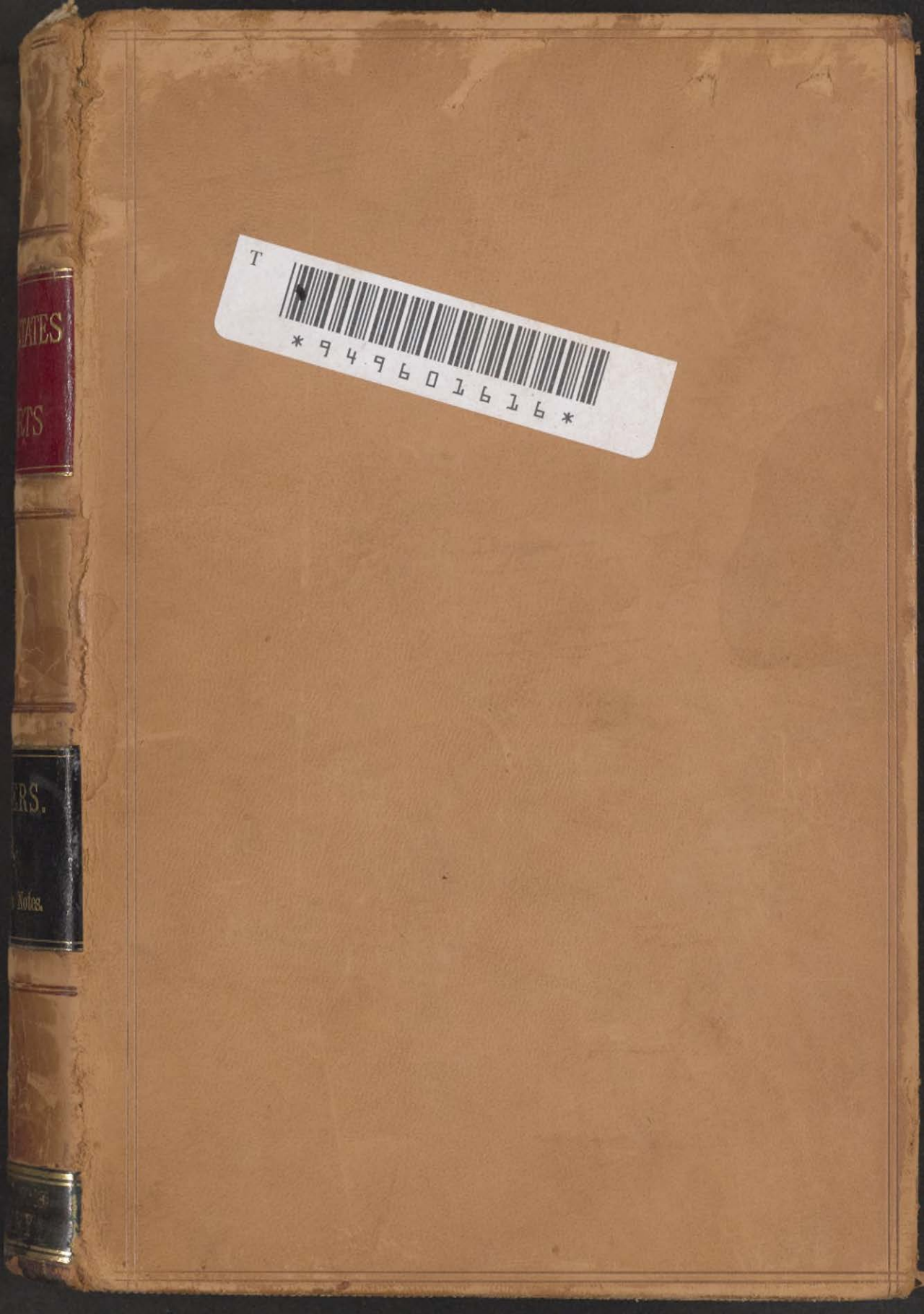
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REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

JANUARY TERM 1834.

By RICHARD PETERS,

COUNSELLOR AT LAW, AND REPORTER OF THE SUPREME COURT OF THE UNITED STATES.

VOL. VIII.

THIRD EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE PERIOD OF THESE REPORTS.

Hon. JOHN MARSHALL, Chief Justice.

