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" that the ſaid plaintiff do alſo recover his coſts expended " in this court and in the ſaid diſtrict court, all which " is ordered to be certified to the ſaid diſtrict court, and " the ſaid regiſter of the land office accordingly."

In the caſe of Maſon v. Wilſon, the judgment of the court was, " that the defendant Wilſon hath by law the better " right to the land in controverſy, and that the judgment " of the court of the United States for the diſtrict of " Kentucky be reverſed and annulled; and that the ſaid " caveat be diſmiſſed, and that the defendant Wilſon reco- " ver his coſts, &c."*

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ERROR to the circuit court for the diſtrict of Connecticut, on a queſtion of prize.

The facts found and ſtated by judge Law, the diſtrict judge, were as follow:

" That the ſhip Trumbull, duly commiſſioned by the " Preſident of the United States, with inſtructions to take " any armed French veſſel or veſſels ſailing under autho- " rity, or pretence of authority from the French republic, " which ſhall be found within the juriſdictional limits of " the United States, *or elſewhere on the high ſeas*, &c. as ſet " forth in ſaid inſtructions; and ſaid ſhip did on the 24th " day of April laſt (April 1800) capture the ſchooner Peg- " gy, *after running her aſhore* a few miles to the weſtward " of Port au Prince, within the *dominions and territory of* " *General Touſſaint*, and has brought her into port as ſet " forth in the libel, and it further appears that all the facts, " contained in the claim, are true†; whereupon this court

A final condemnation in an inferior court of admiralty, where a right of appeal exiſts and has been claimed, is not a *definitive* condemnation within the meaning of the 4th article of the convention with France, ſigned Sept. 30, 1800.

The court is as much bound as the executive to take notice of a treaty, and will reverſe the original decree of condemnation (although it was

* As to the neceſſity of giving notice in the form preſcribed by law, vide *Evans's Eſſay on bills*, 67 68. 69 70. 71 —*and* 2 *H. Bl.* 609. *Nicholſon v. Goutbit.*

† The material facts ſtated in the claim are, that the ſchooner was the property of citizens of the French republic; that ſhe was permitted by Touſſaint

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" are of opinion that as it appears that the ſaid ſchooner " was ſolely upon a trading voyage and ſailed under the " permiſſion of Touſſaint with diſpatches for the French " government, under a convoy furniſhed by Touſſaint, " with directions to touch at Leogane for ſupplies, and " that the arms ſhe had on board muſt be preſumed to be " only for ſelf defence; neither does it appear ſhe had ever " made, or attempted to make, any depredations, and that " ſhe was not ſuch an armed veſſel as was meant and in- " tended by the laws of the United States ſhould be ſub- " ject to capture and condemnation; and that the ſitua- " tion ſhe was in, at the time of capture, being aground " *within the territory and juriſdiction of Touſſaint*, ſhe was " not on the high ſeas, ſo as to be intended to be within " the inſtructions given to the commanders of American " ſhips of war: Therefore, adjudge ſaid ſchooner is not " a lawful prize, and decree that ſaid ſchooner with her " cargo be reſtored to claimant."

correct when made) and decree reſtoration of the property under the treaty made ſince the original condemnation.

Quere. As to the extent of the term *high ſeas?*

From this decree the attorney for the United States, in behalf of the United States and the commander, officers and crew of the Trumbull, appealed to the circuit court, in which Judge Cuſhing ſat alone, as the diſtrict judge declined ſitting in the cauſe, on account of the intereſt of his ſon who was one of the officers on board the Trumbull, at the time of capture, and who, if the ſchooner ſhould be condemned, would be entitled to a ſhare of the prize money.

The circuit court on the appeal found the following facts, and gave the following opinion and decree:

Touſſaint to receive on board the cargo which was on board at the time of capture; that ſhe had diſpatches from Touſſaint to France; that ſhe ſailed by his authority on the 23d of April, for France, navigated by 10 men, including Buiſſon the claimant, and Gillibert the commander, and having on board 4 ſmall 3 pound carriage guns, ſolely for defence againſt piratical aſſaults, and being under convoy of a tender, furniſhed by Touſſaint. That on the 23d April, ſhe was run aſhore, a few miles to the weſtward of Port au Prince, *within the dominion, juriſdiction, and territory of general Touſſaint, ſo that ſhe was faſt and tight aground*; at which time, and in which ſituation, the boats and crew of the Trumbull attacked and took poſſeſſion of her, and got her off. That Touſſaint then was, and ſtill is, on terms of amity, commerce and friendſhip with the United States duly entered into and ratified by treaty That the ſchooner was on a lawful voyage for the ſole purpoſe of trade; and not commiſſioned, or in a condition to annoy or injure the trade or commerce of the United States.

