

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 1, 1858.—Ordered to be printed.

Mr. POLK made the following *adverse*

REPORT.

[To accompany Bill S. (C. of C.) 108.]

The Committee of Claims, to whom was referred the opinion of the Court of Claims in the case of O. H. Berryman and others, report:

The claimants in this case are the officers and crew of the United States schooner "On-ka-hy-e."

On the 24th of January, 1848, the the "On-ka-hy-e" captured the barque "Laurens," alleged to be then engaged in the slave trade, and brought her into the port of New York, where she was libelled and adjudged by the proper tribunal to be forfeited to the captors. There was found on board the "Laurens" the sum of \$18,992 in specie, which was taken possession of by the United States marshal, in obedience to the process of the court, and which he was subsequently ordered to pay into the registry of the court, but failed to do. In consequence of this defalcation of the marshal, the money, which had come into his hands in his official capacity, was lost to the claimants. The Court decide that in virtue of sundry acts of Congress and proceedings in the courts, to which they refer, "the money is in the treasury," "for it has been so adjudged, and all parties are concluded by that judgment." They say: "It seems to have been supposed that this was an attempt to charge the United States, on account of the defalcation of the marshal; but such is not the claim. It is the United States who set up the default of their officer and agent, the marshal, as a defence to the claim." "The judgment of the district court settles that the sum of \$20,664 69 is in the treasury for the purpose of distribution," and that "it is the Secretary of the Navy who is to direct the distribution of the money, and not the district court."

It is therefore adjudged that the claimants are entitled by law to recover the money.

Judge BLACKFORD dissents. His opinion is, that the decree of the district court does not sanction the opinion that the money which was converted by the marshal to his own use ought to be considered to be in the treasury of the United States for distribution; that all that the

decree does is merely to order that the balance realized from the sale of the vessel, and actually paid into the registry of the court, should be paid into the treasury of the United States for distribution, and that the government is not liable for any part of the money which, owing to the marshal's defalcation, never reached the registry of the court or the treasury of the United States. He says: "If the government is liable for that large sum, embezzled by the marshal, it is because there is an obligation on the part of the government to save all persons harmless against the official misconduct of its ministerial officers." The committee concur in this opinion. If, as the Court say, "the \$20,664 69 is in the treasury of the [United States] for the purpose of distribution," then the act of 1849 (9 Stat., 378) provides that "such parts thereof as may belong to the officers and crews of the vessels of the navy shall be paid to them under the direction of the Secretary of the Navy," and no further legislation is necessary. But, in point of fact, it is admitted that the money never came into the treasury, and therefore the state of facts had not arisen which empowered the Secretary of the Navy to direct its payment, or which entitled the claimants to demand it, under the law. The act does not declare that all vessels libelled and adjudged to be lawful prize, or which are, in fact, lawful prize under the law, shall be paid for to the captors out of the treasury until they have acquired the right to such payment by first causing the money to be paid into the treasury for that express use. The government assumes no other responsibility in regard to it than that of an agent or trustee, to receive and distribute such moneys as shall, by due process of law, be placed in its hands for that specific purpose. The government acquires no property or interest in them, and its whole action, so far as the receipt and distribution is concerned, is a gratuitous service for the benefit of the captors. The whole proceedings, therefore, from the seizure of the vessel until its proceeds reach the treasury, are at the sole risk of the parties in interest. They are allowed to invoke the power and to employ the tribunals and officers of the United States to secure the private rights which they may acquire to the property, but the government does not insure them success. They may fail, after the seizure, to bring the prize safely to port; or they may fail, by a mistaken or erroneous decision of the court, to obtain a decree of condemnation; or they may fail, by some mistake or laches of the clerk or marshal, or by some negligence on their own part, to have the proceeds duly paid into the treasury; and in either event, the case has not arisen which would authorize the Secretary of the Navy to cause the money to be paid, or which entitles them to demand it. No money can be lawfully paid out of the treasury without an appropriation made by act of Congress, and the act only authorizes payments of this character out of the moneys arising from the proceeds of the prizes.