" WILLIAM JOHNSON,
" GABRIEL DUVALL,
" JOSEPH STORY,
" SMITH THOMPSON,
" JOHN MCLEAN,
" HENRY BALDWIN,

} Associate Justices.

BENJAMIN F. BUTLER, ESQ., Attorney-General.

RICHARD PETERS, Reporter.

WILLIAM T. CARROLL, Clerk.

HENRY ASHTON, Marshal.

ALEXANDER HUNTER, Marshal.

Mr. Justice JOHNSON was absent, from indisposition, during the whole term. Mr. Justice DUVALL was prevented attending the court until some time after the commencement of the term. HENRY ASHTON, Marshal, died during the term.

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CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1834.

WALTER DUNN *et al.*, Appellants, *v.* HENRY CLARKE *et al.*

Jurisdiction.

The complainants filed their bill in the circuit court of Ohio, praying for an injunction to a judgment in an ejectment, and for a conveyance of the premises; all the complainants were residents in the state of Ohio, and so were the defendants; the judgment was obtained in the circuit court by G., a citizen of Virginia, and the defendant Clarke held the land recovered, under the will of G., in trust.

No doubt is entertained, that jurisdiction may be sustained, so far as to stay execution at law against D.; he is the representative of Graham, and although he is a citizen of Ohio, yet this fact, under the circumstances, will not deprive this court of an equitable control over the judgment; but beyond this, the decree of this court cannot extend.[1]

Of the action at law, the circuit court had jurisdiction, and no change in the residence or condition of the parties can take away a jurisdiction which has once attached. If G. had lived, the circuit court might have issued an injunction to his judgment at law, without a personal service of process, except on his counsel; and as D. is his representative, the court may do the same thing, as against him. The injunction bill is not considered an original bill between the same parties, as at law; but, if other parties are made in the bill, and different interests involved, it must be considered, to that *extent at least, an original bill; and the jurisdiction of [*2
the circuit court must depend upon the citizenship of the parties.

Several persons are made defendants who were not parties or privies to the suit at law, and no jurisdiction as to them can be exercised, by this or the circuit court; but as there appear to be matters of equity in the case, which may be investigated by a state court, it would be reasonable and just, to stay all proceedings on the judgment, until the complainants shall have time to seek relief from a state court.

APPEAL from the Circuit Court of Ohio. This case was submitted to the court as a question whether the court had jurisdiction in the same; and was also argued at large upon the merits and the law, by *Stanberry* and *Ewing*, for the appellants; and by *Corwin*, for the appellees.

The only question decided by the court was upon the jurisdiction; and the arguments on the law and facts of the case are, therefore, necessarily, omitted.

---

[1] S. P. Freeman *v.* Howe, 24 How. 451; Dunlap *v.* Stetson, 4 Mason 349; St. Luke's Hospital *v.* Barclay, 3 Bl. C. C. 250; Jones *v.* Andrews, 10 Wall. 327; Williams *v.* Byrne, Hempst. 472.

McLean, Justice, delivered the opinion of the court.—This suit was brought into this court, by an appeal from the decree of the circuit court of the United States for the district of Ohio. The complainants in the court below filed their bill praying for an injunction to a judgment recovered against them in an action of ejectment, and to obtain a decree for a conveyance of the land in controversy. All the complainants are residents of the state of Ohio, and so are the defendants. The judgment at law was obtained by Graham, a citizen of Virginia, but who has since deceased; and the defendant, Walter Dunn, holds the land recovered, in trust, under the will of Graham. On this state of facts, a question is raised, whether this court has jurisdiction of the cause. This question seems not to have been made in the circuit court.

No doubt is entertained by the court, that jurisdiction of the case may be sustained, so far as to stay execution on the judgment at law against Dunn. He is the representative of Graham; and although he is a citizen of Ohio, yet this fact, under the circumstances, will not deprive this court of
*3] an equitable control over the judgment. *But beyond this, the decree of this court cannot extend.

Of the action at law, the circuit court had jurisdiction; and no change in the residence or condition of the parties can take away a jurisdiction which has once attached. If Graham had lived, the circuit court might have issued an injunction to his judgment at law, without a personal service of process, except on his counsel; and as Dunn is his representative, the court may do the same thing, as against him. The injunction bill is not considered an original bill between the same parties, as at law: but if other parties are made in the bill, and different interests involved, it must be considered, to that extent at least, an original bill; and the jurisdiction of the circuit court must depend upon the citizenship of the parties.

