 9. The United States may recover back money fraudulently obtained from the treasury, upon making out a case to the satisfaction of a jury. *Quarter-master Thomas's case*, 253.
- 10. The late collector at Savannah being indebted to the government, and the amount of such indebtedness being reported by the district attorney below that standing against him on the treasury books, an action at law should be brought against him for the apparent balance due. *Bullock's case*, 639.

ADMINISTRATORS.

- 1. The pay of an officer in the navy cannot be stopped on account of a balance due to the government from an estate of which that officer is the administrator. *Major Gamble's case*, 675.

ADVANCES.

- 1. The President of the United States, having the foreign intercourse fund under his direction, may advance to a minister going from the United States to Chili such part of his salary as he shall deem necessary to the proper fulfilment of public engagements in respect to him. *Advice*, 620.

AIDS-DE-CAMP.

- 1. The act of 11th January, 1812, does not provide pensions for aids-de-camp, as such, regulated by their pay as such; and therefore, until further legislation, they can receive only the pensions to which their commissions entitle them. *Capt. White's case*, 413.

ALIENS.

- 1. An alien can inherit, carry away, and alienate personal property, without being liable to any *jus detractus*; but not real estate. *Gahn's case*, 275.

ALLOWANCES.

See CLAIMS, COMPENSATION, and INTEREST.

APPEALS.

- 1. An appeal lies to the Supreme Court from the decrees of a district judge, deciding that he has no jurisdiction over a particular subject. District judges are not the exclusive judges of their own jurisdiction: if the Supreme Court be of opinion that they have jurisdiction, they must conform to its judgment. *Appeal from district judge of Georgia*, 56.
- 2. Appeals and writs of error to the Supreme Court of the United States are founded only upon errors in points of law properly raised in the courts below for decision. *Ward and Johnson's case*, 614.

APPOINTMENTS TO OFFICE.

- 1. The President cannot appoint a commissioner to make a treaty with Indians, for the purpose of extinguishing their title to lands within the United States, without the advice of the Senate. *Advice*, 65.
- 2. It has been the practice of the Executive to appoint the three judges having common-law jurisdiction for the Northwestern Territory, from an implied power; yet, as the implication does not extend beyond these, the governor is justified in appointing all other officers for that Territory. *Advice*, 102.
- 3. Where an act of Congress gives the President power to appoint an officer, without defining the tenure by which the office is to be held, a commission may legally issue to the officer to hold the office during the pleasure of the President. *Case of register of wills in Washington*, 212.
- 4. The President has power to fill, during a recess of the Senate, by temporary commission, a vacancy that occurred by expiration of commission during a previous session of that body—the term in the constitution “may happen during the recess” being equivalent to “may happen to exist during the recess,” without which interpretation it could not be executed in its spirit, reason, and purpose. *Gen. Swartwout's case*, 631.
- 5. The act of 3d March, 1823, was a permanent and general amendment of the pre-existing judiciary system, affecting not only the judges then in office, but all who should thereafter come into office in the Territory of Michigan. *Judge Doty's case*, 696.

ARRESTS.

1. The arrest of the domestic of a public minister is illegal; all process, therefore, is forbidden, and the persons concerned in any such process are liable to fine and imprisonment. *Van Berckel's case*, 26.
2. If, however, the domestic be an inhabitant of the United States, and shall have contracted debts, prior to his entering into the service of the minister, which are still unpaid, he is not entitled to the benefit of the act concerning crimes that gives this immunity; nor shall any person be proceeded against for such arrest, unless the name of the domestic be registered in the Secretary of State's office, and transmitted to the marshal of the district in which Congress shall reside. *Ibid.*
3. The arrest is regulated by act of Congress: the entering a public minister's house to serve an execution will either be absorbed in the arrest, as being necessarily associated with it, if that be found criminal, or, if the arrest be admissible, must be punished, if at all, under the law of nations. *Ibid.*
4. The late governor of Guadeloupe, who had caused a vessel to be seized and condemned by authority assumed as such officer, and being here as a prisoner of war on parole, is not more exempt from arrest than any other foreigner not a public minister. *Collet's case*, 45.
5. A vessel under arrest, to prevent her from cruising against belligerent powers, may be discharged on the order of the Executive, communicated to the marshal having her in custody. *Case of sloop Republican*, 48.
6. The expenses occasioned by the arrest should be paid by the owner, and be made a condition of the delivery; and the suit commenced by him ought to be withdrawn before any indulgence is granted. *Ibid.*
7. Arrest for trial is a proceeding belonging to the judiciary, not to the executive branch of the government; and the warrant of arrest must be founded on an information on oath. *Obed Wright's case*, 229.
8. The President has no power to cause an arrest to be made, except upon probable cause, supported by oath or affirmation. (*Vide* article VI of Amendments to the Constitution.) *Ibid.*
9. The President may issue his proclamation against an offender who has once been regularly arrested and made his escape; for, in such case, the regularity of the arrest implies that the probable cause has been furnished on oath, according to the constitution. *Ibid.*

ASSIGNEES.

1. Where an assignee of a government contract to build a fortification executes a bond to the government, with sureties, conditioned that he fulfil the original contract, he and his sureties are as much bound to the performance of the original contract as they would be in the case of a contract wholly original. *Hawkins's case*, 402.
2. Payment under the act of May 24, 1824, "for the relief of the assignees and legal representatives of John H. Piatt," may be made to the assignees to the amount of their assignment; and as the amount for which the claim was assigned was not fixed in the assignment, it having been given for advances "made and to be made," the accounting officers must examine into and ascertain the amount actually due the assignees thereon. *Assignees of Piatt*, 692.
3. Notes of the assignor, exhibited by the assignees, are *prima facie* evidence of the debt; yet the administrators have the right to controvert it. *Ibid.*

ASTOR, JOHN JACOB.

1. It would be unlawful to grant permission to John Jacob Astor to send a vessel in ballast to Michilimackinac to bring away skins and furs. *Advice*, 175.

ATTORNEY GENERAL.

1. The Attorney General is bound to give his opinion to the President and heads of departments on a case stated in writing; but he will not act as *arbitrator*, nor render an *award*. *Advice*, 209.
2. The Attorney General is not authorized to give an official opinion in any case, except on the call of the President or some one of the heads of departments. Subordinate officers of the government, who desire an official opinion, must seek it through the head of the department to which such subordinate is accountable. *Advice*, 211.
3. It is the duty of the Attorney General to give his advice on questions of law only when required by the President and heads of departments—not to in-

ATTORNEY GENERAL (*Continued.*)

- investigate the truth of any allegation of a fraudulent collusion to obtain money from the treasury. *Quartermaster Thomas's case*, 253.
4. The Attorney General's duties are confined to the prosecution and conduct of certain suits in the Supreme Court, the giving of his advice and opinions on questions of law when required by the President and heads of departments, and the discharge of duties concerning the sinking fund, and cannot be enlarged by the incumbent of the office without a violation of his official oath. It is not his duty to give official opinions to the House of Representatives. *Reply to Ho. of Reps.*, 335.
 5. The acts creating the office and defining the duties of the Attorney General limit his official opinions to questions of law propounded by the President and heads of departments. *Reply to Ingham*, 492.
 6. In our government, neither the Attorney General nor any other officer should be permitted to stretch his authority and carry the influence of his office beyond the circle which the law of the land has drawn around him. *Ibid.*
 7. The Attorney General will decline giving official opinions concerning infringements of the rights of patentees by dealers in the patented articles of manufacture, it not being the duty of the officers in charge of the Patent Office to decide upon the legal effect of patents issued in conformity to the laws, nor to inform patentees of their rights. *Nourse's case*, 575.
 8. It is not the duty of the Attorney General to instruct district attorneys in the discharge of their duties; nor can the Secretary of the Treasury, under his privilege of consulting that officer, properly require him to draw pleas, or to indicate the course to be pursued in particular suits depending in the district and circuit courts. *United States vs. Salathiel Curtis et al.*, 608.
 9. The Attorney General will give his advice and opinion on questions of law, when requested by the heads of any of the departments, touching any matters that may officially concern their departments, but not on matters that do not. *Ibid.*
 10. The averment that the particular suits, in which opinions are desired, may come before the Supreme Court, affords no excuse for expressions of opinion by the Attorney General anterior to their coming before it. If it did, it would apply with equal force to every case depending in district and circuit courts throughout the United States. *Ibid.*

AWARD UNDER TREATY WITH GREAT BRITAIN.

1. An award by commissioners under the 7th article of the treaty with Great Britain to several persons collectively, is conclusive upon the matter so far that the right to transfer is vested in all the persons in favor of whom it is made; and if those concerned have neglected to have inserted in it the amount of their respective interests, or if they disagree as to their several proportions, the embarrassments are attributable to themselves. The government cannot undertake to decide among them. *Case of the Somerset*, 153.

BANKS.

1. The commissioners appointed in pursuance of the act incorporating the Bank of the United States, have no power, as such, to superintend the election of directors, or to interfere therewith. *Case of Bank of the United States*, 19.
2. The original subscribers, whether holding interest or not, or their proxies, have the only right of voting; and the stockholders can be easily provided with judges of the election. *Ibid.*
3. Under the 14th section of the act incorporating the Bank of the United States, the treasury must receive its bills in payment of debts due to the United States. *Bank of United States*, 268.
4. It is not competent for a bank, with an ordinary charter, to set apart by deed, not under seal, lands, so as to exempt them from execution for the debts of the bank. The principle, that a corporation can grant only by its seal, is of universal application, and applies as well to the case of a grant to the United States as to an individual. *Case of Bank of Vincennes*, 572.
5. The stockholders are not individually liable for the notes of the Saline Bank, for the reason that both the notes issued by the bank and the discount notes given to it are contracts founded in a breach of the law, and which a court will not lend its aid to enforce. *Case of Saline Bank of Virginia*, 214.
6. Neither can the Saline Bank, as a bank, sustain suits, being unchartered, as all their transactions, contracts, and promises are founded in a breach of the law. *Ibid.*

BANKS (Continued.)

7. A judgment may be obtained against an individual debtor by default, and against receivers of public moneys on return of process under an act of Congress; but as against corporate bodies, the practice is regulated by the practice of the several States in such cases. *United States vs. Bank of Somerset*, 258.

BARRATRY.

1. The authority of the general government to take, forcibly detain in custody, and bring to this country, from Europe, a person charged with barratry on private property, is doubtful. The offender, if he were here, would be amenable to our courts. *Capt. Clifton's case*, 123.

BATTURE.

See **INTRUDERS.**

BILLS OF EXCHANGE.

1. Bills of exchange may be endorsed by an attorney in fact, having competent authority, derived from a power. *Advice*, 188.

BINGHAM, MR., AND THE BRIG HOPE.

1. The government is not bound to satisfy a judgment for damages recovered against its agent, when it is not made to appear that the property for which the suit was brought came into his hands as such agent, and where the avails of the property were retained by him, and were sufficient to indemnify. *Case of the Hope*, 99.
2. A receiver of captured property to deliver to the true owners, as they should be ascertained by Congress, and who converted the property and had the means of indemnifying himself, has no claim upon the United States for the payment of a judgment obtained against him, unless it expressly appear that such property came into his hands as agent for the United States. *Ibid*, 127.

BONDS.

1. A former purser reappointed to that office in the navy, under the act of 30th March, 1812, should give a new bond. *Purser Satterwhite's case*, 175.
2. Attestation is not essential to the validity of a consular bond. *Consul Strong's case*, 378.

BREACHES OF NEUTRALITY.

See **NEUTRALITY.**

BREVETS, AND BRET PAY.

1. There is no act of Congress now in force which recognises any such office as that of brevet major of marines. *Advice*, 352.
2. The act of 3d March, 1817, fixing the peace establishment of the marine corps, not having retained any majors in the service, the brevets theretofore conferred were thereby made to cease with the termination of the lineal rank of majors by commission. *Ibid*, 489.
3. Generals Gaines and Scott, being major generals by brevet, and brevets being recognised in the act of July 6, 1812, which has been continued in practice since the return of peace, and having commands according to their brevet rank, are entitled to the pay of major generals. *Case of Gens. Gaines and Scott*, 525.
4. Whether General Macomb is entitled to the brevet pay of brigadier general, depends upon whether he has a command according to his brevet rank. But what a command according to brevet rank is, the law does not decide; the same is left to be determined by the regulations of the army. *General Macomb's case*, 547.
5. The opinion of the Attorney General of the 29th December, 1821, was founded on the act of the 16th of April, 1818, and the army order of the 8th of May following, founded thereon, and giving construction to it. The repeal of the section of the act of 2d March, 1821, which sustained the army order, removes one of the grounds upon which it was suggested that they were in command of divisions, and leaves that fact to be settled by the Department of War. *Case of Gens. Gaines and Scott*, 564.
6. If they are in command of divisions according to the arrangement of troops on the peace establishment, they are, nevertheless, by force of the act of the 16th April, 1818, entitled to the pay and emoluments of their brevet rank. *Ibid*.

BREVETS, AND BREVET PAY (*Continued.*)

7. Captain Wainwright, of the marine corps, having served ten years in the grade of captain, and having applied for brevet promotion under the act of 16th April, 1814, the question was presented whether, since the act of 3d March, 1817, fixing the peace establishment of the marine corps, and abolishing the office of major in the same, the President could confer the brevet of major at all? and if so, whether it should not be the brevet of major in the army?—*Held*, that the only brevet rank of major which the President can confer is that of brevet major in the army of the United States. *Capt. Wainwright's case*, 578.
8. If it shall be deemed inexpedient to confer upon a captain of marines the brevet rank of major in the army, then he is entitled, if entitled at all to promotion, to the brevet rank of lieutenant colonel in the marine corps. *Ibid.*
9. Brevet rank takes effect whenever, by special assignment, the brevet officer is invested with a separate command, comprising troops of different corps, at a particular post. *Col. Fenwick's case*, 604.
10. The provisions of the act of July 6, 1812, authorizing the President to confer brevet rank on such officers of the army as shall have served ten years in any one grade, apply to brevet officers generally, and such as have been breveted for gallant services. *Advice*, 653.
11. The service actually rendered for ten years in any one grade being the ground of promotion, any officer performing it for that term, whether he holds the grade by commission or by brevet, is entitled to promotion. *Ibid.*

BRIGADIER GENERAL.

1. The President has power to nominate to the Senate a suitable person for the office of brigadier general of the militia of the Territorial governments. *Advice*, 165.

CADETS.

1. Cadets are soldiers, receiving the pay of sergeants, and bound to perform military duty in such places and on such service as the commander-in-chief shall order; and the corps to which they are attached is a part of the military peace establishment. *Advice*, 276.
2. As a part of the corps of engineers, they form a part of the land forces of the United States, and have been constitutionally subjected by Congress to the rules and articles of war, and to trials by court-martial. *Ibid.*
3. The cadets at West Point who have been or may be wounded whilst in the line of their duty, are entitled to be placed on the list of invalids, as provided in the acts of March 16, 1802, April 29, 1812, and March 3, 1815. *Advice*, 348.
4. The 3d section of the act of 1812, making provision for the corps of engineers, provided that the cadets theretofore appointed in the service of the United States, as well as those who might in future be appointed, should, at the pleasure of the President, be attached to the Military Academy at West Point, made subject to the regulations thereof, and to be thereby consolidated with the original corps of engineers. *Ibid.*
5. Being consolidated with the original corps, they could not, therefore, be properly distinguished from them afterwards, but were subject to be called into actual service whenever and wheresoever it might please the President, and were made amenable to the rules and articles of war. *Ibid.*
6. So that it follows, as a legal consequence, that the cadets attached to the Military Academy at West Point are entitled to the benefits of the provision made for wounds and disabilities received in the line of their duty by the 14th section of the act of 1802. *Ibid.*
7. The existing regulations for the government of the Military Academy may be altered by the Secretary of War, with the approbation of the President. *Advice*, 469.
8. The professors and cadets at that academy, as such, are not commissioned officers within the meaning of the 64th article of the rules and articles of war, for the purpose of being detailed as members of a general regimental court-martial; nor can such court be formed of professors, for the trial of cadets. *Ibid.*
9. Cadets may be tried by a regimental or garrison court-martial, according to the 66th and 67th articles of the rules and articles of war. *Ibid.*

CAPTURES.

1. When the decree of a judge raises a presumption against the jurisdiction of the courts of the United States, in cases of capture, it will not be improper for the district attorney to cause the necessary depositions to be taken *de bene esse*, to be used by the Executive in case the appellant does not prosecute his appeal or the decree be affirmed. *Case of Clinton and Giles*, 39.
2. Captures must be determined upon competent evidence; and no rules for determining the competency of evidence are more proper than those which prevail in courts of admiralty, and which, being founded on general and universal principles, are essential to a safe and pure administration of justice. *Case of the William*, 40.
3. The master of a captured vessel, by the usage of admiralty, is a competent witness. *Ibid.*
4. If the prize be a pirate, the officers and crew are to be prosecuted in the circuit court of the United States, without respect to the nation to which each individual may belong. *Case of the Nigre*, 85.
5. If it be regularly commissioned as a ship of war, the officers and crew are to be detained as prisoners, except such as are citizens of the United States. *Ibid.*
6. Citizens of the United States who aid a nation with whom we are at war on the high seas, against the United States, are guilty of treason. *Ibid.*
7. Offenders against the United States may be arrested, imprisoned, or bailed, agreeably to the usual mode of process in a State, but can be tried only before the court of the United States having cognizance of the offence. *Ibid.*
8. Proceedings against the ship and cargo are to be had before the district court of the United States, according to the laws of Congress and the usage and practice of courts of admiralty in prize causes. *Ibid.*
9. Where a French vessel, captured and condemned as lawful prize to the captors and to the United States prior to the treaty of September 30, 1800, in moieties, and the avails of the appraised vessel and cargo were in the hands of the clerk at the date of the treaty, and one moiety paid to the captors and the other paid into the United States treasury, after the signing of the treaty, and, upon a hearing before the Supreme Court on writ of error, no bond having been given, the decree of the circuit court was reversed, and the vessel, apparel, guns, &c., ordered to be restored; and, pursuant thereto, the moiety in the United States treasury was paid over, and a claim being made for the other moiety that had been paid to the captors—DECIDED, that the United States are not liable for such moiety. *Case of the schooner Peggy*, 114.
10. The owners of a vessel chartered to the Navy Department, for the purpose of carrying provisions and naval stores to Malta and Syracuse, without stipulations in the charter-party to furnish any particular or special papers, captured by a Spanish privateer on the ground that the vessel was carrying naval stores to the port of an enemy of Spain, the voyage and risk being fixed by the charter-party and freight charged accordingly, are liable for the loss sustained by the capture. *Case of the Huntress*, 162.
11. Where a brig captured off Tripoli, as prize of war, by a part of a squadron, and condemned, was afterwards taken by the commodore at a valuation, and placed in the service of the United States—DECIDED, that the captors were entitled to their prize interest of the government, and that the other moiety should be applied to the navy pension fund. *Case of the Transfer*, 186.
12. Where a captured fleet was condemned as a prize of war, and afterwards purchased by the President for \$255,000, under an act of Congress directing such purchase, and the distribution of that amount between the captors and their heirs, it was not intended to alter the mode of distribution, nor to deprive the widow of a seaman slain in the struggle from claiming and receiving the same share that she would have received had the prize been sold under a decree of court. *Case of Mrs. Hardy*, 402.
13. The profits of a capture made by individuals acting without a commission inure to the government, but it has not been the practice to exact them. It has been their practice to recompense gratuitous enterprise, courage, and patriotism, by assigning the captors a part, and sometimes the whole of the prize. *Case of the Dos Hermanos*, 463.