In this case it is admitted that the money was never actually paid into the treasury, and that therefore there were no funds in the treasury which these parties could demand as belonging to them.

The committee, after a careful consideration of the case, concur substantially in the opinion delivered by Mr. Justice Blackford, that the claimants have no right against the government, and they recommend

that the bill "for the relief of O. H. Berryman and others" do not pass.

The opinion of Judge Blackford is hereto annexed as a part of this report.

BERRYMAN AND OTHERS *vs.* THE UNITED STATES.

Judge BLACKFORD's dissenting opinion :

I dissent from the judgment of the Court in this case.

The claimants are the officers and crew of the schooner On-ka-hy-e, a commissioned vessel of the United States of America, belonging to the navy.

This schooner, in January, 1848, captured, on the high seas, the barque Lawrence, charged with being engaged in the slave trade.

In March, 1848, the said barque was brought into the port of New York, by the captors, for adjudication, she having on board eighteen thousand nine hundred and ninety-two dollars in specie.

Afterwards, on the 15th of said month of March, a libel was filed in the district court of the United States for the southern district of New York, by the district attorney, against the said barque and her cargo.

Upon the filing of the libel, the usual process was issued, commanding the marshal (Ely Moore) "to attach the said barque, her tackle, guns, goods, and effects, found on board thereof, and specie, and to detain the same in his custody until the further order of the court," &c.

On the said 15th of March, the marshal, (Moore,) in obedience to said process, attached said barque, "her tackle, &c., and the goods and effects found on board thereof, therein described."

On the 21st of April, 1849, the court ordered the said marshal (Moore) to pay said specie, being about twenty thousand dollars, into the registry of the court.

On the 25th of the same month of April, the court ordered that said marshal (Moore) pay into the court eighteen thousand nine hundred and ninety-two dollars, being the amount of said specie, on or before the 1st of May then next following, or that an attachment issue against him.

On the same 25th of April, the court also ordered one Peck, a deputy marshal, to pay said money into court, or that he be attached.

On the 1st of May, 1849, the said money not having been paid into the registry, the court ordered an attachment to issue against said marshal, (Moore,) returnable forthwith; and on the next day an attachment was also ordered against the said deputy marshal.

Various answers to the libel were filed, and several depositions taken.

The said district court, on the 3d of July, 1849, rendered the following decree :

"It is considered by the court, that the said barque Lawrence, at the time of her arrest and capture, as set forth in the pleadings, being a vessel belonging to the United States, was employed and made use of in the transportation or carrying of slaves from one foreign coun-

try or place to another, to wit: from the western coast of Africa to Brazil, within the intent and meaning of the act of Congress, approved May 10, 1800, in such case made and provided. Wherefore, it is ordered, adjudged, and decreed by the court, that the said barque Lawrence, her tackle, furniture, appurtenances, and the goods, property, and effects, found laden on board her, be condemned and forfeited to the use of the United States, the libellants in this cause, pursuant to the provisions of the act of Congress in that behalf. And it is further ordered and decreed that the libellants recover their taxed costs against the claimants who have intervened in this cause. And on motion of J. Prescott Hall, esq., proctor for the libellants, it is ordered that the clerk of this court issue a *venditioni exponas* against the said barque Lawrence, her tackle, apparel, and furniture, and the goods, property, and effects, found laden on board, and returnable on the first Tuesday of August next."

The following return was afterwards made to the said writ:

"In obedience to the above precept, I have sold the above named vessel and cargo, and such sale amounts to four thousand seven hundred and twenty dollars and seven cents; which sum I have paid to the clerk of this court, as I am above commanded.

"Dated this 8th day of November, 1849.