In the present case, several persons are made defendants who were not parties or privies to the suit at law, and no jurisdiction as to them can be exercised, by this or the circuit court. But, as there appear to be matters of equity in the case, which may be investigated by a state court, this court think it would be reasonable and just, to stay all proceedings on the judgment, until the complainants shall have time to seek relief from a state court. And the court direct that all proceedings be thus stayed, and that the decree of the circuit court be modified so as to conform to this view of the case.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Ohio, and was argued by counsel: On consideration whereof, it is the opinion of this court, that in the present case several persons are made defendants who were not parties or privies to the suit at law, and that no jurisdiction can be exercised by this or the circuit court; but as there appear to be matters of equity in the case, which may be investigated by a state court, this court think it would be reasonable and just, to stay all proceedings on the judgment, until the complainants shall have time to seek relief from a state court, and they so order and decree. And the court further order, that the decree of the circuit court be reformed, so as to conform to the opinion of this court.

*John Stratton, Appellant, *v.* Leonard Jarvis and C. H. H. Brown, Appellees.

Salvage.—Appeal.

A libel was filed in the district court of Maryland, for a salvage service performed by the libellant, the master and owner of the sloop Liberty, and by his crew, in saving certain goods and merchandises on board of the brig Spark, while aground on the bar at Thomas's Point in the Chesapeake Bay; the goods were owned by a number of persons, in several and distinct rights; and a general claim and answer was interposed in behalf of all of them, by Jarvis & Brown (the owners of a part of them) without naming who, in particular, the owners were, or distinguishing their separate proprietary interests.

This proceeding was doubtless irregular in both respects; Jarvis & Brown had no authority, merely as co-shippers, to interpose any claim for other shippers with whom they had no privity of interest or consignment: and several claims should have been interposed by the several owners, or by other persons authorized to act for them in the premises; each intervening in his own name for his proprietary interest, and specifying it. If any owner should not appear to claim any particular parcel of the property, the habit of courts of admiralty is, to retain such property, or its proceeds, after deducting the salvage, until a claim is made, or a year and a day have elapsed from the time of the institution of the proceedings. And when separate claims are interposed, although the libel is joint against the whole property, each claim is treated as a distinct and independent proceeding, in the nature of a several suit, upon which there may be a several independent hearing, decree and appeal. This is very familiar in practice, in prize causes and seizures *in rem* for forfeitures; and is equally applicable to all other proceedings *in rem*, whenever there are distinct and independent claimants.

The district court decreed a salvage of one-fifth of the gross proceeds of the sales of the goods and merchandises, and directed the same to be sold accordingly; the salvage thus decreed was afterwards ascertained, upon the sales, to be in the aggregate, $2782.38; but no formal apportionment thereof was made. From this decree, an appeal was interposed, in behalf of all the owners of the goods and merchandises, to the circuit court; but no appeal was interposed by the libellant; the consequence is, that the decree of the district court is conclusive upon him as to the amount of salvage in his favor; he cannot, in the appellate court, claim anything beyond that amount; since he has not, by any appeal on his part, controverted its sufficiency.

Although no apportionment of the salvage among the various claimants was formally directed to be made, by any interlocutory order of the district court, an apportionment appears to have been in fact made, under its authority; a schedule is found in the record, containing the names of all the owners and claimants, the gross sales of their property, and the amount of salvage apportioned upon each of them respectively; by this schedule, the highest *salvage [*5
chargeable on any distinct claimant is $906.17, and the lowest $47.60, the latter sum being below the amount for which an appeal, by the act of 3d of March, 1803, ch. 93, is allowed from a decree of the district court in admiralty and maritime causes.

In the appeal here, as in that from the district court, the case of each claimant having a separate interest, must be treated as a separate appeal, *pro interesse suo*, from the decree, so far as it regards that interest; and the salvage chargeable on him constitutes the whole matter in dispute between him and the libellants; with the fate of the other claims, however disposed of, he has and can have nothing to do. It is true, that the salvage service was in one sense entire; but it certainly cannot be deemed entire for the purpose of founding a right against all the claimants jointly, so as to make them all jointly responsible for the whole salvage; on the contrary, each claimant is responsible only for the salvage properly due and chargeable on the gross proceeds or sales of his own property, *pro rata*; it would otherwise follow, that the property of one claimant might be made chargeable with the payment of the whole salvage; which would be against the clearest principles of law on this subject. The district and circuit courts manifestly acted upon this view of the matter; and their decrees would be utterly unintelligible upon any other; their decrees, respectively, in giving a certain proportion of the gross sales must necessarily apportion that amount *pro rata* upon the whole proceeds, according to the distinct interests of each claimant. This court has no jurisdiction to entertain the present appeal, in regard to any of the claimants, and the cause must for this reason be dismissed; the district court, as a court of original jurisdiction, has general jurisdiction of all causes of admiralty and maritime jurisdiction; without reference to the sum or value of the matter in