CHARTER-PARTY.

1. The owners of a vessel chartered to the Navy Department, for the purpose of carrying provisions and naval stores to Malta and Syracuse, without stipulations in the charter-party to furnish any particular or special papers, captured by a Spanish privateer on the ground that the vessel was carrying naval stores to the port of an enemy of Spain, the voyage and risk being fixed by the charter-party and freight charged accordingly, are liable for the loss sustained by the capture. *Case of the Huntress*, 162.

CLAIMS.

1. The claim of the holder of a certificate issued pursuant to the act of Congress passed 4th August, 1790, for interest for the year 1791, is inadmissible. *Buchanan's case*, 17.
2. The claim for a vessel arrested in neutral waters is valid; and it is the duty of the government causing such an arrest to make restitution. *Case of the Grange*, 33.
3. A claim founded upon a judgment for damages recovered against an agent of the government is inadmissible, where it is not made to appear that the property for which the judgment was recovered came into his hands as such agent, and where the avails of the property retained by him were sufficient to indemnify him. *Bingham's case*, 99.
4. Where a vessel alleged to be Danish property was seized as French property, on the south side of the island of St. Domingo, and, whilst waiting examination under the protection of the American flag, was seized by a British armed ship and taken into Jamaica, and there condemned, and a claim having been made by the Danish subject upon the government for compensation—decided, that the first captors were not liable for the first capture and detention long enough for examination, nor for the second capture; and that the government of the United States is not bound for the unlawful captures of its subjects. *Case of the Mercator*, 106.
5. Where a Portuguese brig had been captured by a French schooner, and thirteen days afterwards recaptured by an American vessel and taken to St. Kitts, where she was adjudged to be restored on payment of salvage, and the vessel or salvage subsequently demanded of the United States by the French minister as being provided for in the treaty with France, and not condemned at the signing thereof—decided, that the treaty did not authorize the French government to make any demands on the United States for property thus recaptured from it, and which they are obliged to restore to the original owners on payment of salvage. *Case of a Portuguese brig*, 111.
6. Where a French vessel, captured and condemned as lawful prize to the captors and to the United States prior to the treaty of September 30, 1800, in moieties, and the avails of the appraised vessel and cargo were in the hands of the clerk at the date of the treaty, and one moiety paid to the captors and the other paid into the United States treasury, after the signing of the treaty, and, upon a hearing before the Supreme Court on writ of error, no bond having been given, the decree of the circuit court was reversed, and the vessel, apparel, guns, &c., ordered to be restored; and, pursuant thereto, the moiety in the United States treasury was paid over, and a claim being made for the other moiety that had been paid to the captors—decided, that the United States are not liable for such moiety. *Case of the Peggy*, 114.
7. A receiver of captured property to deliver to the true owners, as they should be ascertained by Congress, and who converted the property and had the means of indemnifying himself, has no claim upon the United States for the payment of a judgment obtained against him, unless it expressly appear that such property came into his hands as agent for the United States. *Bingham's case*, 127.
8. Claims upon the United States for freight charged by individuals, alleging that they transported articles for the French government and its citizens, prior to the treaty of 1800, which were captured, were not provided for by the convention, and cannot be allowed. *Advice*, 136.
9. The claim of a commanding officer at the navy-yard, who, by law, is entitled to the pay and emoluments of a captain commanding a squadron, for payment of an account for house-rent, is somewhat doubtful; yet the Attorney General inclines to the opinion that, in view of his necessities whilst in that department of service, and the analogies of custom in other departments, it is admissible. *Advice*, 160.

CLAIMS (*Continued*)

10. The claim for damages sustained by the capture of a vessel chartered to the Navy Department, for the purpose of transporting provisions and naval stores to Malta and Syracuse, without stipulations in the charter-party to furnish any particular or specific papers, and which was captured by a Spanish privateer, on the ground that the vessel was carrying naval stores to the port of an enemy—the voyage and risk having been fixed in the contract, and freight charged accordingly—is groundless as against the government. *Case of the Huntress*, 162.
11. The claim of the captors of a prize of war off the coast of Tripoli, which was afterwards taken by the commodore of the American squadron at a valuation, for their moiety of the value of the vessel and cargo, should be allowed. *Case of the Transfer*, 186.
12. The claim of the navy agent at Boston for the allowance and payment of office-rent, clerk-hire, fuel, and stationery, over and above his annual compensation for services, is valid and may be allowed. *Advice*, 188.
13. The claim of the owner of certain English prizes, payment for which had been obtained from the Bey of Tunis by Commodore Decatur, and by the latter deposited with Mordecai M. Noah, then consul at Tunis, who improperly applied the same in payment of certain drafts which he had authorized to be drawn upon the Department of State for the release of certain American prisoners at Algiers, and which had been negotiated, presented, and dishonored, in consequence of the disapproval by the department of the proceedings of Noah in the premises, for payment to him, by the government, of the amount of his funds in the hands of Mr. Noah thus appropriated to the payment of the said draft, is not admissible. *Winslow Lewis's case*, 196.
14. Where the Quartermaster General had entered into an agreement with an individual to pay him \$8,000 for a vessel upon condition that the latter should deliver her in good order at the mouth of the Apalachicola by a specified time, and the latter agreed to do so, "dangers of the sea, or being prevented by an enemy, excepted," yet failed to deliver her in time; but, under a division order from General Jackson, directing the Quartermaster General to purchase the vessel "if to be had at cost here," he took possession of her without any consultation with the owner or agent, and sent her up the river with supplies for the army—DECIDED, that, by virtue of the conversion, the United States ought to pay for her, not the stipulated price, but *quantum valebat*. *Case of the Peacock*, 245.
15. When the British invaded Castine, the commander of the United States ship Adams, then lying in that port, burnt her, to prevent her from falling into the hands of the enemy; the fire communicated with a neighboring warehouse, in which there was valuable property destroyed, for which a claim is made against the government—DECIDED, that the destruction was one of those casualties of war, resulting from exposure, that give no claim upon the government. *Case of Richard's case*, 255.
16. The claim of the holder of a warrant upon the treasury, and who had for a long period of time neglected to present it for payment, for interest upon his demand, is inadmissible. *Case of Aquila Giles*, 268.
17. Interest is in the nature of damages for withholding money which the party ought to pay, but would not or could not; but when the holder of a claim upon which it is demanded, for a long space of time, omits to apply for payment, he does not come within the reason of the rule. *Ibid.*
18. The claim of the representatives of Doctor Bullus, late navy agent at New York, for compensation for extra services alleged to have been performed by him in purchasing and forwarding from New York supplies for the lake service, &c., depends, for its validity, upon the fact of the services having been out of the line of his duty. If they were of a contingent character, they may be compensated by the Secretary of the Navy. *Case of representatives of Bullus*, 302.
19. Claims of inhabitants of New York, who, upon the adjustment of the boundary line between that State and New Hampshire, were thrown into the latter State, and afterwards into Vermont, and whose titles were ultimately extinguished for a pecuniary consideration, for damages, are inadmissible. *Clark's case*, 320.

CLAIMS (*Continued.*)

20. The case is not varied by the allegation that the sufferers were British subjects, as, by the 9th article of the treaty of 1794, it is expressly stipulated that British subjects who held lands in the United States should continue to hold them in like manner as if they were natives. *Ibid.*
21. A claim for necessary advancements by district marshals of money to procure the necessaries of life for prisoners under arrest and in confinement, awaiting a trial, is valid, and may be properly allowed. *Advice*, 322.
22. The claim for payment to witnesses in a criminal prosecution before a federal court, who have been imprisoned in consequence of their inability to give security for their appearance at court, for the time they were so detained, cannot be allowed under any existing law. *Advice*, 344, 494.
23. The claim of a district attorney for a special compensation for attending a State court on behalf of the United States, and for attending upon taking depositions, and for disbursements in the suit, is valid, and may be allowed, in addition to the prescribed salary and emoluments of his office.—*Mellivaine's case*, 365.
24. A widow of a seaman who was slain in the battle of Lake Erie has a valid claim for a share of the prize-money, as the captured vessels were purchased by the President of the United States for the use of the government, and as the act of Congress authorizing such purchase was not intended to affect the rights of those who would otherwise have been entitled under a decree of court. *Mrs. Hardy's case*, 403.
25. The claim of a Secretary of War for special compensation for services performed in leaving the seat of government for the seat of war, is not admissible. If he went to the field, by order of the President, for military purposes, he may be allowed the expenses of the tour, but nothing more. *Gen. Armstrong's case*, 457, 493.
26. Privateers without a commission have no legal claim to any share of a prize captured by them. The entire profits of such an achievement always inure to the government to which the captors belong. *Case of the Dos Hermanas*, 463.
27. The claim of a major general retained in service by the act of 3d March, 1815, "fixing the military peace establishment of the United States," for forage for seven horses, at the rate of eight dollars per month, and the pay, rations, and clothing of a private soldier of the line for four servants, is not sustained by law, and ought not to be allowed. *Gen. Jackson's case*, 468.
28. The claim of the Surgeon General for an allowance for fuel and quarters has as good a foundation as have similar claims for other officers of the army; and there is as forcible a reason for supplying him with them as there is for supplying them for a major general or any other officer. *Advice*, 475.
29. The claim of captains in the marine corps who were breveted majors under and by virtue of the authority contained in the act of 16th April, 1814, for the additional compensation to which such brevets entitled them, after 3d March, 1817, is not admissible, as the last-mentioned act retained no majors in service; and the brevets theretofore conferred, of necessity, ceased with the termination of the lineal rank of that commission. *Advice*, 489.
30. The claim of the non-resident devisee of an annuity charged by will upon an estate, a portion of which has since become the property of the government, with constructive notice of the charge, for arrears of such annuity and interest, is admissible, as to the arrears of the annuity and for interest, only from the time of the filing of a bill to recover it. *Mrs. Thornton's case*, 494.
31. The validity of the claim of major generals by brevet for compensation according to their brevet rank, depends upon the fact whether they have been in command of divisions, according to the arrangement of troops on the peace establishment. *Cases of Generals Gaines and Scott*, 525, 564.
32. The claim grounded on the alleged wrong occasioned by the condemnation of a vessel covered by Spanish documents, as in fact British, falsely and fraudulently covered, having been fairly considered by the Supreme Court, and in effect adjudged to be inequitable and invalid, can be allowed only pursuant to a special act of Congress, which that body is not advised to pass. *Case of the Isabella*, 536.
33. No claims for losses sustained by officers, volunteers, rangers, or others, engaged in the campaign against the Seminole Indians, are valid, except for such as took place in consequence of the failure of the government to sup-

CLAIMS (*Continued.*)

- ply sufficient forage, and to such claimants only as can furnish the evidence called for by the proviso contained in the act of 4th May, 1822. *Advice*, 543.
34. Whether a major general by brevet is entitled to the brevet pay, depends upon the fact whether he has a command according to his brevet rank. *Gen. Macomb's case*, 547.
 35. The claim for interest upon the demands assumed by the United States in, and settled by the commissioners appointed under, the treaty of 8th January, 1821, with the Creeks, is inadmissible, there having been no stipulation made for the damage or detention of property. *Georgia claims*, 550.
 36. The United States never have agreed to become responsible to the Georgia claimants further than the Indians were; and a claim for interest against a nation of Indians, or a payment of interest by them, is without a precedent. In treaties with them, nothing more has ever been asked than that the property taken be returned, or an equivalent for its fair value, at the time of the conversion. *Georgia claims*, 554.
 37. Interest is not any part of a debt, nor a necessary consequence of a debt. By the polity of many nations it is forbidden, and not held to be a right in all cases by those who allow it in some. It is generally disallowed upon unliquidated demands; and, as the Georgia claims are of that character, the generale rule will exclude it. *Ibid.*
 38. The debt having been adjusted on liberal principles, in consequence of the property having been averaged above its actual value from 1703 to 1802, it would be prodigality, not justice, to subjoin interest to such allowances. *Ibid.*
 39. The treaty, moreover, interposes, after the amounts are liquidated, and inhibits the payment of interest upon them. *Ibid.*
 40. A claim grounded on the finding of a jury in Kentucky is not sufficiently established to authorize its allowance at the treasury, even as a set-off to an account due upon contract. *Ward and Johnson's case*, 589.
 41. It is a payment of a claim, in effect, to allow it to come into a settlement as a set-off: wherefore, unless a claim is entitled to be paid directly, it cannot be allowed indirectly by way of set-off. *Ibid.*
 42. In the settlement of claims required to be adjusted by Congress, the accounting officers may have recourse to the report of the committee recommending the passage of the act for the principles which are to govern them, as an act passed pursuant to a written report of a committee may be considered the adoption of that report. *Tompkins's case*, 596.
 43. Where a claim is to be settled on principles of equity, subject to the revision of the President, the accounting officers are required to act upon it in the first instance; for the revisory power is only an appellate authority, to be exercised only after the latter shall have exercised their prerogative in the matter. *Ibid.*
 44. The claim of certain citizens of Baltimore for interest is inadmissible, under the act of 26th April, 1822, as it would be an increase of the demand to allow interest on the amount, or to assume it as a debt due at a date anterior to the allowance. *The Baltimore claims*, 605.
 45. A judge advocate is entitled to compensation for extra expenses in travelling and sitting as judge advocate, and to special compensation for clerical services, under the 21st and 22d sections of the act of 16th March, 1802. *Advice*, 618.
 46. Claims properly referable to the accounting officers for adjustment may not properly be interfered with by the Executive, except, as in the case of D. D. Tompkins, where the right of appeal has been expressly given by act of Congress. *Major Wheaton's case*, 624.
 47. The claim of the marshal of the district of Georgia for the support of negroes constituting the cargo of a Spanish vessel brought in for adjudication under the laws prohibiting the slave trade, is not absolutely binding upon the government in consequence of the decision of the circuit court of that State in favor of it. The support of slaves *pendente lite* appears to have been placed under the direction of the President. *Case of the Ramirez*, 635.
 48. A collector of customs has no valid claim upon the government for his proportion of a fine against a debtor released by the President, as any vested right of such collector to such fine could not be released by the President, and he has therefore sustained no damage by the act. *Wingate's case*, 636.

CLAIMS (*Continued.*)

49. The claim of the State of Ohio for three per cent. upon the sales of the public lands within that State sold since the 30th of June, 1802, is valid, so far forth as the amount of that per centage upon such sales after deducting the expenses of survey. The expenses of survey, &c., must have been in the contemplation of both parties to the act affirming the compact that Congress should retain the expenses incident to the sales before making the computation upon which the rights of Ohio in this behalf are founded. *Adair's case*, 640.
50. The officers and crew of a United States vessel have no valid claim upon the government for saving a government vessel wrecked on the Florida reef. *Case of the Richard and Charles*, 675.
51. The claim of a purser in the navy for full pay for ten years next after his resignation, made, but not accepted, because of the unsettled state of his accounts, is inadmissible at the department. *Darby's case*, 677.
51. The Executive has nothing to do with the settlement of public accounts, either in the form of direction to the accounting officers *a priori*, or revision and reversal *a posteriori*, except, in a case like that of D. D. Tompkins, where the particular law expressly provides for a settlement by the accounting officers and the Executive. *Anderson's case*, 678; *Gen. Hull's case*, 705; *Col. McKenney's case*, 706.
52. The claim of the surveyor of City Point and Bermuda Hundred for the compensation provided for the surveyor at Petersburg, (he having performed the duties of surveyor at that port,) must, under the circumstances, be recognised as valid. *Peterson's case*, 686.
53. The right of assignees and legal representatives of a deceased claimant to receive payment, to the extent of their claim, having been established by act of Congress, and the amount due them not appearing on the face of the assignment, it is competent and proper for the accounting officers to examine into the matter, and to ascertain the true amount, before making payment to any one. *Walker's case*, 692.
54. On the settlement of the claims of A, which have been directed by Congress to be paid to his assignees and representatives, the government cannot retain from the moneys thus directed to be paid the amount of a government claim against A & Co. *Piatt's case*, 700.
55. In adjusting claims at the treasury, the accounting officers cannot set off against A's trustees a debt owing by A to the assignees of B, who was a debtor to the United States. *Case of trustees of Smith & Buchanan*, 700.
56. The claim of the State of Virginia upon the general government for reimbursement of money expended by her in the war of 1812 with Great Britain, for the use and benefit of the United States, has been directed to be settled by Congress; and, in this case, there is a warrant of law for allowing interest. *The Virginia case*, 722.
57. The United States were bound to Virginia, by the relation which subsists between the general and State governments, to provide the means of carrying on the war; and failing to make such provision, and Virginia herself having made it from her own resources, the same became a debt against the United States, which they were bound to reimburse. The rule concerning interest has been, that where a State supplied the moneys for expenditure from her own treasury, no interest has been allowed; but where a State, from the condition of her own finances, was obliged to borrow the money, and to thus incur a debt on which she herself became obligated to pay interest, interest has been allowed to her for indemnity. *Ibid.*
58. In the case of Virginia, there is a special act authorizing the payment of interest, and prescribing the rules for computing it. Interest may be computed upon loans, or money borrowed and actually expended for the use and benefit of the United States during the late war with Great Britain, but shall not be computed on any sum which Virginia has not expended for the use and benefit of the United States, as evidenced by the amount refunded, nor upon any sum on which she has not paid interest, nor upon any sums refunded or paid her subsequent to such refunding or payment. *Ibid.*
59. It was the intention of Congress to reimburse to the State of Virginia all the interest which she had actually paid on account of loans made necessary by her having taken the place of the United States in meeting the expenditures of the war in that State; and although the money so borrowed may have

CLAIMS (Continued.)

been placed in the State treasury, and thereby blended with the State revenue, yet if, from the revenues thus blended, a sum equal in amount to the sum borrowed were expended for the use of the United States, the State is nevertheless entitled to interest, without proof that the very dollars borrowed were expended. *Ibid.*

60. In like manner is she entitled to interest on loans made necessary by the exhaustion of the State treasury in taking up loans for the use of the United States. *Ibid.*

COLLECTORS OF CUSTOMS.