H. F. TALLMADGE, *U. S. Marshal.*"

Petitions of part of the crew of the capturing vessel having been filed, the court, on the 8th of January, 1851, made the following order:

"Upon the filing of the petition of intervention of John H. Wilkins and others, captors of the barque Lawrence, &c., (against which a final decree of condemnation has been made herein,) praying for a decree of distribution of the condemned property and its proceeds, according to law: It is ordered that the usual monition do issue; and it is further ordered that a commission do issue herein, under the seal of this court, directed to Smith Barker, esq., counsellor at law, of the city of New York, appointing him prize commissioner herein. And it is further ordered that the said commissioner do proceed with all reasonable diligence to take the testimony herein, conformably to the rules of this court, for the purpose of ascertaining the amount subject to distribution, the persons entitled as distributees, and the several sums to which they are respectively entitled; and return the same into court, together with his report thereon, on or before the return day of the monition."

In May, 1851, the following report of the said prize commissioner was filed:

"Report of Smith Barker, the prize commissioner, appointed herein.

"To the Hon. Samuel R. Betts, judge of the district court of the United States for the southern district of New York:

"The report of Smith Barker, prize commissioner, duly appointed herein by order of the court, respectfully represents:

"That in compliance with the requisitions of the commission to

him issued, he has proceeded to take testimony concerning the subject-matter to him referred; and the said testimony is duly returned into court, accompanying this report thereon.

“A final decree of condemnation having been pronounced herein by the court against the property captured, the questions remaining for determination are: ‘how shall the captured and condemned property or its proceeds be divided? and to whom shall it be paid as lawful distributees? and in what proportions?’

“And first, how shall the condemned property or its proceeds be distributed?

“The testimony clearly establishes the fact of the superiority of the capturing force both in men and arms; and, therefore, were this a prize of war, under the naval laws of the United States, the capture not resulting from any extraordinary hazard, or from the exercise of any great or unusual skill or bravery, there would be no doubt that the prize, or its proceeds, would be subject to division and distribution, in equal proportions, between the government and the captors. But this was a capture made by a government vessel of a merchant vessel, found violating the laws of the United States which prohibit the slave trade, and a very serious question has arisen whether, under the terms of that law, the captors are not entitled to the entire proceeds of the prize.

“If the act of May 10, 1800, which is entitled ‘An act in addition to the act entitled an act to prohibit the carrying on the slave trade from the United States to any foreign place or country,’ were the only law of the United States under which this forfeiture has been incurred, it might perhaps be difficult to escape the conclusion that the captors would be entitled to the entire proceeds of the capture; and still more difficult would it be to avoid this result, were it not necessary in these proceedings to resort to, and be governed by, the provisions of the general law of April 23, 1800, entitled ‘An act for the better government of the navy of the United States.’

“By the fourth section of the act of May 10, 1800, it is provided, ‘that it shall and may be lawful for any of the commissioned vessels of the United States to seize and take any vessel employed in carrying on trade, business, or traffic, contrary to the true intent and meaning of this and the act to which this is an addition, and such vessel, together with her tackle, apparel, and guns, and the goods and effects (other than slaves) which shall be found on board, shall be forfeited, and may be proceeded against in any of the district or circuit courts, and shall be condemned *for the use of the officers and crew of the vessel making the seizure, and be divided in the proportion directed in the case of prize.*’ Now, it may very fairly be contended, that the *division* here spoken of is a division among the ‘officers and crew of the vessel making the seizure,’ because the act certainly indicates *no other party* for whose use the prize is to be condemned. Nor is this construction at all weakened, but rather it is strengthened, by the provisions of the seventh section of the act, which reads as follows: ‘That the forfeitures which shall hereafter be incurred under this act, or the said act to which this is an addition, *not otherwise disposed of,* shall accrue and be, one moiety thereof to the use of the informer, and the

other moiety to the use of the United States, except where the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.' Now the 1st, 2d, and 3d sections of the act provide for distinct cases of penalties and forfeitures, to be incurred by citizens having an interest in vessels employed in the slave trade, by citizens serving on board any vessel of the United States employed in the slave trade, and by citizens serving on board any foreign vessel in that employment. These are evidently the forfeitures alluded to in the seventh section as 'not otherwise disposed of:' first, because for their recovery the mediation of an informer is supposed; and second, because in the sections imposing the forfeitures there are no provisions for their disposition.