controversy; but the appellate jurisdiction of this court and of the circuit courts, depend upon the sum or value of the matter in dispute between the parties, having independent interests.[1]

APPEAL from the Circuit Court of Maryland. In the district court of the United States for the district of Maryland, a libel was filed by the appellant, for salvage, against several packages of merchandise of the invoice value of $13,641.95, the property of fifteen consignees, alleged to have been saved from the brig Spark, in the Chesapeake Bay; the vessel having been on a voyage from New York to Baltimore, and having struck on Thomas's Point, in the bay, on the 11th of March 1831. The libellant was master of the sloop Liberty, a small vessel which took from the Spark the merchandise stated to have been saved; he having been employed for
*6] the purpose, in *Annapolis, by the master of the Spark, who, after she was on shore, went there to obtain vessels in which to discharge the carge.

The libel alleged, that the contract under which the Liberty was employed for a stipulated compensation, was rescinded by the owners of the Spark, who had repaired to her from Baltimore, after hearing of her misfortune; they declaring they would not be responsible for the payment of the sum stipulated, but that they "abandoned the goods;" and the claim for hire having thus been converted into a case of salvage. The answer of the appellees, the owners of the merchandise, denied the claim of the libellant to salvage, and relied upon the agreement for a stipulated compensation as fixed upon by the master of the Spark, the amount of which was offered to be paid to the libellant, and was by him refused. The answer also denied, that the cargo of the Spark was in danger of loss; and that services of a meritorious character, upon which a claim for salvage would rest, had been performed by the libellant.

The district court allowed, as a salvage, twenty per cent., which, on appeal by the appellees, the circuit court reduced to five per cent., on the gross proceeds of the goods; from which decree of the circuit court the libellant appealed.

In the circuit court the following agreement was entered into:

"List of owners.—Patterson & Duncan; J. B. Danford; Chamberlin & Caldwell; William B. Keys & Co.; Baltzell & Davidson; Mummey & Meredith; John Armstrong & Son; William M. Ellicott & Co.; Sackett & Shannon; Baltzell & Dalrymple; Peabody, Riggs & Co.; Bancroft & Peck; Lawrence & Anderson; S. & J. B. Ford; Jarvis & Brown.

"List of consignees.—Joseph Taylor & Son; John T. Barr; B. & Davidson; M. & Meredith; C. F. Pochon & Co.; Ellicott & Co.; S. & Shannon; B. & D.; N. F. Williams; P. R. & Co.; B. & Peck; E. Eichelberger & Co.; Talbot Jones & Co.; H. & W. Crawford; J. & B.; Morrison & Egerton.

"It is agreed, that separate appeals be filed in this case for each of the owners' as specified in the foregoing list, and that the cause be consid-
*7] ered and treated as if such separate appeals were filed, and that none of the appellants shall have any privileges *or advantages which

[1] Spear *v.* Place, 11 How. 522; S. P. Rich *v.* Lambert, 12 Id. 347; Clifton *v.* Sheldon, 23 Id. 481.

would not appertain to them, if such appeal were a separate one. (Signed by the proctors of the respondents and appellants.)

Nov. 18, 1831."

The salvage was apportioned among the owners of the property saved as follows :

Owners.	Consignees.	Amount of goods, saved.	Amount of salvage.
Patterson & Duncan	Joseph Taylor & Son	$493 12	$98 62
J. B. Danforth	Same	357 82	71 56
Chamberlin & Caldwell	Same	400 00	80 00
Wm. B. Keys & Co.	John T. Barr	1471 65	294 33
Baltzell & Davidson	B. & Davidson	757 42	151 48
Mummey & Meredith	M. & M.	361 60	72 32
John Armstrong & Son	C. F. Pochon & Co.	238 00	47 60
Wm. M. Ellicott & Co.	Wm. M. E. & Co.	862 36	172 47
Sackett & Shannon	S. & S.	501 60	100 32
Baltzell & Dalrymple	B. & D.	2000 00	400 00
Peabody, Riggs & Co.	P., R. & Co.	409 50	81 00
Bancroft & Peck	B. & P.	360 19	72 04
Lawrence & Anderson	Erskine Eichelberger & Co.	424 85	84 97
S. & J. B. Ford	H. & W. Crawford	473 00	94 60
Jarvis & Brown	J. & B.	4530 84	906 17
		$13,641 95	$2728 38