See CUSTOMS, SLAVE TRADE.

COLLECTORS OF TAXES.

1. Collectors of taxes and internal duties appointed under the act of 22d July, 1813, were appointed permanently to perform the duties of collection, whenever Congress imposed the tax, and, consequently, were obligated to collect the tax imposed in 1815. *Reed's case*, 339.
2. Sureties of collectors appointed under the act of 1813 are liable for their delinquencies under the act of 1815 to the amount of the penalties of their bonds. *Ibid.*
3. The discharge of a collector of taxes from a judgment obtained against him for a defalcation will, under the common law, release his sureties. Whether the act of 1817 will preserve the liability of their sureties in case of their discharge as insolvent debtors—*quere?* *Dundas's case*, 367.
4. Collectors of taxes, and other officers to whose appointment the consent of the Senate is requisite when in session, appointed during a recess, and subsequently nominated and confirmed, hold under the first commission until the confirmation of the nomination by the Senate, when a new commission should issue and a new bond be given. *Advice*, 637.
5. Sureties of a collector of taxes appointed during a recess are liable only for acts performed under the President's commission. *Ibid.*
6. Where a collector appointed by the President during a recess of the Senate falls in arrear with the government during his first commission, but after his nomination to and confirmation by the Senate makes payments into the treasury, yet continues in arrear for current dues to the government, for which a suit is brought, it is competent for the jury to apply the payments in exoneration of the balances for which the sureties under the first commission were bound. *Ibid.*

COLONIZATION.

1. The act entitled "An act in addition to the acts prohibiting the slave trade" does not authorize the President to appropriate any part of the sum therein specified to the purchase of land on the coast of Africa or elsewhere, for the purposes of a settlement, nor to the transportation of free people of color to Africa, nor to the purchase of carpenters' tools for the purpose of making a settlement in Africa, nor to the payment of the salary and expenses of transporting an agent from this country to Africa. *Advice*, 314, 317.

COLORÉD MEN.

1. Free colored people in Virginia are not citizens of the United States in the sense in which the term "citizens" is used in the acts regulating foreign and the coasting trade, so as to be qualified to command vessels. *Advice*, 506.
2. Since the acts of Congress under which troops were raised in the late war were construed so as to permit of the enlistment of colored men; and since recruiting officers recruited them on a contract for the pay and bounty stipulated by law; and as the officers of government recognised them as a part of the army, (receiving pay and rations with other troops,)—a *practical* construction has been given to those acts which entitles the colored soldiers to the promised lands. *Advice*, 602.

COMMANDANTS.

1. The commanding officer at the navy-yard is entitled to receive the pay and emoluments of a commodore, and therefore is entitled to apartments or house free of rent. *Advice*, 160.
2. When inferior officers or soldiers who think themselves wronged complain to the commanding officer of a regiment, he ought to summon a regimental court-

COMMANDANTS (*Continued.*)

- martial to inquire into the truth or falsehood of the complaint, and decide thereon; but, as its authority extends no further than a court of inquiry, the rules and practice of the latter should, in general, govern the proceedings. *Advice*, 166.
3. Officers in command at posts where rations for the troops thereat are required by contract to be supplied, are the persons authorized to supply deficiencies when they occur. *Orr's case*, 260.
 4. Where the commandant at a post anticipates a failure in supplies contracted to be furnished, he may make provision for them before the failure absolutely occurs; yet the contractor is not liable for them until the failure takes place: then he is liable, whether they were purchased previously or subsequently; for it is the failure and time upon which the responsibility arises. *Ibid.*
 5. If a general had a right to draw supplies from a place out of his military department, through the enemy's country, he was bound to furnish an escort from that place through that country. If the case were one of real and imminent danger, the contractor had a right to an escort; and, if it were not furnished, he is exonerated from the consequences of the failure. *Ibid.*
 6. Commandants of posts where rations are required to be furnished must supply the rations, in case of a deficiency: otherwise, the contractor will not be liable for them. *Orr's case*, 270.
 7. Commandants of posts are not authorized to require contractors for rations, for six months in advance, to keep that supply deposited in advance of a perpetually advancing point of time, at which the supply is required to be placed at the post. *Morrison's case*, 329.
 8. The distinction made in the department between rations in deposit and rations for daily issues, has no warrant in the army contracts; nor can any military order create it in such a way as to affect the bearing of such contracts. A quantity of provisions only, called a supply of rations for a specified time, is required, and those are to be issued by the contractor; and in case the commandant of the post where they are to be furnished makes an order for more rations, or for a different disposition of them than the contract provides, it is inoperative upon the question of the contractor's legal obligations under the contract, but does not exonerate the government from payment. *Ibid.*
 9. If the contractor for supplies for daily issues shall be required to place at a given post a specified number of rations for a specified time, the government must either consume them or pay for them; for the requisition is an assurance on the part of the government that the rations are necessary and will be consumed and paid for. *Ibid.*

COMMENCEMENT.

1. Pensions, under the act of the 15th of May, 1820, commence when the testimony in the case shall have been taken, authenticated, and completed, in all respects, as it is required to be, in order to its proper reception at the department. *Col. Johnson's case*, 562.
2. Brevet rank, in fact, commences, with its concomitant advantages and perquisites, whenever the breveted officer is, by special assignment, invested with a separate command according to his rank. *Col. Fenwick's case*, 604.

COMMISSIONS.

1. A commission lawfully issued by the President, without defining on its face the term for which the office is to be holden, authorizes the incumbent to discharge its duties only during the President's pleasure. *Case of register of wills for District Columbia*, 212.
2. A commission issued to an officer of the navy may be afterwards altered in respect to its number—that being no part of the commission, properly so called, but a mark affixed by the Secretary of the Navy to prevent questions of rank from arising among officers holding commissions of the same date. *Lieut. Newcomb's case*, 325.
3. But whenever it is, for any cause, proposed to alter or change the number of a commission, the persons to be affected by the proposed change ought to have opportunity to be heard as to the facts. *Ibid.*
4. Commissions issued pursuant to the act of 22d July, 1813, during a recess of the Senate, were so far permanent that, upon a confirmation by the Senate,

COMMISSIONS (*Continued.*)

- at its next session, of the same incumbents, the office conferred continued without intermission, and the bonds given for the performance of duties under the temporary commission remained obligatory for performance after confirmation. *Sherman's case*, 574.
5. The doctrine contained in the foregoing note was subsequently overruled by the Supreme Court, and the decision of that body announced at page 637. *Ed.*
 6. Commissions for the purpose of filling vacancies happening during a recess of the Senate may be issued by the President at any time during a recess; but such commissions will expire at the end of the next session. *General Swartwout's case*, 631.
 7. The term "may happen during the recess," in that part of the constitution which confers the appointing power upon the President, is equivalent to "may happen to exist during the recess:" wherefore, a temporary commission may lawfully issue, without consulting the Senate, to fill any vacancy in office "that may happen to exist" at any time during a recess of that body. *Ibid.*
 8. A commission issued by the President during a recess of the Senate continues only to the end of the next session thereof, or until the confirmation, if a confirmation of the nomination of the same individual is had before, and until the issue of a new one. *Advice*, 637.
 9. The second commission is not a continuation of the first, but is a new appointment, conferring a new authority, and requiring, in cases where security is necessary, the execution of new bonds to the government, conditioned for the performance of the duties of the office. *Ibid.*

COMMISSIONERS.

1. Commissioners appointed in the act incorporating the Bank of the United States have no power, as such, to superintend the election of directors thereof. *Case of U. S. Bank*, 19.
2. Commissioners to treat with Indians concerning the possession of their lands cannot be appointed except with the advice and consent of the Senate. *Advice*, 65.
3. The commissioners appointed under and pursuant to the 5th article of the treaty with Great Britain must all agree to decisions made by them in executing its provisions. *Advice*, 66.

COMPENSATION.

1. The commanding officer at the navy-yard is entitled to receive the pay and emoluments of a commodore, and therefore is entitled to apartments or house free of rent. *Advice*, 160.
2. Under the act of 3d March, 1809, navy agents may be allowed two thousand dollars per year over and above office-rent, clerk-hire, fuel, stationery, &c. *Advice*, 188.
3. The act of April 18, 1814, does not limit the right of the President to increase the pay of the officers and men belonging to the navy, to the close of the war with Great Britain. *Advice*, 192.
4. The office of navy agent not having been created by law, there has been no law defining its duties, from which to determine whether the navy agent at New York has or has not rendered extra service. *Bullus's case*, 302.
5. In general, it is the duty of navy agents to execute such instructions as they may from time to time receive from the executive departments. *Ibid.*
6. The Secretary of the Navy has the contingent fund of the department entirely at his disposal, from which he may draw for the purpose of compensating any services rendered in any of the relations of his department which are of a contingent character. *Ibid.*
7. Under the act of 8th May, 1792, for regulating processes, &c., allowances may be made to marshals for supplying any of the necessaries of life to prisoners. *Advice*, 322.
8. The Surgeon General is entitled to an allowance for fuel and quarters, the same as other officers of the army. *Advice*, 475.
9. Where a Secretary of War, in time of war, goes from the seat of government to perform a service, the propriety of which had been previously discussed by the President and adopted by him as a measure that would be useful to the public, his claim for payment of the expenses of the journey is well

COMPENSATION (Continued)

- founded. Opinion of 25th January, 1821, explained. *General Armstrong's case*, 493.
10. Whether General Macomb is entitled to the brevet pay of major general, depends upon whether he has a command according to his brevet rank. But what a command according to brevet rank is, the law does not decide: the same is left to be determined by the regulations of the army. *General Macomb's case*, 547.
 11. Generals Gaines and Scott being major generals by brevet, and brevets being recognised in the act of July 6, 1812, which has been continued in practice since the return of peace, and having commands according to their brevet rank, are entitled to the pay of major generals. *Generals Gaines and Scott's cases*, 525.
 12. The opinion of the Attorney General of the 29th December, 1821, was founded on the act of the 16th of April, 1818, and the army order of the 8th of May following, founded thereon and giving construction to it. The repeal of the section of the act of 2d March, 1821, which sustained the army order, removes one of the grounds upon which it was suggested that they were in command of divisions, and leaves that fact to be settled by the Department of War. *Generals Gaines and Scott's cases*, 564.
 13. If they are in command of divisions according to the arrangement of troops on the peace establishment, they are, nevertheless, by force of the act of the 16th April, 1818, entitled to the pay and emoluments of their brevet rank. *Ibid.*
 14. The pay of a purser stops with the acceptance of his resignation, subject to the settlement of his accounts—the condition of the acceptance only keeping the office alive for the purpose of settlement, and not for accruing compensation. *Darby's case*, 346.
 15. A judge advocate is entitled to compensation for extra expenses in travelling and sitting as judge advocate, and to special compensation for clerical services under the 21st and 22d sections of the act of 16th March, 1802. *Advice*, 618.
 16. The per diem allowance made to officers for travelling expenses, by the act of 16th March, 1802, is confined to officers travelling to and from court-martial, and is not authorized to be paid to those who are travelling on other business. *Advice*, 708.
 17. The term "major" contained in the provision of the act of 24th April, 1806, regulating the pay of battalion and regimental paymasters, and providing that they shall receive the pay and emoluments of major, may be taken to mean a major of infantry. *Clark's case*, 704.

COMPUTATION.

1. The words "within two years from the time of sale," used in the clause of the act of Congress giving the owners of lands sold for the taxes of 1815 and 1816 the right to redeem them of the purchasers at the tax sales, exclude the day of sale from the computation. (See 27 Henry VIII, ch. 10; 2 Dyer, 186; Moor, S. C., 40; 1 Henry Blackstone R., 13; and Cowper, 714, for authorities as to computation of time.) *Jones's case*, 364.

CONSIGNEES.

1. The consignee of a quantity of rum imported by the brig Hope in 1816, and afterwards sold, is liable for the duties within the case of the United States vs. Lyman, (1 Mason's Reports, 422,) and an action may be maintained against him for them. *McClellan's case*, 658.

CONSULS

1. A riot before the house of a foreign consul by a tumultuous assembly, requiring him to give up certain persons supposed to be resident with him, and insulting him with improper language, is an offence not within the act of the 30th of April, 1790, for the punishment of certain crimes against the United States. *Case of British consul at Norfolk*, 41.
2. A consul is not a public minister, nor entitled to the privilege attached to the person of such an officer. As the law now stands, the offence in question cannot be legally prosecuted in the courts of the United States. If, however, the grand jury will present the offence in that court, it will be the duty of the district attorney to reduce the presentment into form, and the point in controversy will thus be put in a train for judicial determination. *Ibid.*

CONSULS (*Continued.*)

3. French consuls in the United States have no authority for requiring district marshals to execute their sentences arising under the treaty with their government. *Advice*, 43.
4. A consul is not privileged from legal process by the general law of nations, nor is the French consul-general by the consular convention between the United States and France. *L-tombe's case*, 77.
5. Though a consul, for a transaction in which he acted as the commercial agent of his government, the President has no constitutional right to interpose his authority, but must leave the matter to the tribunals of justice. *Ibid.*
6. American consuls at foreign ports are not authorized to demand of masters of merchant vessels that have been stranded the three months' pay for the seamen required by the act of 1863. *Advice*, 148.
7. The bonds of American consuls are not required to be attested. The plea of *non est factum* would be sufficiently met by proof of the handwriting. *Strong's case*, 378.
8. Foreign consuls and vice-consuls are not public ministers within the law of nations, or the acts of Congress, but are amenable to the civil jurisdiction of our courts; and in the case of the Genoese consul (2 Dallas, 297) it was held that they were not privileged from prosecutions for misdemeanors. *Villanova's case*, 406.
9. But consuls are bound to appear only in the federal courts; the constitution and laws, contemplating the responsibility of consuls, having provided these tribunals, in exclusion of the State courts, in which they shall answer. *Ibid.*
10. American consuls may demand of ship-masters three months' pay over wages, &c., on account of seamen left at the ports where such consuls reside, on account of inability of the seamen to return in the vessels in which they went out. *Maury's case*, 593.

CONTRACTS.

1. A contract with the government to carry certain provisions and naval stores up the Mediterranean sea at the risk of the contractor, gives no claim upon the government for loss on account of a capture *in transitu*. *Case of the Huntress*, 162.
2. Where contracts for supplies for the army contain the clause providing for a supply, in case of deficiency, by the commanding general or person appointed by him at each post or place, the person appointed by the commanding general to take command at the post or place is the person authorized to supply the deficiency. *Orr's case*, 260.
3. Where the commandant at a post anticipates a failure in supplies contracted to be furnished, he may make provision for them before the failure absolutely occurs; yet, the contractor is not liable for them until the failure takes place; then he is liable whether they were purchased previously or subsequently; for it is the failure and time upon which the responsibility arises. *Ibid.*
4. If a general had a right to draw supplies from a place out of his military department, through the enemy's country, he was bound to furnish an escort from that place through that country. If the case were one of real and imminent danger, the contractor had a right to an escort; and, if it were not furnished, he is exonerated from the consequences of the failure. *Ibid.*
5. The contractor is not liable to pay for rations furnished in case of his failure, except such as may be furnished by the commanding general, or person appointed by him at the post or place where the rations were stipulated to be furnished. *Orr's case*, 270.
6. Contracts for rations which provide that supplies for certain posts shall be furnished *six months in advance*, require a supply of six months' rations not in advance of a perpetually advancing point of time, but only in advance of the point of time at which the supply is required to be placed at the post. *Morrison's case*, 389.
7. The distinction made in the department between rations in deposit and rations for daily issues, has no warrant in the army contracts; nor can any military order create it in such a way as to affect the bearing of such contracts. A quantity of provisions only, called a supply of rations for a specified time, is required, and these are to be issued by the contractor; and in case the commandant of the post where they are to be furnished makes an

CONTRACTS (*Continued.*)

order for more rations, or for a different disposition of them than the contract provides, it is inoperative upon the question of the contractor's legal obligations under the contract, but does not exonerate the government from payment. *Ibid.*

8. If the contractor for supplies for daily issues shall be required to place at a given post a specified number of rations for a specified time, the government must either consume them or pay for them; for the requisition is an assurance on the part of the government that the rations are necessary and will be consumed and paid for. *Ibid.*

COPY-RIGHTS.

1. A copy of a book may be deposited with the Secretary of State after six months from the time of its publication, if not done before, and it will avail from the time of such deposit. *Debol's case*, 532.

COURTS OF JUDICATURE.

See JUDICIARY.

COURTS MARTIAL.