"That David Jewitt, commander of the ſaid public armed veſſel, called the Trumbull, being duly commiſſioned, and inſtructed by the Preſident of the United States, as ſet forth in the ſaid libel, did on or about the 23d of April laſt, capture the ſaid ſchooner Peggy, after running her aground about piſtol ſhot from the ſhore, a few miles to the weſtward of Port au Prince, called alſo Port Republican, on the coaſt of the iſland of Saint Domingo, and afterwards bring her into port, as ſet forth in the libel. That at the time of the capture of the ſaid ſchooner there were ten perſons aboard her. That ſhe was then armed with four carriage guns, being four pounders, with four ſwivel guns, ſix muſkets, four piſtols, four cutlaſſes, two axes, ſome boarding hatchets, tommahawks, and handcuffs. That ſhe was a trading French veſſel of about a hundred tons, then laden with coffee, ſugar, and other merchandize. That ſhe had come from Bourdeaux to Port au Prince, where the claimant had taken in ſaid cargo, and from whence he ſailed on or about the ſaid 23d day of April with ſaid ſchooner and cargo, having diſpatches from general Touſſaint for the French government. That the ſaid Buiſſon ſailed from Port au Prince as aforeſaid with the permiſſion and direction of general Touſſaint to proceed to Bourdeaux; that ſaid ſchooner ſo ſailed from Port au Prince under convoy of an armed veſſel by order of ſaid Touſſaint without a paſſport from Mr. Stevens, conſul general of the United States at Saint Domingo, but that Buiſſon had been promiſed by Touſſaint's brother that one ſhould be obtained and ſent him, which, however, was not done; that ſaid ſchooner had ſailed from Bourdeaux for Port au Prince with fifteen men, beſides eight paſſengers (according to the roll of equipage) armed with ſome guns, ſwivels and muſkets; that ſaid captain Buiſſon was without any commiſſion as for a veſſel of war, and alleges that he was armed only for ſelf defence. That at the time of ſaid capture, the guns of ſaid ſchooner were loaded with canniſter ſhot, one of which being fired, the ſhot fell near the bow of the Trumbull; but the ſaid Buiſſon declares that ſaid gun was fired only as a ſignal to his convoy. That the ſaid captain Buiſſon appeared to be in a diſpoſition, and was prepared with force to reſiſt the boats which were ſent from the Trumbull to board him, a lit-

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" tle previous to the capture, in caſe of their attempting " it; and that the ſaid ſchooner and cargo are French " property.

" Upon theſe facts the court is of opinion as follows, " viz.

" However compaſſion may be moved in favour of " the claimant by ſome circumſtances; ſuch as that he " was charged with diſpatches from general Touſſaint, " between whom and the United States there were " ſome friendly arrangements reſpecting commerce; that " he was not in a capacity of greatly annoying trade, " from the fewneſs of his men; and his allegation that " he was armed only in defence; yet as the court is bound " by law, which makes no ſuch diſtinctions; as armed " French veſſels are not protected by any treaty or con- " vention; particularly not by the regulations between " general Touſſaint and the American conſul; and as the " ſaid ſchooner Peggy was in a condition capable of an- " noying, and even of capturing ſingle, unarmed trading " veſſels, unattended with convoy; The court cannot " avoid being of opinion, that ſhe falls within the de- " ſcription, and general deſign, of the expreſſion of the " law, an armed French veſſel.

2dly. That ſhe was captured on the high ſeas: the ar- " gument taken by the claimants counſel, from the extent " of national juriſdiction on ſea coaſts bordering on " the country, not applying to this caſe ſo as to ac- " quit the ſaid ſchooner; the ſea coaſt of Saint Domingo, " not being neutral; not made ſo by any treaty or con- " vention; but to be conſidered as hoſtile, upon our pre- " ſent plan of laws of defence with reſpect to France; " as much ſo as any part of the coaſt of France, as far as " regards *French armed veſſels.*

" The court is therefore of opinion that the ſaid " ſchooner Peggy and cargo are lawful prize:

" It is therefore conſidered, decreed and adjudged by " this court, that the decree of the diſtrict court reſpect- " ing the ſame, as far as regards their acquittal, be, and " the ſame is hereby reverſed; and that the ſaid ſchoon-

" er with her apparel, guns and appurtenances, and the " goods and effects which were found on board of her " at the time of capture, and brought into port as afore- " ſaid, be and the ſame are hereby condemned as forfeited " to the uſe of the United States, and of the officers and " men of the ſaid armed veſſel called the Trumbull, one " half thereof to the United States, the other half to the " officers and men to be divided according to law; the " ſaid ſchooner Peggy being of inferior force to the ſaid " armed veſſel called the Trumbull."