"The forfeiture imposed by the fourth section, under which the prize in this case was taken and the condemnation had, *cannot* be alluded to in the seventh section: first, because it is not such a forfeiture as is established by the aid of an informer; and second, because the disposition of that forfeiture is *otherwise* and especially provided for in the section imposing it, viz: the property 'shall be condemned for the use of the officers and crew making the seizure.'

"It is therefore apparent that if the provisions of this act alone were to be consulted on the question of distribution, the captors would present a very strong claim to the entire proceeds of the capture. But in order to ascertain *the proportions* according to which the proceeds of the prize are to be distributed among the lawful distributees, it is necessary to resort to the provisions of the general act 'for the better government of the navy of the United States,' passed April 23, 1800; and here we find in the fifth section of that act the following sweeping provision: '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 officers and men making the capture.' To this it may perhaps be answered, that this law evidently refers only to captures made in time of war, and also, that being a law seventeen days *earlier* in date than that under which this capture was made, its provisions cannot be construed to control those of the later act. But when it is considered that no good reason can be urged in favor of a law entitling the captors in a case like this to the *entire* proceeds of the capture, which is not of equal force in every other case provided by the laws in which they are entitled to a *moiety* only, it is proper to consider the provisions of the act of April 23, not as controlling, but as explanatory of those of the act of May 10, 1800. Had the latter act declared that the property should be condemned to the *exclusive* 'use of the officers and crew of the vessel making the capture,' 'to be divided' *among them* 'in the proportion directed in the case of prize,' it would be free from all ambiguity, and require no explanation from the act passed seventeen days before, directing 'the proportion in the case of prize.' But the words 'exclusive' and 'among them' are not in the law, and hence the distributees are not distinctly indicated by the law. This being the case, the general provision in relation to the division of the pro-

ceeds of *all prizes* contained in the fifth section of the act of April 23, may very properly be regarded as explanatory of the provision of the fourth section of the act of the 10th May following.

“On the 2d of March, 1807, Congress passed an act ‘to prohibit the importation of slaves into the United States from and after the first of January, 1808.’ By the seventh section of said act it is provided that the proceeds of vessels, &c., taken in contravention of the law, ‘shall be divided equally between the United States and the officers and men who shall make the seizure.’ The same provision is also contained in the first section of the act of April 20, 1818, being an act in addition to the one last mentioned; and with much greater particularity is that provision declared in the first section of the act of March 3, 1819, entitled ‘An act in addition to the acts prohibiting the slave trade.’

“With these considerations, although it must be conceded that the question is not free from embarrassment, it is submitted, that inasmuch as the captured vessel was of inferior force to that of the captors, the proceeds of the prize should be divided equally between the United States and the officers and crew of the vessel which made the capture.

“The next question is, who are entitled to be distributees as captors?

“The testimony shows that the capture was made by the officers and crew of schooner *On-ka-hy-e*, a commissioned vessel of the United States of America, and belonging to the navy thereof. If any other public ship or vessel had been in sight at the time the capture was made by the officers and crew of the *On-ka-hy-e*, the officers and crew of such other ship or vessel would, in law, be considered as taking part in the capture, and under the seventh subdivision of section sixth of the act of April 23, 1800, would be entitled to share with the officers and crew of the *On-ka-hy-e*; but the testimony conclusively establishes the fact that no other vessel was in sight, and therefore the moiety of the proceeds of the condemned property subject to distribution among the captors should be divided according to the provisions of the said sixth section of the act last above cited.