1. When inferior officers or soldiers who think themselves wronged complain to the commanding officer of a regiment, he ought to summon a regimental court-martial to inquire into the truth or falsehood of the complaint, and decide thereon; but, as its authority extends no further than a court of inquiry, the rules and practices of the latter should, in general, govern the proceedings. *Advice*, 166.
2. Punishment by courts-martial of offences committed on board of letters-of-marque, is contemplated only when such offences are committed without the jurisdiction of the United States. *Advice*, 177.
3. Courts-martial of marine officers stationed on shore, and convened under the articles of war, may try and sentence to suffer corporeal punishment marines who have deserted from the public ships. *Advice*, 187.
4. The President of the United States has the power to order a new trial before a court-martial where, in his opinion, the court erred on the first trial in excluding proper testimony. *Captain Hall's case*, 233.
5. The provision in the articles of war that "no officer, &c., shall be tried a second time for the same offence," is borrowed from the common law, and is not held, in either civil or military tribunals, to preclude the accused from having a second trial on his own motion. *Ibid.*
6. The plea of *autres faits acquis*, or *convict*, is the privilege of the accused, which he may use or waive at pleasure. If he does not choose to use it, courts will not take notice of it so as to bar a trial. *Ibid.*
7. It is error for a court-martial to refuse a second trial to the accused when the same has been ordered by the President. *Ibid.*
8. A plea before a court-martial of a former arrest and discharge is bad; a former trial, only, is a defence under the 87th article of the rules and articles of war. *Lieutenant Gasaway's case*, 294.
9. As to the perspicuity and precision of the charges: if the description of the offence is sufficiently clear to inform the accused of the military offence for which he is to be tried, and to enable him to prepare his defence, it is sufficient. *Ibid.*
10. Courts-martial have the power to reconsider any judgment and sentence rendered by them during the term or sitting, and to change the judgment and sentence even to death where the former imposed only imprisonment; but the execution of a sentence of death is *irrevocable* unless the court pronouncing it consist of thirteen commissioned officers, where that number might have been convened without manifest injury to the service. (See 64th article of rules and articles of war.) *Williamson's case*, 296.
11. No sentence of a naval court-martial held within the United States can be carried into effect until confirmed by the commander of the fleet in which the offence occurred, or by the officer ordering the court. *Advice*, 309.
12. The accused cannot be tried by court-martial after two years from the issuing of the order, even on his own application, unless, by reason of absence or some other manifest impediment, he shall not have been amenable to justice within the time limited by the articles of war. *Advice*, 383.
13. The professors and cadets at the Military Academy, as such, are not commissioned officers within the meaning of the 64th article of the rules and

COURTS-MARTIAL (*Continued.*)

- articles of war, for the purpose of being detailed as members of a general regimental court-martial; nor can such court be formed of professors for the trial of cadets. *Advice*, 469.
14. Cadets may be tried by a regimental or garrison court-martial, according to the 66th and 67th articles of the rules and articles of war. *Ibid.*
 15. Courts-martial did not have jurisdiction over cases of disobedience of the governor of New York concerning the quota of ninety-three thousand men which he was invited to raise by the circular from the War Department of the 4th of July, 1814, for the reason that it was no violation of any existing law of the United States, nor of the orders of the President. *Elton's case*, 473.
 16. Where a general court-martial has been ordered, and the names of the officers and supernumeraries to compose it are set forth in the warrant, and, by reason of the non-attendance of one of the officers on the first day, a supernumerary takes his place, and the court, thus organized, proceeds to business, the absent member cannot properly, thereafter, be added to the court upon his arrival, until the case on trial has been disposed of, if at all. *Advice*, 698.
 17. There is nothing in the acts of Congress on this subject, nor in any of the analogies of the law in relation to civil tribunals, which authorizes a newly arrived member to be superadded at all to a court which has been once legally organized. *Ibid.*
 18. The rule of law that no evidence shall be given against a prisoner except in his presence, is a personal privilege which he may waive. *Advice*, 706.
 19. If consent be given that depositions of witnesses abroad may be used on a trial, the point of time at which the consent shall be expressed will not affect the competency of the testimony. *Ibid.*
 20. The per diem allowance made to officers for travelling expenses, by the act of 16th March, 1802, is confined to officers travelling to and from courts-martial, and is not authorized to be paid to those who are traveling on other business. *Advice*, 708.

CUSTOMS.

1. Goods and merchandise carried from any place in the territory of his Britannic Majesty on the continent of America, by the subjects of Great Britain, into any of the northern districts of the United States, are subject to the same duties which would be payable by our citizens on the same goods imported from the same place, in American ships, into the Atlantic ports of the United States. *Advice*, 155.
2. The provision in the treaty relating to the duties on goods and merchandise does not extend to ~~tonnage~~ duties. *Ibid.*
3. Duties on goods seized with a vessel of a neutral nation, and sold, but afterwards adjudged to be unlawful prize, may be lawfully exacted, and cannot be remitted by the Executive. *Case of the Euplus*, 176.
4. The destruction of goods by a public enemy does not release the owner from the payment of duties which had been secured according to law. *Advice*, 269.
5. Where double duties are the fruits of a compromise, in a case of forfeiture, the collector prosecuting is as much entitled to his moiety of them as he would have been to his moiety of the forfeiture which they represent. *McLane's case*, 259.
6. If foreign armed ships adopt the character of merchant ships, they must be subject to the consequences thereof, and be treated as merchant ships by our revenue officers. *Advice*, 337.
7. Saltpetre was free from duty under the laws of the United States on the 3d of May, 1803. *Advice*, 345.
8. Foreign goods carried into a port of Florida before possession thereof under the treaty was delivered to our government, which remained water-borne until after such delivery and then brought in the same vessel into the United States, are liable to duties. *Advice*, 413.
9. The consignee of a quantity of rum imported by the brig *Hoppe* in 1816, and afterwards sold, is liable for the duties within the case of the United States vs Lyman, (1 Mason's Reports, 482;) and an action may be maintained against him for them. *McClellan's case*, 658.
10. The act of the 3d March, 1825, relative to the completion of entries for the benefit of drawback, must be construed as being prospective in its operation. *Advice*, 707.

DAMAGES.See **CLAIMS.****DEATH-WARRANTS.**

1. The President will issue death-warrants in order to give effect to the laws in cases where they are necessary by the practice of the State in which the sentence is passed. *Advice*, 226.

DEPOSITIONS.

1. When the decree of a judge raises a presumption against the jurisdiction of the courts of the United States, in cases of capture, it will not be improper for the district attorney to cause the necessary depositions to be taken *de bene esse*, to be used by the Executive in case the appellant does not prosecute his appeal or the decree be affirmed. *Advice*, 39.
2. Depositions of witnesses abroad may be taken by consent and used before courts-martial; and, if the consent be given, the point of time when it is given will not affect the competency of the testimony. *Advice*, 706.

DISCHARGE.

1. A vessel under arrest, to prevent her from cruising against belligerent powers, may be discharged on the order of the President, communicated to the marshal having her in custody. *Case of the Republican*, 48.
2. The expenses occasioned by the arrest should be paid by the owner, and be made a condition of the delivery; and the suit commenced by him ought to be withdrawn before any indulgence is granted. *Ibid.*
3. The President has no power to discharge public debtors imprisoned on meane process, but only debtors imprisoned on execution; at the same time requiring the judgment to remain good, to be satisfied out of any estate then, or afterwards, belonging to the debtor. *Gale's case*, 231.

DISTRIBUTION.See **PRIZES**, and **SALVAGE.****DISTRICT ATTORNEYS.**

1. The district attorney of Georgia may be required to prosecute *criminaliter* all persons who shall have brought into his district slaves from Martinique. *Advice*, 29.
2. A district attorney may be required to cause depositions to be taken *de bene esse*, to be used by the Executive in case the appellant in a prize case does not prosecute his appeal, where the decree of the court raises a question of jurisdiction. *Advice*, 39.
3. The district attorney may assure a counterfeiter who shall disclose his accomplices, and produce the plates and counterfeited paper, of a pardon; not the mere disclosure is not enough. *Smith's case*, 77.
4. The district attorney of New Jersey is entitled to special compensation for attending a State court in behalf of the United States, and for attending upon taking depositions, and for disbursements in the suit; but, if the cause be removed to the circuit court of the United States, and be there attended to by him, his compensation is that which district attorneys are entitled to under the act of 26th February, 1799—being the highest fees which are allowed by the laws of the State of New Jersey for similar services in the supreme court of that State. *McIlwain's case*, 385.

DISTRICT MARSHALS.

1. District marshals are not required by law to execute the sentence of French consuls, arising under the 13th article of the convention with his Most Christian Majesty and the United States. *Advice*, 43.
2. It is lawful for a district marshal to serve either civil or criminal process on board a British man-of-war lying within our territory. *Case of the Chesterfield*, 87.
3. The United States may maintain an action of debt on the bond given by a marshal for misfeasance of himself or deputation, and a jury may assess the damages. Individuals injured by his official misconduct, may use the name of the United States in prosecuting a suit on the bond to recover satisfaction. *Advice*, 92.
4. A marshal is not entitled to the commission of one and a quarter per cent. provided by the act of 26th February, 1799, upon specie captured, as in cases where he sells vessels and other property. *Advice*, 178.
5. Under the act of 8th May, 1792, for regulating processs, &c., allowances

DISTRICT MARSHALS (*Continued.*)

may be made to marshals for supplying any of the necessities of life to prisoners. *Advice*, 322.

6. A marshal may bring suit against a defaulting deputy, whenever the marshal has become liable to a suit on his bond to the United States by reason of the delinquency of such deputy. *Advice*, 363.

DIPLOMACY.

1. A foreign minister should correspond with the Secretary of State on matters which interest his nation, and not through the press of our country. He has no authority to communicate his sentiments to the people of the United States by publications in manuscript or print. *Chev. de Yrujo's case*, 74.

DOMESTICS.

See PUBLIC MINISTERS.

ENDORSEMENT.

1. Bills of exchange may be endorsed by an attorney in fact, having competent authority derived from a power. *Advice*, 188.

EVIDENCE.

1. Evidence *de bene esse*, in the form of depositions, may be taken in prize cases, to be used before the Executive where the decree of the court raises a presumption against the jurisdiction of the judiciary. *Clinton and Giles's case*, 39.
2. Captures must be determined upon competent evidence, and no rules for determining the competency of evidence are more proper than those which prevail in courts of admiralty, and which, being founded on general and universal principles, are essential to a safe and pure administration of justice. *Case of the William*, 40.
3. The master of a captured vessel, by the usage of admiralty, is a competent witness. *Ibid.*
4. It is irregular for the War Department to accept certificates of navy surgeons instead of their "affidavits," as required by the act of 3d March, 1819, regulating payments to invalid pensioners. *Advice*, 533.
5. The rule of law that no evidence shall be given against a prisoner, except in his presence, is a personal privilege which he may waive. *Advice*, 706.

EXECUTIVE.

1. The Executive will not, according to the usage of sovereigns, interfere with the regular course of the administration of justice, where a foreigner is a party, until he shall have gone with his case to the court of dernier resort. *Pagan's case*, 25.
2. The Executive may cause depositions to be taken in the case of a capture, where the decree of the court before which the matter has been prosecuted raises a presumption against its jurisdiction. *Clinton and Giles's case*, 39.
3. The act of 3d March, 1791, directing the laying out of tracts to inhabitants of Vincennes, did not authorize the Executive to make any conveyances for the allotments; and if patents are necessary to confirm the titles, it yet remains with Congress to direct by whom they shall be issued. *Advice*, 44.
4. A vessel under arrest, to prevent her from cruising against belligerent powers, may be discharged on the order of the President, communicated to the marshal having her in custody. *Case of the Republican*, 48.
5. The President cannot appoint a commissioner to make a treaty with Indians, for the purpose of extinguishing their title to lands within the United States, without the advice of the Senate. *Advice*, 65.
6. If a foreign ambassador commit an offence in our country, it belongs to the President, not to an individual citizen, to take notice of it. *Chevalier de Yrujo's case*, 71.
7. The Executive will not interfere with judicial proceedings between an individual and the commissioner of a foreign nation, where the controversy may have a legal trial. *Sinclair's case*, 81.
8. The Executive will not surrender to the minister of Great Britain, under the treaty of 1794, persons, as fugitives from justice, unless they are charged with murder or forgery committed within the jurisdiction of his sovereign. *Advice*, 83.
9. It has been the practice of the Executive of the United States to appoint the three judges provided for in the ordinance for the government of the North-

EXECUTIVE (*Continued.*)

- western Territory having common-law jurisdiction, from an implied power. *Advice*, 102.
10. The authority of the general government to take, forcibly detain in custody, and bring to this country, from Europe, a person charged with barratry on private property, is doubtful. The offender, if he were here, would be amenable to our courts. *Capt. Clifton's case*, 123.
 11. Military force may be employed by the Executive to remove from public lands any persons who may have taken possession of them since the passage of the law of 3d March, 1807. *Advice*, 164.
 12. The President has power to nominate to the Senate a suitable person for the office of brigadier general of the militia of the Territorial governments. *Advice*, 165.
 13. Duties on goods seized with a vessel of a neutral nation and sold, but afterwards adjudged to be unlawful prize, may be lawfully exacted, and cannot be remitted by the Executive. *Case of the Euplus*, 176.
 14. Intruders, without title subsequent to March 3, 1807, may be removed under the provisions of the act of that date, without three months' notice. If the marshal fail to effect such removal, upon trial, the President may employ adequate military force to accomplish it. *Advice*, 180.
 15. The act of April 18, 1814, does not limit the right of the President to increase the pay of the officers and men belonging to the navy to the close of the war with Great Britain. *Advice*, 192.
 16. Where an act of Congress gives the President power to appoint an officer, without defining the tenure by which the office is to be held, a commission may legally issue to the officer to hold the office during the pleasure of the President. *Advice*, 212.
 17. The President does not possess the power to direct a person indicted for cheating the accounting officers by means of forged papers, supporting fictitious losses, to be let to bail or discharged on his own recognizance. *Pease's case*, 213.
 18. The President will issue death-warrants in order to give effect to the laws in cases where they are necessary by the practice of the State in which the sentence is passed. *Advice*, 228.
 19. Arrest for trial is a proceeding belonging to the judiciary, not to the executive branch of the government; and the warrant of arrest must be founded on an information on oath. *Wright's case*, 229.
 20. The President has no power to cause an arrest to be made except upon probable cause, supported by oath or affirmation. (*Visd* article VI of Amendments to the Constitution.) *Ibid*.
 21. The President may issue his proclamation against an offender who has once been regularly arrested and made his escape; for, in such case, the regularity of the arrest implies that the probable cause has been furnished on oath according to the constitution. *Ibid*.
 22. The President has no power to discharge public debtors imprisoned on meane process, but only debtors imprisoned on execution; at the same time requiring the judgment to remain good, to be satisfied out of any estate then or afterwards belonging to the debtor. *Advice*, 231.
 23. The President of the United States has the power to order a new trial before a court-martial, where, in his opinion, the court erred on the first trial in excluding proper testimony. *Capt. Hall's case*, 233.
 24. The Executive cannot lawfully cause an arrest to be made of a midshipman charged with having broken the peace of a State, with a view to his surrender to the governor thereof for the purposes of trial. *Midshipman Child's case*, 244.
 25. The President cannot appoint registers and receivers for the land districts, until there shall be sufficient land surveyed to authorize the opening of land offices. *Advice*, 290.
 26. The act entitled "An act in addition to the acts prohibiting the slave trade" does not authorize the President to appropriate any part of the sum therein specified to the purchase of land on the coast of Africa or elsewhere, for the purposes of a settlement, nor to the transportation of free people of color to Africa, nor to the purchase of carpenters' tools for the purpose of making a settlement in Africa, nor to the payment of the salary and expenses of transporting an agent from this country to Africa. *Advice*, 314, 317.

EXECUTIVE (*Continued.*)

27. The President may so far mitigate a sentence of death pronounced by a naval court-martial as to substitute a milder punishment in its stead. *Bansman's case*, 327.
28. The power of absolute pardon given to the President by the constitution includes the power of issuing a conditional one; yet there is great danger that conditional pardons may result as absolute ones, from the difficulty of enforcing conditions after the offender shall have been released from the custody of the law. *Advice*, 341.
29. The condition, in order to be effectual for any purpose, must be such that a resort need not be had to the power of arrest in the original case. *Ibid.*
30. Pardons may be issued before conviction. They pre-suppose an offence, and nothing more; and there is neither any constitutional nor legal provision which requires them to be preceded by a trial, a verdict, or a sentence. They may be founded on a confession in writing. *Ibid.*
31. The general power given to the President to lease the Saline on the Wabash carries with it all the incidental powers necessary to a settlement with the lessees, to transfer the kettles to a subsequent lessee, or to a former one, for a debt growing out of a lease of the works. *Taylor, Wilkins, & Morrison's case*, 352.
32. The power of pardon neither requires nor authorizes the President to enter into an investigation of facts not set up nor proven at the trial, which, if true, should have been thus interposed to the indictment, after a trial, conviction, and an appeal, and decision adverse to the accused has been made by the Supreme Court of the United States; nor to pardon the accused. *Case of Rosewater, Hornes, & Warrington*, 359.
33. It is the duty of the President to exercise a general supervision over the subject of the appropriation of the public grounds in the city of Washington; and as the right to occupy and improve any of these grounds depends upon whether the improvements are for public purposes, so the power of the President to assent to improvements depends upon whether they are for public purposes, and are useful. *Advice*, 368.
34. The resolution of the corporation of the city of Washington, proposing to improve a part of the Judiciary Square by erecting thereon a city hall, is to appropriate the public grounds for both a public and a useful purpose, and may be approved by the President; provided, that the quantity of ground required neither exceeds nor falls short of the purpose. *Ibid.*
35. The assent of the President to acts of the corporation of Washington should be expressed in the same manner as his assent is expressed to acts of Congress. *Ibid.*
36. The President will not interfere in a matter of private and individual litigation. If the petitioner has been injured, the laws of the country afford him redress. *Pancoast's case*, 405.
37. The grant of salt-springs contained in the act admitting Illinois into the Union includes all salt springs, discovered and undiscovered, to which the President of the United States has thought or shall think it necessary to annex lands for the purpose of working them, and none other. *Advice*, 420.
38. The discretion theretofore exercised by the President in declining to withhold from sale such springs as were supposed to be of little value, is neither impaired nor taken away by the act admitting Illinois into the Union. *Ibid.*
39. Where a foreign vessel was driven into an American port, with a cargo of Jamaica rum, for safety, and a portion of the cargo sold to pay seamen's wages and other expenses, and application was made to the President for permission to sell the remainder—*Held*, that he has not the power to give such permission. *Advice*, 460.
40. The Executive may employ military force, under the act of 3d March, 1807, to remove intruders from the public lands. *Advice*, 471.
41. The President of the United States may direct the marshal to remove intruders from lands the title to which has not passed out of the United States. *Advice*, 475.
42. The President has power to grant a conditional pardon to a convict, provided the condition be compatible with the genius of our constitution and laws. *Bryant's case*, 482.
43. The fund for foreign intercourse is an annual fund, placed at the disposal of the President to defray its expenses; and he is limited in respect to an