The case was argued by *Wirt*, for the appellant ; and by *Mayer*, for the appellees.

As the court gave no opinion on any other point but that of jurisdiction, the arguments upon the merits, and on other questions presented by the counsel, are omitted.

Mayer, for the appellees, contended, that the supreme court had not jurisdiction in the case, as the sum in controversy was not sufficient to authorize an appeal from the circuit court to this court. The property saved consisted of merchandise in separate parcels, belonging to different consignees ; but one parcel exceeded $2000 in value.

By the agreement of the counsel, the appeals were to be separate ; and the case rests upon the principles decided by this court in the case of *The Warren*, 6 Pet. 143. The interests of the owners of the merchandise were not consolidated. The consolidation, by the general decree, is unimportant.

*As to the single parcel of goods exceeding $2000 in value, the inquiry is not, what was the value of the goods, but what amount of [*8
salvage should be allowed. The claim of the libellant is not presented to this court beyond the salvage on all the goods saved, as given by the district court ; and that amounted to but $800. Although the case may stand before this court *de novo*, yet this relates only to the matter in the district court, from the decree of which court the libellant did not appeal.

Wirt, in reply, contended, that in case of salvage, it never had been decided, that the separate interests and rights of the owners of the property saved would be looked into. The saving is an aggregate conjoint act ; and the amount of the whole goods saved, all of which are subjected to salvage,

should regulate the jurisdiction. In any other view, a large cargo might be so split up into different ownerships, as even to take away the jurisdiction of the district court. The decree of the district and circuit courts was for a gross sum, to be paid out of the total amount of the cargo; thus both courts took jurisdiction over the whole property saved, as an amount in gross, which was far beyond the sum required to give jurisdiction. The agreement in the circuit court has no action on the appeal from that court; nor does the case of *The Warren* apply, as there, the amount claimed by each of the parties was fixed by the decree of the court below.

Story, Justice, delivered the opinion of the court.—This is the case of a libel for a salvage service performed by the libellant, the master and owner of the sloop Liberty, and by his crew, in saving certain goods and merchandises on board of the brig Spark, while aground on the bar at Thomas's Point in the Chesapeake Bay. The goods were owned by a number of persons, in several and distinct rights; and a general claim and answer was interposed in behalf of all of them by Jarvis & Brown (the owners of a part of them), without naming who in particular the owners were, or distinguishing their separate proprietary interests. This proceeding was doubtless irregular in both respects. Jarvis & Brown had no authority, merely as co-shippers, to interpose any claim for other shippers with *whom *9] they had no privity of interest or consignment; and several claims should have been interposed by the several owners, or by other persons authorized to act for them in the premises, each intervening, in his own name, for his proprietary interest, and specifying it. If any owner should not appear to claim any particular parcel of the property, the habit of courts of admiralty is, to retain such property, or its proceeds, after deducting the salvage, until a claim if made, or a year and a day have elapsed from the time of the institution of the proceedings. And when separate claims are interposed, although the libel is joint against the whole property, each claim is treated as a distinct and independent proceeding, in the nature of a several suit, upon which there may be a several independent hearing, decree and appeal. This is very familiar in practice, in prize causes, and seizures *in rem* for forfeitures; and it is equally applicable to all other proceedings *in rem*, whenever there are distinct and independent claimants. The irregularity (such as it is) in the present case, is however of no importance, as the parties, by their agreement of record, have agreed that separate appeals should be filed from the decree of the district court for each of the owners, as specified in a list subjoined thereto, and that the cause should be considered and treated as if such separate appeals were filed, and that none of the appellants should have any privileges or advantages, which would not appertain to them if such appeal were a separate one. This agreement, in legal effect, creates the very severance, which the original claim and answer ought to have propounded in due form.