“An authenticated copy of the muster-roll, showing the officers and men who were on board the *On-ka-hy-e* at the time of the capture, namely, on the 24th day of January, A. D. 1848, has been produced from the Navy Department, and will be found annexed to the testimony herewith reported. In accordance with that list and with the provisions of the law of 1800, a schedule of distribution will be found at the termination of this report.

“The property condemned herein as lawful prize by a decree of this court made on the 30th day of July, 1849, consisted of the barque *Lawrence*, her tackle, apparel, &c., and the effects found on board, which consisted of a quantity of specie, amounting to the sum of eighteen thousand nine hundred and ninety-two dollars.

“By the defalcation of the late marshal of the United States for the southern district of New York, the said specie never reached the registry of the court. It came into his custody in his official capacity, and was converted to other uses. It came into his possession in the month of March, 1848, and it does not appear that any attempt was

made to enforce a compliance with the rule of the court, requiring its deposit in the registry of the court, until more than a year after that time. The record shows the proceedings which were then taken to obtain from him the fund, and the fruitlessness of all efforts to that end. The specie, when first received by the marshal or his deputy, was deposited in the Mechanics' Banking Association. It was paid out, it appears, from time to time, upon the checks of the deputy marshal, the deposit having been, at the request of the deputy, changed by the bank, and placed to his credit, instead of that of the marshal. An action is now pending in the State court against the bank in favor of the government, to compel a repayment of this fund, upon the ground of its illegal payment by the bank to the order of the deputy. Whether anything from any quarter, either from the bank or from the sureties upon the official bond of the marshal, will ever be realized to replace this fund thus diverted, is a question of interest to the government, but in a pecuniary point of view cannot be so regarded to the captors. So far as their rights and interests are concerned, the fund should, of course, be considered as in the treasury of the United States; nor can there be any doubt that it will be, as it ought to be, paid to them therefrom, by the proper authority, under and in accordance with a decree of distribution herein to be made by the court.

"It will not, probably, for a moment, be contended that the captors should be delayed in their receipt of the moiety of the proceeds of the capture, to which the law entitles them, by reason of the defalcation of the agent of the government, who, in that capacity, was entrusted with its possession, and has not paid it over. If it would be right to delay the captors until the termination of the litigation now pending, or which may be hereafter pending, to recover the money, for the same reason they should be subjected to the hazards of the result of that litigation; and it cannot be supposed that such a proposition could be seriously entertained by any person. So far, therefore, as this report is concerned, the commissioner considers it his duty to regard this fund as a subject of distribution in precisely the same manner as though the attorney for the libellants had enforced a compliance by the marshal with the rule of this court in the month of March, 1848, and the money were now in the registry of the court.

"The specie condemned and subject to distribution herein amounts to\$18,992 00

"The gross proceeds of the sale of the vessel, with her tackle, apparel, &c., as appears by the return of the marshal to the writ of *venditioni exponas*, was 4,720 07

"Making a total of 23,712 07

"The proceeds of the sale were duly deposited in the registry of the court.

"It appears by the vouchers on file, and by a copy of the clerk's cash account, that large payments have, from time to time, been made from this fund, under the order of the court, to defray the various expenses attending the prosecution of the libel, and the costs and disbursements in the safe-keeping and sale of the property.

“By the aforesaid cash account of the clerk, which is annexed to the testimony reported herewith, it appears that the sums of cost, expenses, and disbursements so paid, under the order of court, amount, in the aggregate, to the sum of \$3,047 38.