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- outfit only by the provision that it shall not exceed a year's salary. When the outfit has been paid, it is beyond the recall of the President or Congress. *Adams's case*, 545.
44. It is the duty of the President to cause to be delivered to the minister of Denmark a slave, who, by concealment in an American vessel lying at St. Croix, had been brought to the port of New York, and detained in prison until orders might be given concerning the further disposal of him. *Barry's case*, 566.
 45. So long as Denmark tolerates slavery in her dominions it is an invasion of her sovereignty to take away from St. Croix, by seduction, invitation, connivance, ignorance, or mistake, slaves from the possession of Danish owners; and, if avowed and unredressed on our part, is a just cause of war. To bring them to the United States, and to refuse to return them to their owners on the call of their government, would be such a violation of private property, and such a lawless infraction of the rights and sovereignty of Denmark, as to expose us to the just resentment of that nation, and the merited reproach of the civilized world. *Ibid.*
 46. The President may issue an order directed to the marshal of the State of New York, requiring him to deliver the slave to the order of the minister of Denmark; or he may notify the governor of that State of the facts, and request him to cause him to be delivered to the marshal for the purpose of delivering him over to the minister. *Ibid.*
 47. The President is not required to act upon the accounts of Daniel D. Tompkins, pursuant to the act of Congress, until the accounting officer shall have exercised their prerogatives. *Tompkins's case*, 596.
 48. The President has no power to cause any of the public lots in the city of Washington to be filled up; nor to require the stagnant waters thereon to be removed. *Advice*, 615.
 49. The President will not interpose in any suit brought against a vessel charged with having violated the laws concerning the slave-trade. *Advice*, 618.
 50. The President of the United States, having the foreign intercourse fund under his direction, may advance to a minister going from the United States to Chili such part of his salary as he shall deem necessary to the proper fulfilment of public engagements in respect to him. *Advice*, 620.
 51. The laws regulating the settlement of the public accounts, under which the Treasury Department is organized, require the Auditors to receive and examine accounts, and to certify them to the Comptrollers, who also examine and pass upon them, and certify the balances thereon to the Register; and give no power of appeal to the President, except in particular instances, like that of the accounts of Daniel D. Tompkins, where the power of revision and final decision by the President was expressly conferred by the act. *Major Wharton's case*, 624.
 52. Although it is the duty of the President to take care that the laws be faithfully executed, he is not required to execute them himself. He is not required to audit and allow public accounts, but to see that the officers assigned to that duty perform it faithfully. The Auditors and Comptrollers are assigned to that duty—they constitute the accounting department; and so long as they continue to discharge their duties faithfully, the President has no authority to interfere. *Ibid.*
 53. The settlement of an account by the proper accounting officers is final and conclusive, so far as concerns the Executive department of the government. If the individual whose account has been thus settled conceives himself injured by such settlement, his recourse must be to the judiciary or to Congress. *Ibid.*
 54. If a balance be found against him by the disallowance of credits which he deems just, he may refuse payment and abide a suit; in which case he will have the benefit of the opinion of a court and jury. *Ibid.*
 55. If a balance be found in his favor, but smaller than he thinks himself entitled to, his appeal is to Congress, where the representatives can pass upon his claim. *Ibid.*
 56. The President has power to fill, during a recess of the Senate, by temporary commission, a vacancy that occurred by expiration of commission during a previous session of that body; the term in the constitution "may happen during the recess" being equivalent to "may happen to exist during the

EXECUTIVE (*Continued.*)

- recess:" without which interpretation it could not be executed in its spirit, reason, and purpose. *General Swartwout's case*, 631.
57. The President cannot interpose in the settlement of accounts before the Comptroller, and require that officer to allow a credit to an individual in the settlement. *Wingate's case*, 636.
 58. The subsequent nomination to and confirmation by the Senate of an appointee during a recess is not a continuation of the first commission, but is a new appointment, and requires a new bond for the performance of its duties. *Advice*, 637.
 59. Where an officer appointed by the President during a recess of the Senate falls in arrear with the government during his first commission, but after his nomination to and confirmation by the Senate makes payments into the treasury, yet continues in arrear for current dues to the government, for which a suit is brought, it is competent for the jury to apply the payments in exoneration of the balances for which the sureties under the first commission were bound. *Ibid.*
 60. The President has no right to interfere with the duties of accounting officers. *Anderson's case*, 678.
 61. The interference of the President in any form with the settlement would be illegal. He has no official connexion with the settlement of such accounts; and so far from being called upon to interpose any directions to the accounting officers, it would be an unauthorized assumption of authority for him to interfere at all. *Ibid.*
 62. The executive department of the government cannot be enjoined, nor can its business be arrested by the judiciary. The executive branch of the government is co-ordinate with, and as independent of, the judiciary as the legislative. *Cathcart's case*, 681.
 63. Nevertheless, the judiciary is often found to be a useful auxiliary to the Executive in the administration of public affairs. *Ibid.*
 64. And there are many instances in which it is expedient for the Executive to respect the process of the courts, so far as to suspend action upon matters that they ought to pass upon. *Case of representatives of Piatt*, 684.
 65. The President cannot legally interfere with the accounting officers whilst in the discharge of their duties. *Gen. Hull's case*, 705; *McKenney's case*, 706.
 66. Although the corporation of Washington have the power, by their charter, with the approbation of the President of the United States, to draw lotteries, the amount to be thus raised cannot exceed ten thousand dollars in any one year. *Advice*, 720.
 67. If the corporation have not improved this provision during any former years, the right to do so for those years has gone; for the President during those years only had the right to judge of the expediency of a lottery or lotteries by the circumstances then existing. *Ibid.*
 68. The power is a special and limited one, and can be exercised in no other manner, and at no other times, than those expressed in the charter. *Ibid.*

EXTRA ALLOWANCES.

See COMPENSATION.

EXTRADITION.

1. The bringing away of slaves from Martinique, the property of residents there, is unlawful, and measures ought to be taken for their restoration to their true owners. *Advice*, 29.
2. If a Spanish subject who has violated the territorial law of Florida shall be within the United States at the time of demand for him as a subject and fugitive from justice, he ought to be given up for trial and punishment; yet there is no law directing the mode of proceeding. *Advice*, 68.
3. A requisition from the British minister is not authorized by the 27th article of the treaty of 1794, unless the persons demanded are charged with murder or forgery committed within the jurisdiction of Great Britain. *Advice*, 83.
4. It is the duty of the President to cause to be delivered to the minister of Denmark a slave who, by concealment in an American vessel lying at St. Croix, had been brought to the port of New York, and detained in prison until orders might be given concerning the further disposal of him. *Berry's case*, 566.

FEES.

See COMPENSATION.

FORFEITURE.

1. A vessel under forfeiture for having violated the laws prohibiting the slave trade remains subject to the taint in the hands of subsequent purchasers, and the President will not interpose in any suit brought against the vessel on that account. *Advice*, 618.

FOREIGNERS.

1. If a foreigner be prosecuted in the courts of the United States for an act done by him in an official capacity whilst in his own country, he must plead his authority in the action. *Collot's case*, 45.
2. The government will not interfere with a private action against a foreigner for receiving a negro on board his ship. The defendant in such a case is on a footing with every other foreigner not a public minister, in respect to his suability, and he must answer or demur to the allegations against him. If he have a good defence under the treaty of peace, he must plead it in the usual course of judicial proceedings; and until the regular course of such proceedings shall have failed to do justice to a foreigner, there can be no just ground of complaint to the President. *Captain Cochran's case*, 49.
3. The term "prosecutions," employed in the sixth article of the treaty with Great Britain, imports a suit against another in a criminal cause; such prosecutions being conducted in the name of the public, the ground of them being distinctly known as soon as they are instituted, and being always under the control of the government. *Captain Cochran's case*, 50.
4. A foreigner, though a consul, is not privileged from legal process by the general law of nations, nor is the French consul-general exempted by the treaty with France. *Letombe's case*, 77.
5. Where the commissioner of a foreign nation is involved in a suit with a citizen, and the same can have a fair trial, the Executive will not interfere. *Sinclair's case*, 81.
6. The courts of the United States in every State are at all times open to the subjects of a foreign power in friendly relations with them. The more especially will such remedies be extended in case of fraud. *Antoine's case*, 192.
7. An unnaturalized foreigner can inherit, carry away, and alienate personal property, without being liable to any *jus detractus*; but not real estate. *Advice*, 275.

FOREIGN CONSULS.

See CONSULS.

FOREIGN MINISTERS.

See MINISTERS.

FOREIGN TRIBUNALS.

1. The opinion of a British judge, directing a plaintiff who had been a British subject, but who had taken the oath of allegiance to the government of the United States, to be nonsuited on the ground that the contract which formed the subject-matter of the suit was unlawful between British subjects, and regarding the plaintiff as such, is founded on the ancient and standing laws of Great Britain, which can be altered only by the legislative power of the nation. *Green's case*, 53.
2. A nation ought not to interfere in the causes of its citizens brought before foreign tribunals, except in a case of the refusal of justice or of palpable injustice. *Ibid.*
3. When a suitor applies to foreign tribunals for justice, he must submit to the rules by which those tribunals are governed. *Ibid.*

FRAUD.

1. There is no law of the United States which makes a fraud, by forgery, perjury, subornation of perjury, and the corruption of a justice of the peace, punishable by criminal prosecution. *Advice*, 209.
2. If money has been fraudulently obtained from the United States, an action in the name of the United States will lie to recover it back. *Ibid.*
3. The United States may recover back money fraudulently obtained from the treasury, upon making out a case to the satisfaction of a jury. *Quarter-master General Thomas's case*, 253.
4. Land patents may and ought to be withheld where the confirmations have

FRAUD (Continued.)

been obtained by fraud. If actually issued, the courts will cancel them. *Advice*, 699.

FURLOUGHES.

1. A furlough granted to a sailing-master, on condition that he should relinquish from that date his pay and emoluments as a naval officer, until further orders, is absolute; the condition being void in law. *Drew's case*, 592.

GARNISHEE.

1. The Treasurer of the United States is not subject to execution against his person, goods, nor chattels, nor to any other process, as against a garnishee, under the laws of Maryland. Where such process shall have been issued, the district attorney may be instructed to move to dismiss it. *Advice*, 604.

GUARDIANS.

1. A child must have been under sixteen years of age at the death of the non-commissioned officer, musician, or private, in order to invest the guardian with the right to commute the bounty land for half-pay. *Advice*, 195.

INDIANS.

1. As well British subjects as citizens of the United States, who desire to trade with the Indians, are required to obtain licenses therefor. *Advice*, 155.
2. The Seneca Indians must be protected in the enjoyment of exclusive possession of their lands, as defined and bounded in the treaty of Canandaigua, until they have voluntarily relinquished it. *Case of the Senecas*, 468.
3. A right of occupancy during pleasure has always been conceded by Europeans to the North American Indians, (6 Cranch, 121; 8 Wheaton, 548;) wherefore, the question whether purchasers from the State of Massachusetts may enter upon the Seneca lands, depends altogether on the character of the title which the latter retain in them. *Ibid*.
4. So long as they remain in possession of the lands defined in the treaty, neither the government of the United States nor individuals can lawfully enter upon them, but by consent freely rendered on a full understanding of the case. *Ibid*.
5. The Cherokee nation of Indians have not the right to impose taxes on persons trading among them under the authority of the United States. *Case of the Cherokees*, 645.
6. Neither the condition of the Indians, the relations which the United States bear towards them, nor the treaties which subsist between them and our government, permits the power of taxation to be considered as one between equal sovereigns. *Ibid*.
7. Trade with the Cherokees has been provided for by treaty stipulations, giving to Congress the sole and exclusive right of regulating trade with them and managing their affairs as shall be deemed proper. The right thus conferred on the United States is sole and exclusive; wherefore neither the Cherokees nor any other nation had the right thereafter to touch the subject which was thus solely and exclusively given to the United States. *Ibid*.

INJUNCTIONS.

1. An injunction cannot properly issue from the courts to arrest the executive department in the performance of its legitimate duties. *Cathcart's case*, 681.
2. The judiciary, whether acting as a court of law or equity, cannot arrest the proper business of the executive departments. *Case of representatives of Piatt*, 684.
3. The proceedings to be had on an injunction granted by the district judge of Georgia against further proceedings upon a warrant of distress issued from the Treasury Department, under the act of Congress of the 15th of May, 1820, should be the same as in other cases, except that no answer is necessary on the part of the United States. *Bullock's case*, 694.

INTEREST.

1. Interest on certificates issued pursuant to the act of Congress passed August 4, 1790, is not allowable, and the courts would embarrass a system of finance by a determination in favor of interest for the year 1791. *Advice*, 17.
2. Interest is in the nature of damages for withholding money which the party ought to pay, and would not or could not; but where the holder of a claim omits for a long space of time to make application for the payment, and the act of Congress directing payment is silent as to interest, he does not come within the reason of the rule. *Giles's case*, 268.

INTEREST (*Continued.*)

3. Interest on arrears of an annuity charged upon land devised and subsequently vested in the United States, with constructive notice of the incumbrance, is payable to the claimant from the time of the filing of her bill to obtain them. *Thornton's case*, 494.
4. Interest ought not to be allowed on the Georgia claims settled by the commissioners under the treaty of the 8th of January, 1821, with the Creek nation of Indians. *Advice*, 550.
5. Interest ought not to be allowed on the sums assessed by the commissioner in favor of the Georgia claimants, it not having been stipulated in the case, and the United States never having agreed to become responsible to the claimants further than the Indians were, whose place they have taken. *Advice*, 554.
6. Interest is not any part of a debt, nor a necessary consequence of a debt. By the polity of many nations, it is forbidden; and by those whose laws allow it in any case, it is not made a right in all. In cases of unliquidated damages, it is, in general, disallowed; and the Georgia claims being of that character, are excluded by the general rule. *Ibid.*
7. The debt having been adjusted on liberal principles, the property having been averaged above its value from 1783 to 1802, it would be prodigality, not justice, to add interest to such a valuation. *Ibid.*
8. The treaty interposes after the amounts are liquidated, and forbids the payment of interest upon them. *Ibid.*
9. The Secretary of the Treasury has no authority to increase an allowance made by the Secretary of the Navy to certain citizens under the act of 26th April, 1822; and it would be an increase of it to give interest on the amount, or to assume it as a debt due at a day antecedent to the allowance. *The Baltimore claims*, 605.
10. Interest upon the claim of Virginia for reimbursement for moneys expended by her in the war of 1812 should be allowed. *Virginia claims*, 722.
11. The rule concerning interest has been, that where a State supplied the moneys for expenditure from her own treasury, no interest has been allowed; but where a State, from the condition of her own finances, was obliged to borrow the money, and to thus incur a debt on which she herself became obligated to pay interest, interest has been allowed to her for indemnity. *Ibid.*
12. In the case of Virginia, there is a special act authorizing the payment of interest, and prescribing the rules for computing it. Interest may be computed upon loans, or money borrowed and actually expended for the use and benefit of the United States during the late war with Great Britain; but shall not be computed on any sum which Virginia has not expended for the use and benefit of the United States, as evidenced by the amount refunded; nor upon any sum on which she has not paid interest; nor upon any sums refunded or paid her subsequent to such refunding or payment. *Ibid.*
13. It was the intention of Congress to reimburse to the State of Virginia all the interest which she had actually paid on account of loans made necessary by her having taken the place of the United States in meeting the expenditures of the war in that State; and although the money so borrowed may have been placed in the State treasury, and thereby blended with the State revenue, yet if, from the revenues thus blended, a sum equal in amount to the sum borrowed were expended for the use of the United States, the State is nevertheless entitled to interest, without proof that the very dollars borrowed were expended. *Ibid.*
14. In like manner is she entitled to interest on loans made necessary by the exhaustion of the State treasury in taking up loans for the use of the United States. *Ibid.*

INTRUDERS.

See PUBLIC LANDS.

INVENTIONS.

See PATENTS.

JUDICIARY.

1. Where a foreigner is a party to a proceeding in course of regular adjudication before the judiciary, the Executive will not interfere to see whether or not the case is protected by a treaty until the party shall have gone to the court of dernier resort. *Pagan's case*, 25.

JUDICIARY (*Continued.*)

2. The rules adopted by the courts of admiralty for determining the competency of evidence, is a safe guide for the Executive. *Case of the William*, 40.
3. The courts have jurisdiction of an action against the governor of Guadalupe while here as a prisoner of war on parole, for acts done by him as governor, &c.; and if he have a good defence, he must plead it. *Advice*, 45.
4. The courts may award a *habeas corpus* to bring up an American subject unlawfully detained on board a foreign ship-of-war—the commander being within the reach of, and amenable to, the usual jurisdiction of the State where he happens to be. *Advice*, 47.
5. The judiciary must have disposed of a suit brought against a British captain for unlawfully receiving a slave aboard his ship, before the Executive will consider any application in respect to it. *Captain Cochrane's case*, 49.
6. When a foreign judiciary is invoked by an American citizen, he must submit to the rules by which it is governed. *Green's case*, 53.
7. The refusal of a district judge to issue a warrant under the ninth article of the convention between France and the United States, cannot be interfered with by the Supreme Court, the latter having no control over a district judge exercising legal discretion. *Barre's case*, 55.
8. Where a district court decides that it has no jurisdiction to determine whether vessels brought in for adjudication are lawful prizes or not, and the question is one of jurisdiction merely, an appeal to the Supreme Court will lie to determine the question. *Advice*, 56.
9. Acts of hostility committed by American citizens against such as are in amity with us, being in violation of a treaty, and against the public peace, are offences against the United States, so far as they were committed within the territory or jurisdiction thereof; and, as such, are punishable by indictment in the district or circuit courts. Acts of the kind occurring in a foreign country, however, are not within the cognizance of our courts. *The Sierra Leone affair*, 57.
10. The *high seas* are within the jurisdiction of the district and circuit courts of the United States: wherefore, if such an offence be committed thereon by American citizens, such courts will take notice of it, and the offenders may be legally prosecuted in either of those courts, in any district where the offenders may be found. *Ibid.*
11. The offence in question being committed out of the territories of the United States, cannot be noticed by our courts; the offenders must be dealt with abroad, and, after proclamation by the President, will have forfeited all protection from the American government. *Ibid.*
12. The treaty with Spain does not extend the jurisdiction of our courts to offences committed in Spain; nor *vice versa*. *Rosa's case*, 68.
13. The courts exercising admiralty powers cannot pronounce valid sentences of condemnation of captured vessels until such vessels are brought within the jurisdiction of the country to which the captors belong. *Case of the John*, 78.
14. Proceedings against a ship and cargo in the condition of the Nigre, brought in by the Constitution for adjudication, are to be had before the district court, according to the laws of Congress, and the usage and practice of courts of admiralty in prize causes. *Case of the Nigre*, 85.
15. If the prize be a pirate, the officers and crew are to be prosecuted in the circuit court of the United States, without respect to the nation to which each individual may belong. *Ibid.*
16. If it be regularly commissioned as a ship-of-war, the officers and crew are to be detained as prisoners, except such as are citizens of the United States. *Ibid.*
17. Citizens of the United States who aid a nation with whom we are at war on the *high seas*, against the United States, are guilty of treason. *Ibid.*
18. Offenders against the United States may be arrested, imprisoned, or bailed, agreeably to the usual mode of process in a State, but can be tried only before the court of the United States having cognizance of the offence. *Ibid.*
19. Prosecutions for alleged acts of piracy committed on the *high seas*, or in any place out of the jurisdiction of any particular State, should take place in the district where the offender is apprehended, or into which he may be first brought. *Advice*, 185.
20. The courts of the United States in every State are at all times open to the subjects of a foreign power in friendly relations with them. The more es-

JUDICIARY (*Continued.*)

- pecially will such remedies be extended in a case of fraud. *Antoine's case*, 192.
21. Arrest for trial is a proceeding belonging to the judiciary, not to the executive branch of the government; and the warrant of arrest must be founded on an information on oath. *Advice*, 229.
 22. The Executive will not interfere with the judiciary whilst it is in the regular course of giving construction to the acts of Congress, by directing a *nolle prosequi* of a proceeding against a British vessel for a breach of the navigation act of April 18, 1818, after the district court has condemned her to forfeiture. *Case of the Pitt*, 366.
 23. Where it is claimed by a foreign minister that a seizure made by an American vessel was a violation of the sovereignty of his government, and he satisfies the President of the fact, the latter may, where there is a suit depending for the seizure, cause the Attorney General to file a suggestion of the fact in the cause, in order that it may be disclosed to the court. *Case La Jeune Eugène*, 504.
 24. Appeals and writs of error to the Supreme Court of the United States are founded only upon errors in points of law properly raised in the courts below for decision. *United States vs. Ward & Johnson*, 614.
 25. There is no law which renders the decision of the circuit court of Georgia, upon a claim of the marshal of that State for supporting negroes taken from a vessel brought in for adjudication under the laws prohibiting the slave-trade, binding on the Executive department, so as to make it the duty of that department to pass an account which it considers unreasonable and unjust. *Case of the Ramirez*, 635.
 26. The judiciary cannot arrest the executive business of the government, specially devolved on it by the legislature or by the constitution. *Calkett's case*, 681.
 27. The judiciary has no more power over the executive branch of the government than it has over the legislative. *Ibid.*
 28. There are instances in which the courts are found to be a useful auxiliary to the Executive, and promotive of the purposes of justice. *Ibid.*
 29. Where the government becomes, by the circumstances of any particular case, a stakeholder, and several individuals are claiming the benefit of a fund, (with regard to which it is immaterial to the government whether it be due to one, the other, or to several,) the officers of the treasury may, in the exercise of a sound discretion, refer the claimants to the courts for a decision of their respective rights. *Ibid.*
 30. The judiciary, whether acting as a court of law or equity, cannot arrest the proper business of the executive departments. *Case of representatives of Piatt*, 684.