At the trial, in the district court, upon the allegations and proofs in the cause, there was no controversy as to the salvage service; and the case was reduced to the mere consideration of the amount to be awarded as salvage. The district court decreed a salvage of one-fifth of the gross proceeds of the sales of the goods and merchandises, and directed the same to be sold accordingly. The salvage thus decreed was afterwards ascertained, upon the sales

to be in the aggregate $2728.38 ; but no formal apportionment thereof was made. From this decree, an appeal was interposed in behalf of all the owners of the goods and merchandises, to the circuit court ; but no appeal was interposed by the libellant. *The consequence is, that the decree of the district court is conclusive upon him, to the amount of salvage in his favor. He cannot, in the appellate court, claim anything beyond that amount, since he has not, by any appeal on his part, controverted its sufficiency. Although no apportionment of the salvage among the various claimants was formally directed to be made, by an interlocutory order of the district court, an apportionment appears to have been in fact made under its authority. A schedule is found in the record, containing the names of all the owners and claimants, the gross sales of their property, and the amount of salvage apportioned upon each of them respectively. By this schedule, the highest salvage chargeable on any district claimant is $906.17 and the lowest $47.60, the latter sum being below the amount for which an appeal, by the act of the 3d of March 1803, ch. 93, is allowed from a decree of the district court in admiralty and maritime causes. Upon an appeal, the circuit court reversed the decree of the district court, and awarded one-twentieth part (instead of one-fifth) of the gross sales as salvage ; and from this latter decree, the libellant has appealed to this court. [*10

The first question is, whether this court has jurisdiction to entertain the appeal, the aggregate amount of the whole salvage exceeding the sum of $2000 ; but that which is due or payable by any distinct claimant being very far short of that sum. The argument in favor of the jurisdiction is, that the salvage service is entire, and the decree is for a specified proportion or aliquot part of the whole of the gross sales ; and therefore, it is chargeable upon the proceeds as an entirety, and not upon the separate parcels thereof, according to the interests of the separate owners. We are of a different opinion. In the appeal here, as in that from the district court, the case of each claimant having a separate interest must be treated as a separate appeal, *pro interesse suo*, from the decree, so far as it regards that interest ; and the salvage chargeable on him constitutes the whole matter in dispute between him and the libellant : with the fate of the other claims, however disposed of, he has and can have nothing to do. It is true, that the salvage service was in one sense entire ; but it certainly *cannot be deemed entire, for the purpose of founding a right against all the claimants jointly, so as to make them all jointly responsible for the whole salvage. On the contrary, each claimant is responsible only for the salvage properly due and chargeable on the gross proceeds or sales of his own property *pro rata*. It would otherwise follow, that the property of one claimant might be made chargeable with the payment of the whole salvage, which would be against the clearest principles of law on this subject. The district and circuit courts manifestly acted upon this view of the matter ; and their decrees would be utterly unintelligible upon any other. Their decrees, respectively, in giving a certain proportion of the gross sales, must necessarily apportion that amount, *pro rata*, upon the whole proceeds, according to the distinct interests of each claimant. We are, therefore, of opinion, that we have no jurisdiction to entertain the present appeal in regard to any of the claimants ; and the cause must for this reason be dismissed. The district court, as a court of original jurisdiction, has general [*11

jurisdiction of all causes of admiralty and maritime jurisdiction, without reference to the sum or value of the matter in controversy. But the appellate jurisdiction of the court and of the circuit courts depends upon the sum or value of the matter in dispute between the parties, having independent interests.

Appeal dismissed.

*12] *Bank of the Metropolis, Plaintiff in error, *v.* William Jones.

Competency of witnesses.—Authority of bank-officers.

In the case of the Bank of the United States *v.* Dunn, 6 Pet. 51, this court decided, that a subsequent indorser was not competent to prove facts which would tend to discharge the prior indorser from the responsibility of his indorsement; by the same rule, the maker of the note is equally incompetent to prove facts which tend to discharge the indorser.

The officers of a bank have no authority, as agents of the bank, to bind it, by assurances which would release the parties to a note from their obligations.

The principles of the case of the Bank of the United States *v.* Dunn, 6 Pet. 51, affirmed.

Error to the Circuit Court of the district of Columbia, and county of Washington.