“The prize property and its gross proceeds, as above stated, amount to.....\$23,712 07

“Deduct from this the amount of costs thus far incurred and paid 3,047 38

“And the sum remaining subject to distribution, after defraying the bills of cost, if any, not yet paid, together with the expense of these proceedings, is..... 20,664 69

“Your commissioner therefore reports that, after paying the costs, if any still unpaid, incident to the proceedings upon the libel for condemnation of the prize property, and after paying the proper costs and charges incurred in the proceedings for a decree of distribution of the proceeds of said property condemned as lawful prize, the sum remaining of said sum of \$20,644 69 should be divided into two equal proportions; that one of the said moieties should remain in the treasury of the United States as a portion of the navy pension fund, to which fund the share of the proceeds of prize property to which the government is entitled is appropriated by an act of Congress, and that the other moiety should be paid to the captors, in accordance with the naval laws of the United States, which provide for the distribution of prize money. And it appearing that there now remains in registry of the court a portion of the proceeds of the prize property, amounting to the sum of \$1,672 69, that the costs and expenses above mentioned should be paid from that fund, and the balance, if any, be transferred to the treasury, in order that the distribution, under the decree of this court, to the captors entitled, may be made by the Navy Department of the government.

“And your commissioner, after a careful application of the rules of distribution established by the said naval laws of the United States, to the list of the officers and crew of the schooner On-ka-hy-e, who were on board of the said vessel at the time of the capture of the barque Lawrence, reports the following detail of distribution of that portion of the prize fund which by law belongs to the captors:

“1st. To Otway H. Berryman, lieutenant and commander of the On-ka-hy-e at the time of the capture, three twentieths.

“2d. R. T. Renshaw, passed midshipman and acting master; to George Wells, lieutenant; to Alexander Robinson, assistant surgeon, each one third of four twentieths.

“3d. To Leonard Paulding, passed midshipman; A. T. Byrens, midshipman; Frank Zantzinger, captain's clerk, each one third of three twentieths and a half.

“4th. To Edward Williams, carpenter's mate; John Hopkins, quartermaster; W. B. Miller, do.; and Henry Stamworth, ship's cook, each one fourth of two twentieths and a half.

“5th. To William Thompson, ordinary seaman; Wellington Lancaster, do.; George Wilson, do.; Robert Wilson, seaman; Charles

Smith, 2d do. ; Richard Mintough, ordinary seaman ; William Howard, do. ; Thomas Moore, do. ; Joseph Webster, do. ; Bradford Potter do. ; Thomas H. Disney, seaman ; James Wilson, do. ; John H. Wilkins, ordinary seaman ; John Bogert, landsman, William O. Coates, first class boy ; Charles Betts, ordinary seaman ; John Pearsall, do. ; Charles Smith, 3d, do. ; William Potter, seaman ; Joseph Relatic, do. ; Francis Smith, do. ; Edward Smith, do. ; Joseph Ward, do. ; John M. Kay, do. ; and to William C. Leeson, do. ; each one twenty-fifth of seven twentieths.

“ All which is respectfully submitted.

“ SMITH BARKER,
“ Commissioner.”

Filed May 16, 1851.

The commissioner in the above report expresses the following opinions :

1. That the fund for distribution should be distributed as follows : One half to the United States, and the other half to the captors.

2. That the \$18,992 in specie, *which the marshal failed to pay into the registry, but converted to his own use*, should be considered as in the treasury of the United States, subject to a decree of distribution.

On the same day on which said report was filed, the court rendered a decree as follows :

“ This cause having been submitted on the pleadings and testimony and the report of Smith Barker, esq., counsellor at law, prize commissioner duly appointed by the court, and the same having been duly read and considered, it is ordered and decreed that the clerk of the court do pay out of the fund in the registry the costs and expenses which may yet remain unpaid in the proceedings on the original libel, together with the costs and expenses upon the libels for distribution of the proceeds of the property condemned, with the commissioner's fees herein allowed by the court, and that the balance, if any, remaining of said fund, portion of the proceeds of the said prize property, be paid into the treasury of the United States for distribution thereupon, in conformity with the report of the commissioner of prize in that behalf, as follows :