JURISDICTION.

See JUDICIARY.

JUDGMENTS.

1. A judgment may be obtained against an individual debtor by default, and against receivers of public moneys on return of process under an act of Congress; but as against corporate bodies the practice is regulated by the practice of the several States in such cases. *United States vs. Bank of Somerset*, 258.

LANDS, PUBLIC.

1. The act of 3d March, 1791, directing the laying out of tracts to inhabitants of Vincennes, did not authorize either the President or the governor to make any conveyances for the allotments; and if patents are necessary to confirm the titles, it yet remains with Congress to direct by whom they shall be issued. *Advice*, 44.
2. Persons in the Western Territory having land allotted to them under the act of 29th August, 1787, are not entitled to patents until provision shall be made for issuing them. *Advice*, 45.
3. Patents under the act of June 9, 1794, for lands in Virginia, cannot be issued until the claimant shall have first complied with the laws of Virginia to which the act refers. *Advice*, 79.
4. The governor cannot be justified in confirming any of the unauthorized grants, unless actual improvements were made under them previous to the

LANDS, PUBLIC (*Continued.*)

- 3d of March, 1791; nor can he by law be justified in making a discrimination between the persons still holding their original grants, and those who have had such grants confirmed by former governors, or who have purchased under such confirmation, and made improvements, unless such improvements were made previous to the said 3d of March. *Advice*, 95.
5. Grants made by the Spanish government, after the ratification of the treaty, by which the land was ceded to the United States, are void; and though a patent were dated before, unless it were delivered before, it fails to carry the title. *Advice*, 108.
 6. Under the act of March 3, 1791, entitling heads of families who had removed without the limits of the Territory, and occupied certain lands within five years, to the donation lands specified in said act, those persons who returned to their respective districts only, within five years, are entitled to the benefit of said provision. *Advice*, 124.
 7. A land patent issued under a mistake, in consequence of a Virginia military land warrant located on lands which had been previously and regularly located by others, is null and void. *Advice*, 159.
 8. Non-commissioned officers and soldiers enlisted after 10th December, 1814, as well as before, are, on the proper certificates, entitled to a bounty of three hundred and twenty acres of land; and minors, bringing themselves within the requirements, are entitled in like manner as those of full age. *Advice*, 184.
 9. Where the register at Kaskaskia had issued two certificates for the same land to two different persons, held that the first had preference. *Advice*, 191.
 10. Where the local law authorizes a transfer of the right to patents at sheriff's sale, purchasers thereat may demand patents. *Advice*, 191.
 11. The rights of pre-emption given to settlers by the act of the 12th April, 1814, attach to settlers on lands set apart for bounties by the act of 6th May, 1812, who settled thereon prior to the surveys; but not to those who settled thereon subsequently. *Advice*, 290.
 12. The President cannot appoint registers and receivers for the land districts, until there shall be sufficient land surveyed to authorize the opening of land offices. *Ibid.*
 13. The pre-emption claims cannot be ascertained and decided upon by any other agency than that of registers and receivers of the land districts in which they are situate. *Ibid.*
 14. Legislation, to free the subject of granting patents from embarrassment, recommended. *Ibid.*
 15. The holder of an unpatented location cannot dispossess one holding under a patent from the United States by any common law proceeding, but he may institute a proceeding in chancery for the purpose of rescinding a patent improperly granted. *Advice*, 300.
 16. The general standard of remuneration, where title fails, is the purchase money and interest; the improvements to be paid for by the successful party. *Ibid.*
 17. Land warrants, by the laws of Virginia, are not mere chattels; but are regarded as a kind of inchoate title to lands, and descend to heirs. *Advice*, 311.
 18. A land warrant held in the right of a *feme covert* must be assigned by her with her husband, in order to transfer it. *Ibid.*
 19. The United States cannot divert land granted for the express and single purpose of a light-house site, to any use wholly unconnected with the object of the grant, without violating the spirit and terms of the cession. *Advice*, 321.
 20. By the act of March 1, 1800, the Secretary of the Treasury was required to number the 100-acre lots of the fifty quarter townships progressively, and that the patent to be issued for each should, *inter alia*, give the number of the lot located. Such description cannot be departed from, for no form of description variant from that will pass the title of the United States; nor can any patent be issued until the lots shall have been numbered. *Advice*, 323.
 21. Military bounty-land warrants to Canadian volunteers, under the act of March 5, 1816, are not assignable. Such warrants, when fraudulently obtained, may be cancelled so as to prevent their use for any mischievous purpose. *Advice*, 326.

LANDS, PUBLIC (*Continued.*)

22. The United States, being in possession of the Pea Patch under title derived from the Duke of York, may require a prosecutor to show title in himself, before any proof of title need be deduced; and a prosecutor, under deed taking for its western boundary the east side of the Delaware river and bay, can never reach the Pea Patch. *Advice*, 331.
23. The general power given to the President to lease the Saline on the Wabash carries with it all the incidental powers necessary to a settlement with the lessees, to transfer the kettles to a subsequent lessee, or to a former one, for a debt growing out of a lease of the works. *Advice*, 352.
24. Patents under the act of 17th February, 1815, must issue to the owner at the date of the act, if alive; and if dead, to the heirs or devisees. The act attaches no assignable quality to the charity which it bestows; and being the only authority for issuing a patent, its terms must be strictly pursued. *Advice*, 361.
25. The rectangular system of public surveys must be observed and conformed to in the location of certificates. *Ibid.*
26. The words "within two years from the time of sale," used in the clause of the act of Congress giving the owners of lands sold for the taxes of 1815 and 1816 the right to redeem them of the purchasers at the tax sales, exclude the day of sale from the computation. *Advice*, 364.
27. When a New Madrid certificate calls for a quantity of land greater than 160 acres and less than 640, and it becomes necessary to subdivide a quarter section, it should only be done by making the subdividing line parallel and coextensive with the line of the contiguous quarter. *Advice*, 372.
28. It may be located on a fractional section, or part of it, but not so as to appropriate all of the local advantages to the injury of the public. *Ibid.*
29. Locations made in a square, previous to the sectional lines being run, &c., are inadmissible, as the sale is unauthorized until the sectional lines are run. Holders may take less than 160 acres, provided they can find such a tract liable to sale. *Ibid.*
30. Minors have the right to redeem their lands sold for taxes at any time within two years from the removal of the disability, by payment of the purchase money, with ten per cent. thereon, and compensation for improvements, whether deeds have been given to the purchasers or not; for no deed is valid unless given in pursuance of law, and the law does not authorize the giving of a deed until the time of redemption shall have expired. *Advice*, 378.
31. Where lands liable for a direct tax are not divisible, the whole must be sold. Lands sold for taxes may be redeemed within two years, upon payment of the amount paid by the purchaser, with 20 per cent. interest. *Advice*, 401.
32. The grant of salt springs contained in the act admitting Illinois into the Union, includes all salt springs discovered and undiscovered to which the President of the United States has thought, or shall think it necessary to annex lands for the purpose of working them, and none other. *Advice*, 410.
33. The discretion theretofore exercised by the President, in declining to withhold from sale such springs as were supposed to be of little value, is neither impaired nor taken away by the act admitting Illinois into the Union. *Ibid.*
34. The effect of the grant is merely to place the State of Illinois, in regard to these springs and reservations of land, exactly on the ground which had been previously occupied by the United States. *Ibid.*
35. The Canadian volunteers may locate lands for which warrants have been issued to them, by attorney, the same as others similarly entitled have been accustomed to do. *Advice*, 424.
36. Land patents issued by mistake for lands to which other persons have pre-emption rights may be returned and cancelled, or may be repealed by *scire facias* or bill in chancery, at the instance of the United States, or of the pre-emptors in the name of the United States. *Advice*, 458.
37. The Seneca Indians must be protected in the enjoyment of exclusive possession of their lands, as defined and bounded in the treaty of Canandaigua, until they have voluntarily relinquished it. *Advice*, 465.
38. A right of occupancy during pleasure has always been conceded by Europeans to the North American Indians: wherefore, the question whether purchasers from the State of Massachusetts may enter upon the Seneca lands,

LANDS, PUBLIC (Continued.)

- depends altogether on the character of the title which the latter retain in them. *Ibid.*
39. So long as they remain in possession of the lands defined in the treaty, neither the government of the United States nor individuals can lawfully enter upon them, but by consent freely rendered on a full understanding of the case. *Ibid.*
 40. Intruding settlers on the public lands may be removed by military force, under act of 3d March, 1807. The United States have, also, all the common-law and chancery remedies enjoyed by individuals, under similar circumstances, for protection and redress. *Advice*, 471.
 41. The President of the United States may direct the marshal to remove intruders from lands, the title to which has not passed out of the United States. *Advice*, 475.
 42. No person can locate over 160 acres under a New Madrid certificate, unless the aggregate of lands lost exceeds 160, in which case he can locate not exceeding 640 acres. *Advice*, 534.
 43. Land warrants under the act of Congress of 3d March, 1801, must be received at the rate of two dollars per acre in payment for any lands on the west side of the Mississippi. The act of 24th April, 1820, does not affect their value. *Advice*, 536.
 44. The King of Spain had ample power to grant lands in Florida while the province was his, and the Roman Catholic church was capable of taking his grants; but whether the lands in question were granted prior to the time stipulated, is a question of fact to be determined. *Advice*, 563.
 45. The President has unrestricted power to lease the lead mines, on such conditions as he may think proper, for any term not exceeding three years, provided the leases be not inconsistent with existing laws. *Advice*, 593.
 46. Since the acts of Congress under which troops were raised in the late war were construed so as to permit the enlistment of colored men; and since recruiting officers recruited them on a contract for the pay and bounty stipulated by law; and as the officers of government recognised them as a part of the army, (receiving pay and rations with other troops,)—a practical construction has been given to those acts which entitle the colored soldiers to the promised lands. *Advice*, 602.
 47. Grounds purchased in any State, with the consent of its legislature, for the site of forts, magazines, arsenals, dock-yards, and other needful buildings, can neither be taxed by the State nor by the municipality in which they are situated. *Advice*, 620.
 48. It is competent for the Secretary of the Treasury to deduct the expenses of surveys of the lands of the United States lying within the State of Ohio, before computing the three per cent. to which that State is entitled under the act of 3d March, 1803, and to calculate the per centage for Ohio on the balance. *Advice*, 640.
 49. Although the act of 3d March, 1803, was the affirmation of a compact between the United States and the State of Ohio, it must have been within the contemplation of the contracting parties at the time, that Congress should retain the power of regulating the terms of the sales to be made. *Ibid.*
 50. Compacts are to be construed in reference to the subject-matter and the nature of the cases on which they are to operate. *Ibid.*
 51. Claimants are liable for the expenses of resurveys where there had been no survey of the claim under the French or Spanish government previous to the delivery of possession of the territory, and where resurveys are deemed necessary by the commissioners to enable them to decide on the validity of the claims. *Advice*, 655.
 52. A concession confirmed by the 1st section of an act of March 1, 1805, where a survey had been made prior to October 1, 1800, is valid for the entire quantity contained in the survey. *Advice*, 656.
 53. A concession confirmed by the 4th section of the act of 31 March, 1807, where the commissioners issued a certificate for eight hundred arpens, according to the original plat, without ordering a resurvey under the 7th section, is good for the quantity contained in the plat, though it exceed the quantity specified. *Ibid.*
 54. The 1st section of the act of 19th April, 1814, confirmed the claim according

LANDS, PUBLIC (*Continued*)

- to the survey, where a survey had been made. A mistake of the commissioners was immaterial, as the confirmation was effected by the act solely. The commissioners only reported upon—did not decide, the claims. *Ibid*.
55. The 3d section required surveys only where none had been made by the foreign government. *Ibid*.
 56. The surveyor of the public lands in the Territories of Illinois and Missouri, under the power conferred to engage surveyors as his deputies, and to perform all and singular the duties which were required by law to be performed by the surveyor general, may let the work by contract. *Advice*, 661.
 57. It is his duty to fix the compensation of the deputy surveyors, chain-bearers, and axe-men; and it is not perceived how this can be done but by contract, for no deputy surveyor is under any obligation to accept or retain his place unless the compensation shall be satisfactory. *Ibid*.
 58. Fixing compensation by contract is doing all the law requires of the surveyor in that respect: he fixes the compensation. *Ibid*.
 59. The government will not complain of a practice which it has sanctioned, and which does not appear to have been attended with any injurious consequences. *Ibid*.
 60. Land patents may and ought to be withheld where the confirmations have been obtained by fraud. If actually issued, the courts will cancel them. *Advice*, 699.
 61. Where individuals are in possession of lands under a Spanish title, which has been reported by the register of the proper land office to the Secretary of the Treasury, and are at law contesting their titles as against claimants, they are not intruders within the meaning of the act of 3d March, 1807, to prevent settlements being made on lands ceded to the United States until authorized by law. *Advice*, 703.
 62. The third section of the act of 12th April, 1814, makes it the duty of the Commissioner of the General Land Office to examine whether the certificate of the recorder of land titles in Missouri was fairly issued to an assignee according to the true intent and meaning of that act; and if found not to have been, to withhold a patent. *Advice*, 718.
 63. Suspension recommended until trial of title under the act of 20th May, 1834; and in case the same is neglected, until the claim shall be barred by the fifth section of said act. *Ibid*.

LEASES.

See PUBLIC LANDS.

LETTERS-OF-MARQUE.

1. Punishment by court-martial of offences committed on board of letter-of-marque, is contemplated only when such offences are committed without the jurisdiction of the United States. *Advice*, 177.
2. Where an American vessel commissioned with a letter-of-marque and reprisal has been sold to foreigners, and the new owners are found cruising with the same commander, with the same letter, and under the American flag, and there is good reason to suppose that the commission of the letter-of-marque has been intentionally transferred, it is such an abuse of it as will warrant a suit upon the bond. *Case of the Four Friends*, 179.

LIABILITY.

See CLAIMS.

LIBEL.

1. Any malicious publication, tending to render another ridiculous, or to expose him to public contempt and hatred, is a libel; and in the case of a foreign public minister, the municipal law is strengthened by the law of nations, which secures the minister a peculiar protection, not only from violence, but also from insult. *Advice*, 52.
2. Certain letters addressed to Philip Fatio, and published, concerning the King of Spain and his minister plenipotentiary here, are libellous, and the editor is indictable. *Cobbett's case*, 71.
3. A malicious defamation of any person, and especially a magistrate, by printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule, is a libel. *Ibid*.
4. If a foreign ambassador commit an offence in our country, it belongs to the President, not to an individual citizen, to take notice of it. *Ibid*.

LIGHT-HOUSES.

1. The contractor to build a light-house at the mouth of the Mississippi is not answerable for the failure of the foundation, unless the choice of the same were left to himself. *Advice*, 372.

LOANS.

1. Although the 13th section of the funding act admits that subscriptions may be made to the loan payable in the principal and interest of certain State certificates or notes, *redeemed* notes cannot be used for that purpose. *Advice*, 25.

LOCATION.

See **LANDS**.

MARINE CORPS.

1. There is no act of Congress now in force which recognises any such office as that of brevet major of marines. *Advice*, 352.
2. The Secretary of the Navy is the organ through which the President of the United States, who is commander-in-chief, makes known his will to the navy. The orders issued by him being, in contemplation of law, the orders of the President, and the marine corps belonging to the naval establishment, it follows that the Secretary may suspend, modify, or rescind any order issued by the lieutenant colonel or any subordinate officer of the marine corps, except where a direct authority has been given by Congress to an officer to perform any particular function. *Advice*, 380.
3. And whether the marine corps shall be doing service on ship-board or on shore, the President's orders may properly pass through the Secretary of the Navy to it, except where the corps shall have been incorporated with the army for a given service on land. *Ibid*.
4. The act of 3d March, 1817, fixing the peace establishment of the marine corps, not having retained any majors in service, the brevets theretofore conferred were thereby made to cease with the termination of the lineal rank of majors by commission. *Advice*, 489.
5. Captain Wainwright, of the marine corps, having served ten years in the grade of captain, and having applied for brevet promotion under the act of 16th April, 1814, the question is presented whether, since the act of 3d March, 1817, fixing the peace establishment of the marine corps, and abolishing the office of major in the same, the President can confer the brevet of major at all? and if so, whether it should not be the brevet of major in the army?—**HELD**, that the only brevet rank of major which the President can confer is that of brevet major in the army of the United States. *Advice*, 578.
6. If it shall be deemed inexpedient to confer upon a captain of marines the brevet rank of major in the army, then he is entitled, if entitled at all to promotion, to the brevet rank of lieutenant colonel in the marine corps. *Ibid*.