This ſentence and decree were pronounced on the 23d day of September, 1800.

During the preſent term, and before the court gave judgment upon this writ of error, viz. on the 21ſt of December, 1801, the convention with France was finally ratified by the Preſident; the fourth article of which convention has theſe words:

" Property captured, and not yet *definitively* condemn- " ed, or which may be captured before the exchange of " ratifications, (contraband goods deſtined to an enemy's " port excepted) ſhall be mutually reſtored." " This ar- " ticle ſhall take effect from the date of the ſignature of " the preſent convention. And if, from the date of the " ſaid ſignature, any property ſhall be condemned con- " trary 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."

On the 30th of September, 1800, this convention was ſigned by the reſpective plenipotentiaries of the two nations at Paris. On the 18th of February, 1801, it was ratified by the Preſident of the United States, with the advice and conſent of the Senate, excepting the 2d article, and with a limitation of the duration of the convention to the term of eight years. On the 31ſt of July, 1801, the ratifications were exchanged at Paris, with a proviſo that the expunging of the 2d article ſhould be conſidered as a renunciation of the reſpective pretenſions which were the object of that article.

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This proviſo being conſidered by the Preſident as requiring a renewal of the aſſent of the Senate, he ſent it to them for their advice. They returned it with a reſolve that they conſidered the convention as fully ratified.

Whereupon,

On the 21ſt of December, 1801, it was promulged by a proclamation of the Preſident.

The controverſy turned principally upon two points:

1ſt. Whether the capture could be conſidered as made on the *high ſeas*, according to the import of that term as uſed in the act of congreſs of July 9th, 1798, vol. 4. p. 163.

2d. Whether, by the ſentence of condemnation by the circuit court on the 23d of September, 1800, the ſchooner Peggy could be conſidered as *definitively* condemned, within the meaning of the 4th article of the convention with France, ſigned at Paris on the 30th of September, 1800.

The writ of error was dated on the 2d of October, 1800.

Griſwold and Bayard, for the captors.

Maſon, for the claimant.*

The Chief Juſtice delivered the opinion of the court.

In this caſe the court is of opinion that the ſchooner Peggy is within the proviſions of the treaty entered into with France and ought to be reſtored. This veſſel is not conſidered as being definitively condemned. The argument at the bar which contends that becauſe the ſentence of the circuit court is denominated a final ſentence, therefore its condemnation is definitive in the ſenſe in which that term is uſed in the treaty, is not deemed a correct argument. A decree or ſentence may be interlocutory or final in the court which pronounces it, and receives its

* I regret that not having notes of this caſe, I am unable to report the very ingenious arguments of the learned counſel.

appellation from its determining the power of that particular court over the ſubject to which it applies, or being only an intermediate order ſubject to the future control of the ſame court. The laſt decree of an inferior court is final in relation to the power of that court, but not in relation to the property itſelf, unleſs it be acquieſced under. 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 interlocutary order for a 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 difference 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 depending. In this caſe the ſentence of condemnation was appealed from, it might have been reverſed, and therefore was not ſuch a ſentence as in the contemplation of the contracting parties, on a fair and honeſt conſtruction of the contract, was deſignated as a definitive condemnation.

It has been urged that the court can take no notice of the ſtipulation for the reſtoration of property not yet definitively condemned, that the judges can only enquire whether the ſentence was erroneous when delivered, and that if the judgment was correct it cannot be made otherwiſe by any thing ſubſequent to its rendition.

The conſtitution of the United States declares a treaty to be the ſupreme law of the land. Of conſequence its obligation on the courts of the United States muſt be admitted. It is certainly true that the execution of a contract between nations is to be demanded from, and, in the general, ſuperintended by the executive of each nation, and th refore, whatever the deciſion of this court may be relative to the rights of parties litigating before it, the claim upon the nation if unſatisfied, may ſtill be aſſerted.

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But yet where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress; and although restoration may be an executive, when viewed as a substantive, act independent of, and unconnected with, other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and of consequence, improper.

It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract, making the sacrifice, ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

JACOB RESLER *v.* JAMES SHEHEE.

RESLER v. SHEHEE.

After the first term next following an office judgment, in Virginia, it is a matter of

THIS was a writ of error upon a judgment of the circuit court of the district of Columbia, sitting at Alexandria, in an action for a malicious prosecution brought by Shehee v. Resler, originally in the court of hustings for the town of Alexandria, and transferred by act of