“ Of the moiety of the prize proceeds to which the captors are entitled: 1st. To Otway H. Berryman, lieutenant and commanding officer of the capturing vessel, three twentieths. 2d. To R. J. Renshaw, passed midshipman and acting master ; George Wells, lieutenant ; Alexander Robiison, assistant surgeon, each one third of four twentieths. 3d. To Leonard Paulding, passed midshipman ; A. T. Byrens, midshipman ; Frank Zantzing, captain's clerk, each one third of three twentieths and a half. 4th. To Edward Williams, carpenter's mate ; John Hopkins, quartermaster ; W. B. Miller, quartermaster ; Henry Stamworth, ship's cook, each one fourth of two twentieths and a half. 5th. To William Thompson, ordinary seaman ; Wellington Lancaster, do. ; George Wilson, do. ; Richard Mintough, do. ; William Howard, do. ; Thomas Moore, do. ; Joseph Wilson, do. ; Bradford Potter, do. ; Charles Betts, do. ; John Pearsall, do. ; Charles Smith, 3d, do. ; Robert Wilson, do. ; Charles Smith, 2d, do. ; James

Wilson, do. ; Thomas H. Disney, do. ; John Retalic, do. ; William Potter, do. ; Francis Smith, do. ; Edward Smith, do. ; Joseph Ward, do. ; John McKay, do. ; William C. Leeson, do. ; John Bogert, landsman, do. ; William O. Coles, first class boy ; John H. Wilkins, ordinary seaman, each one twenty-fifth of seven twentieths.

“And it is further ordered, that the prize commissioner herein be allowed and paid, as his commission in the premises, three per cent. upon the amount of property and its proceeds condemned by the decree of the court.”

The first point decided by the majority of this Court is, that the district court of the United States confirmed, substantially, the report of the commissioner, (Barker.) I differ from the Court on that point. That this matter may be well understood, I have copied into this opinion both the report of the commissioner and the decree of the district court.—(See the transcript of the record of the district court filed with the papers in this Court.)

The report of the commissioner says: That the specie, \$18,992, [which, by the defalcation of Moore, the marshal, was not paid into the registry of the court, nor into the treasury of the United States,] ought to be considered as in the treasury of the United States, and ought to be paid therefrom to the captors in accordance with a decree of distribution to be rendered by the court. The same report also says, that there was a sum of \$20,664 subject to distribution.

Now, I think it is clear that the decree of distribution, rendered by the district court, does not confirm, either in form or substance, those erroneous opinions of the commissioner.

It will be recollected that, as before stated, the Lawrence and cargo were sold by Tallmadge, the successor of the defaulting marshal, for \$4,720 07, which sum Tallmadge, as marshal, paid into the registry of the court. *That was the only money arising from the prize that was ever paid into the registry.*

The decree of the district court, and which is hereinbefore copied, is substantially as follows: It is ordered and decreed that the clerk pay, out of the fund in the registry, (that is, as I understand it, out of the \$4,720 07,) the costs * * * * *; and that the balance, if any, remaining of said fund (that is, as I understand it, of the \$4,720 07) * * * * * be paid into the treasury of the United States for distribution thereupon, in conformity with the report of the commissioner of prize in that behalf, as follows: Of the moiety of the prize proceeds, &c.

I will not dwell upon this matter. The decree does not, in the remotest manner, countenance the erroneous opinion of the commissioner, that the \$18,992, conveyed by the marshal (Moore) to his own use, ought to be considered to be in the treasury of the United States for distribution. Nor does the decree sanction the erroneous statement of the commissioner, that there was the sum of \$20,664 69 subject to distribution. All the decree does is merely to order, that, after deducting the costs and expenses from the \$4,720 07, paid into the registry by Tallmadge, the balance should be paid by the clerk into the treasury of the United States for distribution, which balance was \$1,672 69, less the subsequent expenses.

The majority of the Court also decides, that the district court of the United States had no jurisdiction to render the judgment of distribution.