METROPOLIS.

See **WASHINGTON**.

MIDSHIPMEN.

1. Although there is no act of Congress authorizing a call by a governor for the surrender of a midshipman charged with having broken the peace of a State, nor any law authorizing an arrest by the Executive with a view to a forcible surrender of him for the purposes of trial, it is important that the accused should surrender himself, and that an order from the Navy Department be given. *Childs's case*, 244.

MILITARY ACADEMY.

See **CADETS**.

MILITIA.

1. The President has power to nominate brigadier generals of the Territorial governments. *Advice*, 165.
2. Courts-martial did not have jurisdiction over cases of disobedience of the governor of New York, concerning the quota of ninety-three thousand men which he was invited to raise by the circular from the War Department of the 4th of July, 1814, for the reason that it was no violation of any existing law of the United States, nor of the orders of the President. *Elton's case*, 473.

MINISTERS, PUBLIC.

1. The arrest of the domestic of a public minister is illegal: all process, therefore, is forbidden, and the persons concerned in any such process are liable to fine and imprisonment. *Van Berkel's case*, 26.
2. If, however, the domestic be an inhabitant of the United States, and shall have contracted debts prior to his entering into the service of the minister, which are still unpaid, he is not entitled to the benefit of the act concerning crimes that gives this immunity; nor shall any person be proceeded against for such arrest, unless the name of the domestic be registered in the Secretary of State's office, and transmitted to the marshal of the district in which Congress shall reside. *Ibid*.
3. The arrest is regulated by act of Congress: the entering a public minister's house to serve an execution will either be absorbed in the arrest, as being necessarily associated with it, if that be found criminal, or, if the arrest be admissible, must be punished, if at all, under the law of nations. *Ibid*.
4. Any malicious publication tending to render another ridiculous, or to expose him to public contempt and hatred, is a libel; and in the case of a foreign public minister, the municipal law is strengthened by the law of nations, which secures the minister a peculiar protection, not only from violence, but also from insult. *Advice*, 52.
5. Certain letters addressed to Philip Fatio, and published, concerning the King of Spain and his minister plenipotentiary here, are libellous, and the editor is indictable. *Cobbett's case*, 71.
6. A foreign minister should correspond with the Secretary of State on matters which interest his nation, and not through the press of our country. He has no authority to communicate his sentiments to the people of the United States by publications in manuscript or print. *Ches. de Yrujo's case*, 74.
7. The entry into a minister's garden by the agent of the owner of a slave, and there seizing and carrying away such slave to the owner, is not such a violation of the domicile of the minister as constitutes a punishable offence under the act of Congress of April 30, 1790. *Mr. Merry's case*, 141.
8. The fund for foreign intercourse is an annual fund, placed at the disposal of the President to defray its expenses; and he is limited in respect to an outfit only by the provision that it shall not exceed a year's salary. When the outfit has been paid, it is beyond the recall of the President or Congress. *Advice*, 545.
9. The President of the United States, having the foreign intercourse fund under his direction, may advance to a minister going from the United States to Chili such part of his salary as he shall deem necessary to the proper fulfilment of public engagements in respect to him. *Advice*, 620.

MUNICIPAL AUTHORITY.

See PUBLIC LANDS. WASHINGTON.

NAVAL OFFICERS.

See COMPENSATION. FURLONGS.

NAVAL SERVICE.

1. Enlistments for the naval service being for "two years from the time when the ship shall last weigh anchor for sea," are regular for that term, although made before, and the persons enlisting serve awhile in fitting the vessel for sea. *Advice*, 169.
2. Offenders are regularly kept in the custody of that service, the peculiar laws of which they are accused of having violated, and by which they are to be tried. *Advice*, 172.

NAVY AGENTS.

See COMPENSATION.

NAVY DEPARTMENT.

See CLAIMS. MARINE CORPS.

NEUTRALITY.

1. The arrest of the ship *Grange* within the capes of the Delaware was a seizure in neutral territory, and the attack of an enemy in neutral territory is absolutely unlawful. *Case of the Grange*, 32.
2. The neutrality of the Delaware does not depend on any of the various distances claimed in the sea by different nations possessing the neighboring shores, for here the treaty of Paris and the law of nations, together, will,

NEUTRALITY (*Continued.*)

- perhaps, justify the United States in attaching to their coasts an extent into the sea beyond the reach of cannon-shot. *Ibid.*
3. As the ship *Grange* has been seized in neutral waters, restitution is the duty arising from the act. *Ibid.*
 4. Acts of hostility committed by American citizens against such as are in amity with us, being in violation of a treaty and against the public peace, are offences against the United States, so far as they were committed within the territory or jurisdiction thereof; and, as such, are punishable by indictment in the district or circuit courts. Acts of the kind occurring in a foreign country, however, are not within the cognizance of our courts. *The Sierra Leone case*, 57.
 5. The high-seas are within the jurisdiction of the district and circuit courts of the United States: wherefore, if such an offence be committed thereon by American citizens, such courts will take notice of it, and the offenders may be legally prosecuted in either of those courts in any district where the offenders may be found. *Ibid.*
 6. The offence in question, being committed out of the territories of the United States, cannot be noticed by our courts; the offenders must be dealt with abroad, and, after proclamation by the President, will have forfeited all protection from the American government. *Ibid.*
 7. It is the right of an enemy to purchase goods and instruments of war of a neutral nation, but it may be denied by a law passed; yet, if the reason of its passage were to impede the military operations of either belligerent power and favor the other, such conduct would be a breach of neutrality. *Advice*, 61.
 8. A citizen of a neutral State, who, for hire, serves on a neutral ship employed in contraband commerce with either of the belligerent powers, is not liable to any prosecution for so doing by the municipal laws of his own State; nor is he punishable personally, though taken in the act, by that belligerent nation to whose detriment the prohibited trade would operate. *Ibid.*
 9. Duties on goods seized with a vessel of a neutral nation and sold, but afterwards adjudged to be unlawful prize, may be lawfully exacted, and cannot be remitted by the Executive. *Case of the Euphrates*, 176.
 10. There is no law that can prevent a merchant or ship-owner selling his vessel and cargo to a citizen or inhabitant of Buenos Ayres; but if a vessel be fitted out, furnished, &c., with intent to employ them in the service of any foreign State, to cruise or commit hostilities, &c., it would be unlawful. *Advice*, 190.
 11. A vessel fitted out at Savannah with armament, munitions, and sea stores, and afterwards found with a commission from the republic of Venezuela to cruise against the subjects of the King of Spain, and having sailed on such a cruise, but under another name, seized at Savannah on the charge of having been fitted out in a port of the United States to cruise against the King of Spain, is a fit case for adjudication, and not one calling for the interference of the government. *Case of the Coronet*, 231.

OFFSETS.

See ACCOUNTS AND ACCOUNTING OFFICERS.

ORLEANS.

1. Neither the city council nor any department of the government of Orleans can legally tax the property of the United States within that territory. *Advice*, 157.
2. The military force may be employed by the President to remove from these lands any persons who may have taken possession of them since the passage of the law of 3d March, 1807. *Advice*, 164.
3. The Ursuline nuns of New Orleans have possessory title to their enclosures that cannot be disturbed; the evidence as to residence is imperfect: suspension of sales suggested, to afford Congress an opportunity of acting upon the claim. *Advice*, 350.

OUTFIT.

See MINISTERS.

PARDONS.

1. The district attorney may assure a counterfeiter who shall disclose his ac.

PARDONS (*Continued.*)

- complices, and produce the plates and counterfeited paper, of a pardon; but the mere disclosure is not enough. *Smith's case*, 77.
2. The President may so far mitigate a sentence of death pronounced by a naval court-martial as to substitute a milder punishment in its stead. *Bensman's case*, 327.
 3. The power of absolute pardon given to the President by the constitution includes the power of issuing a conditional one. Yet there is great danger that conditional pardons may result as absolute ones, from the difficulty of enforcing conditions after the offender shall have been released from the custody of the law. *Advice*, 341.
 4. The condition, in order to be effectual for any purpose, must be such that a resort need not be had to the power of arrest in the original case. *Ibid.*
 5. Pardons may be issued before conviction. They pre-suppose an offence, and nothing more; and there is neither any constitutional nor legal provision which requires them to be preceded by a trial, a verdict, or a sentence. They may be founded on a confession in writing. *Ibid.*
 6. The power of pardon neither requires nor authorizes the President to enter into an investigation of facts, not set up nor proven at the trial, which, if true, should have been thus interposed to the indictment, after a trial, conviction, and an appeal, and decision adverse to the accused has been made by the Supreme Court of the United States; nor to pardon the accused. *Cases of Roseveare, Hornes, and Warrington*, 359.
 7. The President has power to grant a conditional pardon to a convict, provided the condition be compatible with the genius of our constitution and laws. *Briant's case* 482.

PATENTS FOR LAND.

See PUBLIC LANDS.

PATENTS FOR INVENTIONS.

1. Specifications for inventions should be such as to convey to all the world the nature of the invention. *Advice*, 64.
2. Patents for inventions are confined, by law, to citizens of the United States. *Advice*, 110.
3. Patents for inventions cannot be withheld on moral grounds, where the allegation and oath, and a suitable specification, have been filed, and a model (if required) deposited. *McDonald's case*, 170.
4. There is no reason for refusing applicants a copy of the specifications, drawings, or model of any patented invention. *Advice*, 171.
5. No patent for an invention can properly issue, unless the applicant makes oath that such invention hath not, to the best of his knowledge, been known or used in this or any foreign country; and if it turn out that any patent shall have been issued for an invention theretofore known and used, the same shall be utterly void. *Advice*, 332.
6. A defendant, when sued by a patentee for an alleged violation of his patent-right, has a right to a copy of the specifications for use on the trial, in order to enable him to show, if he can, that the specification does not contain the whole truth relative to the discovery, or that it contains more than is necessary to the effect desired; and, as the law gives this privilege, it by implication gives the right of using the specification openly and publicly in court. *Advice*, 376.
7. Patentees, and persons holding under patentees, and persons sued for violations of patent rights, should, upon demand, and upon payment of twenty cents per folio for the copy, be furnished with copies of specifications. *Advice*, 718.
8. The 11th section of the patent law does not open to all the citizens of the United States indiscriminately, at pleasure, and for any purpose that may suit them, the right to demand copies of papers respecting patents for inventions granted to others. *Ibid.*

PAY.

See COMPENSATION.

PAYMENTS.

1. Payments of money into the treasury by mistake, can be refunded only pursuant to an act of Congress. *Advice*, 405.
2. The Fourth Auditor is not authorized to consider security offered for a debt,

PAYMENTS (*Continued*)

however ample it may be, a payment of a debt due the government. *Swartwout's case*, 592

3. Payment under the act of May 24, 1824, "for the relief of the assignees and legal representatives of John H. Piatt," may be made to the assignees to the amount of their assignment; and as the amount for which the claim was assigned was not fixed in the assignment, it having been given for advances "made and to be made," the accounting officers must examine into and ascertain the amount actually due the assignees thereon. *Assignees of Piatt*, 692.
4. The government cannot legally retain out of the moneys directed by the act of Congress of May 24, 1824, to be paid to certain assignees and representatives, a bill against the creditor, assigned to the Treasurer under protest. *Advice*, 700.

PEA PATCH.

1. The United States, being in possession of the Pea Patch under title derived from the Duke of York, may require a prosecutor to show title in himself, before any proof of title need be deduced; and a prosecutor, under deed taking for its western boundary the east side of the Delaware river and bay, can never reach the Pea Patch. *Advice*, 331.

PENSIONS.

1. Officers, musicians, and privates, composing the peace-establishment, who, although not "wounded," have lost their health whilst in the line of their duty to such an extent as to be disabled from performing duty any more, are within the meaning of the term "*or otherwise*," and are *prima facie* entitled to the charitable relief of the legislature. *Advice*, 181.
2. Every officer, &c., in full commission, and not on furlough, must be considered in the line of his duty, although at the moment no particular duty is devolved upon him. *Ibid*.
3. The cadets at West Point who have been or may be wounded whilst in the line of their duty, are entitled to be placed on the list of invalids, as provided in the acts of March 16, 1802, April 29, 1812, and March 3, 1815. *Advice*, 348.
4. The form prescribed in the 1st section of the act of 18th March, 1818, in relation to certain indigent persons who performed duty in the land and naval service of the United States during the revolutionary war, to verify the amount of property of the applicant, except the oath of the party and the certificate of the clerk, must be gone through with in open court of record. *Advice*, 356.
5. A court of record, within the contemplation of the acts of Congress, is a court expressly made so by the law of the State which creates it; which has been solemnly adjudged by the tribunals of the several States to be so; which proceeds according to the course of the common law, with a jurisdiction unlimited in point of amount, keeping a record of its proceedings, and which has the power of fine and imprisonment. *Ibid*.
6. It was the intention of Congress to make the amount of the schedule the test of the indigence of the applicant; and that, consequently, the relief given by the former act is to be continued in every case in which the schedule shall exhibit proof of such indigence that the income of the property is inadequate to the support of the applicant. *Ibid*.
7. The act of 11th January, 1812, does not provide pensions for aids-de-camp, as such, regulated by their pay as such; and therefore, until further legislation, they can receive only the pensions to which their commissions entitle them. *White's case*, 413.
8. Navy pensioners are included in the act of March 3, 1819, regulating payments to invalids entitled to pensions under the several laws of Congress granting them. *Advice*, 457.
9. A seaman disabled by punishment inflicted by an enemy for endeavoring to escape from him after having been taken prisoner, is within the spirit of the act of 23d April, 1800, granting pensions to seamen disabled whilst in the line of their duty. *Advice*, 461.
10. It is irregular for the War Department to accept certificates of navy surgeons instead of their "affidavits," as required by the act of 3d March, 1819, regulating payments to invalid pensioners. *Advice*, 533.
11. Pensions under the act of 15th May, 1820, do not commence until the testimony in the case shall have been taken, authenticated, and in all respects

PENSIONS (*Continued.*)

- completed, as the same is required to be, in order to its reception at the department. Col. Johnson's case, 562.*
12. By the term "until the end thereof," (i. e. the war of the Revolution,) contained in the pension act of the 18th March, 1812, is meant "until the treaty of peace was ratified." *Advice, 701.*
 13. The widows and children of those who perished on board of public or private armed vessels, since the 18th day of June, 1812, and prior to the 22d day of January, 1825, are entitled to pensions. *Advice, 709.*
 14. In the case of a prize vessel having foundered or been lost at sea during the above period, having a crew transferred from a public or private armed vessel, the widows and children of those lost in the prize vessel are entitled to pensions. *Ibid.*
 15. So also if a boat has been despatched within that period, from a public or private armed vessel, on any duty, and those on board drowned, the widows and children of the persons lost are entitled to pensions. *Ibid.*

PERJURY.

1. Perjury in falsely deposing to facts relating to claims against the government is limited to depositions taken pursuant to some law of Congress. *Advice, 209.*

PIRACY.

1. The bringing away of slaves from Martinique, the property of residents there, may be piracy, and, depending upon the precise place of its commission, may only be an offence against the municipal laws. *Advice, 29.*
2. Prosecutions for alleged acts of piracy committed on the high seas, or in any place out of the jurisdiction of any particular State, should take place in the district where the offender is apprehended, or into which he may be first brought. *Advice, 185.*
3. The captain and crew of the Fourth-of-July privateer from La Plata, whose separate existence has not been acknowledged by the Executive, may be indicted as pirates. *Advice, 249.*

POLICE

1. The act of South Carolina, authorizing the seizure and imprisonment of persons of color who may come into any of her ports from any other State or any foreign port, until the vessel to which they may be attached shall depart, is void, as being against the constitution, treaties, and laws of the United States, and is incompatible with the rights of all nations in amity with them. *Advice, 659.*

PRE-EMPTIONS.

See PUBLIC LANDS.

PRESIDENT.

See EXECUTIVE.

PRIORITY.

1. Where the register at Kaskaskia had issued two certificates for the same land to two different persons, it was held that the first had preference. *Advice, 191.*
2. 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 the United States shall be first satisfied, (act of March 3, 1797;) but whether the United States have priority over mortgages executed on land of the debtor, whilst a debtor to the United States, *quere.* *Advice, 414.*
3. A prior lien on a policy for the premium of an insurance is overreached by the right of preference of the United States, even though the preference be founded on a subsequent act of insolvency. *Advice, 616.*

PRIZES.

1. It is reasonable, as applicable to all nations, to permit a portion of a prize cargo to be sold under the superintendence of the public officers for reparation of the ship: as to France, it is within the 19th article of the treaty of 1778. *Advice, 67.*
2. As to the sailing, the prize-ship should be permitted to do so whenever the captors wish: a deception practised on the collector and naval officer affords no ground for detaining it. *Ibid.*
3. A captured vessel must be brought within the jurisdiction of the country to which the captor belongs, before a regular condemnation can be awarded. *Case of the John, 78.*

PRIZES (Continued.)