I shall not stop to inquire whether the district court had such jurisdiction or not. It is a question of no importance in this case. The sum to be distributed, according to the facts and the order of the Court, was only \$1,672 69; and it does not even appear that that small sum was ever paid into the treasury of the United States.

There is an act of Congress, approved March 3, 1849, as follows:

“That from and after the passage of this act all prize money arising from captures made by the vessels of the navy of the United States, received by the marshal who shall make sale of such prizes, shall, within sixty days after such sale, deposit the net proceeds, after paying all charges, as now provided by law, into the treasury of the United States; and all money now in the hands of prize agents shall also be deposited in the treasury, to be distributed as now provided by law; such part thereof as may belong to the officers and crews of the vessels of the navy, shall be paid to them under the direction of the Secretary of the Navy; and the law authorizing the appointment of prize agents is hereby repealed.”—(9th Stat. at Large, p. 378.)

Now admitting, for argument's sake, that this act of Congress, as the claimants contend, takes from the district court the authority of saying how prize money shall be distributed, and gives that power to the Secretary of the Navy, I am at a loss to know how the Court of Claims has anything to do with the subject. If the district courts of the United States are divested of jurisdiction in such cases, because the act of 1849 gives the jurisdiction to the Secretary of the Navy, the same act, for the same reason, excludes the Court of Claims of any jurisdiction over the matter. The Court of Claims is a court of limited jurisdiction, and can take no cognizance of any matter which, by law, is referred to another tribunal.

Again, there is no liability of the United States in these cases of prize, except for the payment, to the parties entitled, of the prize money *actually paid into the treasury*. Now, there is no allegation in the petition of the claimants, nor is there any evidence, that any part of the prize money in question has been received by the United States, or been paid into their treasury. The decision of the majority of the Court is against the government for the sum of \$20,664 69. That sum is made up of two items, namely, the \$18,992, which the marshal (Moore) converted to his own use, and of the \$1,672 69, the balance of the proceeds of the sale of the *Lawrence* and cargo. As to the item of \$18,992, it is impossible, in my opinion, to make the government liable for that. No part of that money, *owing to the marshal's defalcation*, ever reached the registry of the court, or the treasury of the United States. If the government is liable for that large sum embezzled by the marshal, it is because there is an obligation on the part of the government to save all persons harmless against the official misconduct of its ministerial officers. I recognize no such principle. Judge Story takes the correct view of this subject. The following is his language: “In the next place, as to the liability of

public agents for torts or wrongs done in the course of their agency, it is plain that the government itself is not responsible for the misfeasances, or wrongs, or negligencies, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guaranty to any persons the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests; and indeed, laches are never imputable to the government."—(Story on Agency, sec. 319.) The claimants are the losers either of the whole or of the one half of the \$18,992. The remedy, if any, for such loss, is not against the United States, but against the defaulting marshal (Moore) and his sureties, on their bond, or against the marshal alone, or against any other person to whose default the loss can be traced. If there is no such remedy, that is no reason that the government should pay over money which it never received.

With regard to the other item of \$1,672 69, there is no allegation in the petition, nor is there any proof, as before said, of its payment into the treasury of the United States. It is true, the district court ordered that balance, less the subsequent expenses, to be paid into the treasury; but that is the last we hear of it. Were we even to suppose that the clerk complied with the order, and paid said small balance into the treasury, we should be also bound to suppose, at the same time, that the money was paid over by the proper department to the persons entitled to it. But we have no right to indulge in suppositions on the subject. If the money was paid into the treasury the claimants should show it.

The claimants, in my opinion, have no right against the government to either of the items which make up their large claim of \$20,664 69; nor have they any right against the government to any part of that claim. A sufficient reason for that opinion, were there no other, is, *that there is no proof that a single dollar of said money was ever paid into the treasury of the United States.*

For the foregoing reasons, I dissent from the judgment of the Court in this case.