4. If the prize be a pirate, the officers and crew are to be prosecuted in the circuit court of the United States, without respect to the nation to which each individual may belong. *Case of the Nigre*, 85.
5. If it be regularly commissioned as a ship-of-war, the officers and crew are to be detained as prisoners, except such as are citizens of the United States. *Ibid.*
6. Citizens of the United States who aid a nation with whom we are at war on the high seas, against the United States, are guilty of treason. *Ibid.*
7. Offenders against the United States may be arrested, imprisoned, or bailed, agreeably to the usual mode of process in a State, but can be tried only before the court of the United States having cognizance of the offence. *Ibid.*
8. Proceedings against the ship and cargo are to be had before the district court of the United States, according to the laws of Congress and the usage and practice of courts of admiralty in prize causes. *Ibid.*
9. Where a French vessel, captured and condemned as lawful prize to the captors and to the United States prior to the treaty of September 30, 1800, in moieties, and the avails of the appraised vessel and cargo were in the hands of the clerk at the date of the treaty, and one moiety paid to the captors and the other paid into the United States treasury, after the signing of the treaty, and, upon a hearing before the Supreme Court on writ of error, no bond having been given, the decree of the circuit court was reversed, and the vessel, apparel, guns, &c., ordered to be restored; and, pursuant thereto, the moiety in the United States treasury was paid over, and a claim being made for the other moiety that had been paid to the captors—DECIDED that the United States are not liable for such moiety. *Case of the Peggy*, 114.
10. Where a brig captured off Tripoli, as prize of war, by a part of a squadron, and condemned, was afterwards taken by the commodore at a valuation, and placed in the service of the United States—DECIDED that the captors were entitled to their prize interest of the government, and that the other moiety should be applied to the navy pension fund. *Case of the Transfer*, 186.
11. Where a captured fleet was condemned as a prize of war, and afterwards purchased by the President for \$255,000, under an act of Congress directing such purchase, and the distribution of that amount between the captors and their heirs, it was not intended to alter the mode of distribution, nor to deprive the widow of a seaman slain in the struggle from claiming and receiving the same share that she would have received had the prize been sold under a decree of court. *Hardy's case*, 402.
12. The profits of a capture made by individuals acting without a commission inure to the government, but it has not been the practice to exact them. It has been their practice to recompense gratuitous enterprise, courage, and patriotism, by assigning the captors a part, and sometimes the whole of the prize. *Case of the Dos Hermanos*, 463.

PUBLIC DEBTORS.

See EXECUTIVE.

PUBLIC GROUNDS.

See WASHINGTON.

PUBLIC LANDS.

See LANDS.

PUBLIC MINISTERS.

See MINISTERS.

PUBLIC PEACE.

1. It is a misdemeanor to plot and combine to disturb the peace and tranquillity of the United States, and to draw them into a war with a foreign nation. *Blount's case*, 75.

PURSERS.

See COMPENSATION. SURETIES.

REDEMPTION.

1. The words "within two years from the time of sale," used in the clause of the act of Congress giving the owners of lands sold for the taxes of 1815 and 1816 the right to redeem them of the purchasers at the tax sales, exclude the day of sale from the computation. *Advice*, 364.
2. Minors have the right to redeem their lands sold for taxes at any time within

REDEMPTION (*Continued.*)

two years from the removal of the disability, by payment of the purchase-money, with ten per cent. thereon, and compensation for improvements, whether deeds have been given to the purchasers or not, for no deed is valid unless given in pursuance of law, and the law does not authorize the giving of a deed until the time of redemption shall have expired. *Advice*, 378.

- 3 Lands sold for taxes may be redeemed within two years, upon payment of the amount paid by the purchaser, with 20 per cent. interest. *Advice*, 401.

REGISTRY.

1. The benefit of the registry of an American vessel is lost to the owner during his residence in a foreign country; but upon his return to this country the disability ceases. *Winslow's case*, 523.
2. The fact that during the foreign residence of the American owner the vessel carried a foreign flag, does not work any divestiture of title, nor render the disability perpetual. *Ibid.*
3. The laws of nations do not allow reprisals, except in case of violent injuries directed and supported by the State, and the denial of justice by all the tribunals and the prince. *Advice*, 30.
4. Where error is apparent on the record of a judgment for unjustifiable seizure in a State court, a writ of error may be applied for in behalf the aggrieved party. *Ibid.*

RESCISSION.

See PUBLIC LANDS.

RESTITUTION.

1. As the ship *Grange* has been seized in neutral waters, restitution is the duty arising from the act. *Case of the Grange*, 33.

RESTORATION.

1. Slaves unlawfully brought away from Martinique, the property of residents there, should be restored to their owners. *Advice*, 29.
2. Where a captured vessel was ordered to be restored after condemnation and sale, and the moiety of the proceeds in the treasury paid over, it was decided that government was not liable for the share which had been paid to the captors. *Advice*, 114—119.
3. On the requisition of the British minister, a British vessel and cargo which the master had wantonly and feloniously taken into an American port in violation of our revenue laws, and there seized by the officers of the port for such violation, should be restored to an innocent owner. The forfeitures and penalties prescribed by our laws have never been inflicted on owners of vessels which have been brought within our power by others' crime. *Case of the Maria*, 509.
4. Where it is claimed by a foreign minister that a seizure made by an American vessel was a violation of the sovereignty of his government, and he satisfies the President of the fact, the latter may, where there is a suit depending for the seizure, cause the Attorney General to file a suggestion of the fact in the cause, in order that it may be disclosed to the court. *Case of La Jeune Eugénie*, 504.
5. Where a French vessel, with Africans on board unlawfully taken from their native land, was captured by pirates, and from them recaptured by an American vessel and brought into port, and a demand for the Africans was made by the French minister with a view to their restoration—HELD, that the application was well founded, and should be acceded to. *Case of La Pensée*, 534.
6. A slave unlawfully brought into the port of New York from St. Croix, and detained in prison for orders respecting him, should be restored, by delivering him to the minister of Denmark. *Barry's case*, 566.

SALARIES.

See COMPENSATION.

SALVAGE.

1. The recaptors of American vessels from pirates are entitled to salvage; but the rate rests in the discretion of the court before which the cases shall be brought. *Case of the Lucius*, 531.
2. A recapture from pirates gives a fair claim for salvage by the general maritime law; and by the act of March 3, 1800, national ships are entitled to salvage from the ships of friendly powers rescued from their enemies; which act, in spirit, applies to rescues from pirates. *Case of the Theodore*, 577.

SALVAGE (Continued)

3. The rate of salvage to which recaptors of an American vessel from pirates are entitled is governed by the act of Congress of 3d March, 1800, giving, where the vessel shall have been sent forth and armed as a vessel of war, one-half of the vessel, but only one-sixth of the cargo. (See case of the *Adeline*, 9th Cranch, 287; *Wheaton on Captures*, 237; 1 Cranch, 28.) The only general rule that can be suggested is one-sixth, and half of the vessel if she shall have been armed after her capture. *Advice*, 584.
4. If the recaptured vessel had been long in the hands of pirates, and had been used as their own, a higher salvage ought to be allowed than if she were recaptured in the moment of her capture, having just struck, and her crew still in a capacity to make resistance. *Ibid*
5. The 4th section of the act of 3d March, 1800, refers to the prize law for the proportion of the salvage which the officers and crew shall take in a given case, as well as for the mode in which the share so taken by them shall be distributed. *Advice*, 594.
6. The rules for the distribution of prize-money are: that the whole of the prize belongs to the captors when the vessel captured is of equal or superior force to the vessel making the capture; and when of inferior force, the prize is directed to be divided equally between the United States and the officers and men making the capture. *Ibid*.
7. The officers and crew of a United States vessel are not entitled to salvage as against the government for saving the property of the United States wrecked on the Florida reef. *Case of Richard and Charles*, 675.

SEAMEN.

See SHIP-MASTERS.

SHIP-MASTERS.

1. The master of a vessel belonging to the United States, sold in a foreign country in consequence of her being stranded, is not, within the meaning of the legislature, liable for three months' unearned pay to the seamen under the act of 1803, for neither justice, policy, nor equity requires an appropriation of the proceeds of a sale for the return of a crew when the sale was the result of a disastrous providence. *Advice*, 148.
2. Seamen left behind in a foreign country on account of inability, from sickness, to return in the vessel in which they went out, are within the provisions of the act of 25th February, 1803, supplementary to the act concerning consuls, and for them the master should deposit with the consul three months' pay over wages, &c., as in other cases of voluntary discharge. *Advice*, 593.

SIGNATURE.

1. If the Secretary of the Treasury is capable of seeing what he does, so that one paper cannot be passed upon him for another, he may impress his name with a stamp or copperplate instead of a pen, provided he keep the stamp or copperplate in his own possession and apply it himself, or cause it to be applied in his presence. *Advice*, 670.

SLAVES AND THE SLAVE-TRADE.

1. The importation of slaves into the United States is unlawful, and offenders may be prosecuted therefor. *Advice*, 29.
2. The act of 22d March, 1774, "to prohibit the carrying on the slave trade from the United States to any foreign place or country," is a penal statute, and is to be strictly construed. *Tayer's case*, 312.
3. Wherefore, a collector of customs cannot require a bond as a pre-requisite to giving a clearance, except upon the oath or affirmation of some citizen. *Ibid*.
4. The act "in addition to the acts prohibiting the slave trade" does not authorize the President to appropriate any part of the sum therein specified to the purchase of land on the coast of Africa, nor in the purchase of carpenters' tools for the colony there. *Advice*, 314, 317.
5. The act of 3d March, 1819, applies to all negroes previously brought into the United States contrary to the provisions of any of the acts of Congress on the subject, and not disposed of by State laws. *Advice*, 334.
6. By the act of Congress of 2d March, 1807, the importation of slaves from Africa or elsewhere into the United States, or any place within their jurisdiction, is prohibited under severe penalties; and the importer and all per-

SLAVES AND THE SLAVE-TRADE (*Continued.*)

- sons claiming under him are therein declared to have no title to the negroes imported, nor to their services. *Advice*, 446.
7. And by the same act, it is left to the legislatures of the States to regulate the manner in which the negroes thus imported shall be disposed of. *Ibid.*
 8. It is the duty of every good citizen who may be apprized of a breach of this law, to take prompt and immediate steps for the seizure of the negroes, and to inform the governor of the State, that he may give directions for the disposal of them. *Ibid.*
 9. The statute of Georgia, making the regulations contemplated by the law of Congress passed 19th December, 1817, is not unconstitutional. *Ibid.*
 10. The act of 1818, prohibiting the importation of slaves into the United States, was not intended to prohibit the return of slaves who should leave the United States as servants of their owners, with intent to return after a short sojourn abroad. *Advice*, 563.
 11. A vessel under forfeiture for having violated the laws prohibiting the slave trade remains subject to the taint in the hands of subsequent purchasers, and the President will not interpose in any suit brought against the vessel on that account. *Advice*, 619.
 12. There is no law which renders the decision of the circuit court of Georgia, upon a claim of the marshal of that State for supporting negroes taken from a vessel brought in for adjudication under the laws prohibiting the slave trade, binding on the executive department, so as to make it the duty of that department to pass an account which it considers unreasonable and unjust. *Advice*, 635.

SMUGGLING.

1. The innocent purchaser of a brig under forfeiture for smuggling takes her subject to the confiscation, as much as the purchaser of a stolen horse takes it subject to the claim of the true owner. *Advice*, 338.

SUITS.

See ACTIONS.

SUPPLIES.

See ARMY.

SURETIES.

1. Sureties of a purser under an original appointment are not liable for acts done under a reappointment. *Salterwhite's case*, 175.
2. Sureties of collectors of taxes appointed under the act of the 22d July, 1813, are liable for their delinquencies under the act of 1815 to the amount of the penalties of their bonds. *Reed's case*, 339.
3. At common law, the release of one obligor is a release of all the rest; and although the acts of Congress may save the sureties of an insolvent debtor to the United States, the question is doubtful. *Dundas's case*, 367.
4. Where an assignee of a government contract to build a fortification executes a bond to the government, with sureties, conditioned that he fulfil the original contract, he and his sureties are as much bound to the performance of the original contract as they would be in the case of a contract wholly original. *Hawkins's case*, 402.
5. The estate of a surety for a receiver of public moneys for lands is liable, after the death of such surety, for the faithful performance by the receiver of his duties until the end of his term. *Administrators of Paten*, 573.
6. Sureties of a collector of taxes appointed by the President during a recess of the Senate and confirmed by the Senate at its next session, who signed the bond given by the collector when he entered upon his official duties, are liable for the faithful performance of the duties of the collector throughout the term—the appointment during the recess, and the subsequent nomination to and confirmation by the Senate, making but one and the same appointment. *Ibid.*
7. Sureties of pursers in the navy are not liable to have their compensation stopped on account of any balances found due the government from their principals. *Advice*, 617.
8. The Supreme Court having decided that the sureties of a collector of taxes and duties appointed during a recess of the Senate are bound only for acts done under the President's commission, the opinion heretofore given by the Attorney General is reconsidered, and the decision of the court formally communicated. *Advice*, 637.

SURRENDER.

See EXECUTIVE. EXTRADITION. RESTORATION.

SURVEYS.

See PUBLIC LANDS.

TREATIES.

1. The treaty with Spain does not extend the jurisdiction of our courts to offences committed in Spain, nor *vice versa*; and according to the common law, the commandant of the island of Amelia is not liable to any public prosecution before any of our courts for his transactions in Florida. *Advice*, 68.
2. In order that the 6th article of the treaty with Great Britain may be properly executed, it is proper that all public officers should, when demanded, furnish authenticated copies of documents in their possession, according to the duties of their several stations, &c. *Advice*, 62.
3. A requisition from the British minister is not authorized by the 27th article of the treaty of 1794, unless the persons demanded are charged with murder or forgery committed within the jurisdiction of Great Britain. *Advice*, 83.
4. The treaty with France does not authorize the French government to make any demands on the United States for a Portuguese brig recaptured from a French schooner and taken to St. Kitts, and there ordered to be restored on payment of salvage. *Advice*, 111.
5. The treaty of 30th September, 1800, with France, does not require this government to refund that part of the avails of a French prize made prior to that date, and which has been paid over to the captors, &c. *Advice*, 114, 119.
6. Demands for freight, where individuals have transported articles for the French government, or for its citizens, as they are within no positive provision of the convention, are out of the question—the United States being in no event, and on no principles, bound to protect them. *Advice*, 136.
7. An award by commissioners under the 7th article of the treaty with Great Britain to several persons collectively, is conclusive upon the matter so far that the right to transfer is vested in all the persons in favor of whom it is made; and if those concerned have neglected to have inserted in it the amount of their respective interests, or if they disagree as to their several proportions, the embarrassments are attributable to themselves. The government cannot undertake to decide among them. *Advice*, 153.
8. The provisions contained in the treaty of 1794 with Great Britain, relating to duties on goods and merchandise, do not extend to tonnage duties. *Advice*, 155.
9. The preliminary articles of peace with Great Britain provided that there should be a peace when the terms of a peace should be agreed on between that government and France, and his Britannic Majesty should be ready to conclude it; but as they were only preparatory to a peace, there was no peace, in contemplation of the law, until the war of the Revolution terminated, by the ratification of the treaty in 1783. *Advice*, 701.

TREASON.

1. It is treason for a citizen or other person not commissioned, within the United States, to aid France during a maritime war with her. *Advice*, 84.

URSULINE NUNS.

See ORLEANS.

VACANCIES.

See APPOINTMENTS.

WARRANTS.

See PUBLIC LANDS.

WASHINGTON CITY.

1. So long as the law of Maryland, and the order of the commissioners under it, remain unrepealed and unmodified, the wharves proposed to be built by the owners of water-lots on the Potomac and Eastern Branch must follow the direction of the present streets of the city, and cannot be projected at right-angles from Water street to the channel. *Advice*, 223.
2. The order of the commissioners, allowing the proprietors to erect buildings

WASHINGTON CITY (*Continued.*)

- beyond the line of Water street, is invalid ; they having no power to make such an order. *Ibid.*
3. It is the duty of the President to exercise a general supervision over the subject of the appropriation of the public grounds in the city of Washington ; and as the right to occupy and improve any of these grounds depends upon whether the improvements are for public purposes, so the power of the President to assent to improvements depends upon whether they are for public purposes, and are useful. *Advice*, 368.
 4. The resolution of the corporation of the city of Washington, proposing to improve a part of the Judiciary Square by erecting thereon a City Hall, is to appropriate the public grounds for both a *public* and a *useful* purpose, and may be approved by the President ; provided, that the quantity of ground required neither exceeds nor falls short of the purpose. *Ibid.*
 5. The assent of the President to acts of the corporation of Washington should be expressed in the same manner as his assent is expressed to acts of Congress. *Ibid.*
 6. The act of July 16, 1790, for establishing the seat of government of the United States, authorized commissioners, who were to be appointed by the President, to purchase or accept such quantity of land, on the eastern side of the Potomac, within the District of Columbia, as the President should deem proper for the use of the United States ; and by a liberal construction of that provision, only, has it been claimed that the President had power to establish a plan of the city ; but the deeds of the original proprietors require the trustees appointed by them to convey to the commissioners such streets, squares, parcels, and lots, as the *President should deem proper*. In pursuance of the power thus conferred, President Washington, in 1797, executed an instrument of writing, in which he directed the trustees to convey to the commissioners all the streets delineated in a plan intended to be, but not annexed. President Washington having previously ratified Ellicott's engraved plan of the city, it must now be presumed that Ellicott's plan was what he intended to annex ; and that, as it indicated streets through the mall, it was originally intended that streets might be opened through it. *Advice*, 416.
 7. And although President Adams subsequently gave his sanction to another plan, said by the commissioners to have been annexed, which did not indicate streets through the mall, the promulgation, publication, and exhibition of Ellicott's plan on the day of sale of lots, amount to a pledge of the public faith that the streets thus indicated should be opened. *Ibid.*
 8. The corporation of the city of Washington has power to establish a board of health, to make regulations for the preservation of health, to open all necessary drains, and to do every act which the health of the city may require, and to lay taxes, &c, for the purpose of defraying the expenses. *Advice*, 615.
 9. Besides, the act of May 7, 1822, specially authorized the draining and filling of the low grounds near Tiber creek and the canal, and appropriated funds for that purpose. *Ibid.*
 10. The deed from the mayor and commissioner of certain rooms in the City Hall contains unauthorized provisions. The powers of the grantors should be enlarged, and a new deed given. *Ibid.*
 11. Although the corporation of Washington have the power, by their charter, with the approbation of the President of the United States, to draw lotteries, the amount to be thus raised cannot exceed ten thousand dollars in any one year. *Advice*, 720.
 12. If the corporation have not improved this provision during any former years, the right to do so for those years has gone ; for the President, during those years only, had the right to judge of the expediency of a lottery or lotteries by the circumstances then existing. *Ibid.*
 13. The power is a special and limited one, and can be exercised in no other manner, and at no other times, than those expressed in the charter. *Ibid.*

WILLS.

1. The validity of a will to pass personal property in this country depends on the law of the place in which it was made. *Advice*, 382.
2. By the civil law, an executor, *eo nomine*, is not essential to the validity of a will ; the institution of an universal heir, who stands in the place of an English executor and residuary legatee, being sufficient. *Ibid.*

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