This was an action on a promissory note, made by Betty H. Blake, executrix of J. H. Blake, for the sum of $5200, on the 27th of March 1822, in favor of the defendant, and by him indorsed to plaintiffs. The defendant pleaded *non assumpsit*, and the statute of limitation. On the trial of the cause before the circuit court, the following bill of exceptions was signed:

"Be it remembered, that on the trial of the above cause, the plaintiff, in order to sustain the issue, gave in evidence the following promissory note, on which the action was brought:

$5200. "Washington City, March 27th, 1822.

Sixty days after date, I promise to pay to Dr. William Jones, or order, five thousand two hundred dollars, for value received, negotiable at the Bank of the Metropolis. Betty H. Blake,

Executrix of J. H. Blake."

"16th May 1825.—I do hereby admit that a part of the above note is due, and that I am bound to pay whatever balance thereof is due, as far as I was originally bound as indorser. William Jones."

Indorsed—William Jones.

"And the defendant admitted the indorsement thereon, as well as the memorandum on the face thereof, to be in his *handwriting; and
*13] the plaintiff further proved, that said note was regularly protested for non-payment, and notice thereof duly given to the defendant, and the defendant waived, before the jury, the defence upon the statute of limitation.

"Whereupon, the defendant, to prove the issue on his part, under the plea of *non assumpsit*, produced Mrs. Betty H. Blake, the maker of said note, to whom a release was executed by defendant, exonerating her from any responsibility for the costs in this suit, to the form of which release no objection was made. The plaintiff objected to the competency of Mrs. Betty H. Blake to testify to any matters impeaching the original validity of the

said note, or of said indorsement, but the court overruled the exception, and permitted the said witness to be sworn and examined."

The evidence of Mrs. Blake was the following: "That, at the time of the death of her husband, Doctor James H. Blake, in the summer of 1819, there were several notes made by him running in the Bank of the Metropolis, and that the deceased was also indebted to other persons in various sums. That, when the notary came with one of said notes to procure payment from her, she, being the sole devisee and executrix of the last will and testament of said deceased, objected to a renewal. Witness sent to General Van Ness, who was at the time the president of the Bank of the Metropolis, and whom her deceased husband, on his death-bed, had recommended to her to consult. Witness informed him, that she did not wish to renew the notes, but he advised her to amalgamate the notes in bank. She informed him, that she could not ask any one to indorse for her; that she would prefer having the property sold, and the debts paid. She never heard General Van Ness say anything upon the subject of the indorsements by the defendant, until long after they were made. Her conversation with General Van Ness was in relation to the indorsement by her son James; he was consulted by her, as her confidential friend and adviser. He advised her against selling the property, as it was very valuable, and would increase daily in value; that witness had better procure some friend to indorse for her; that the security was so valuable, the indorser would incur no responsibility. He suggested her son James as an indorser. She said, he was not of age, and that she did *not wish him to commence the world incumbered with liabilities. He said, it was immaterial; that the security was so valuable, he [*14 could incur no risk. Under this impression, and in consequence of this conversation, she procured her son to indorse said note, and he continued on the note, until he left Washington in the autumn of 1820; and she then mentioned to Dr. Jones, the defendant, what General Van Ness had advised and informed her; who, in consequence, became the indorser, and so continued, upon the renewal of said notes, until the date of the note in question. She gave a deed of trust of certain property of James H. Blake, to secure the Metropolis Bank the amount of the note, which she has been advised she had no authority to give, because she was not authorized to give a preference to the Bank of the Metropolis over other creditors, and she has repeatedly mentioned this circumstance."

The counsel for the plaintiff moved the court to instruct the jury, that this evidence was incompetent upon the trial of the issue; but the court overruled the motion; and instructed the jury, that the evidence was competent and proper evidence for their consideration on the trial. To this overruling, exception was taken, and the plaintiffs prosecuted this writ of error.

The case was argued by *Coxe*, for the plaintiff in error; no counsel appeared for the defendant.

Coxe submitted to the court, that the principle of evidence involved in the case, was determined in the case of the *Bank of United States* v. *Dunn*, 6 Pet. 51. The whole question is, whether any testimony can be given by a party to a note to invalidate it.

McLean, Justice, delivered the opinion of the court.—This cause was brought into this court, by writ of error to the circuit court of Washington county, in the district of Columbia. In that court, an action was commenced by the Bank of the Metropolis against the defendant, on a promissory note made by Betty H. Blake, for the sum of $5200, dated the 27th of
*15] March 1822, payable in sixty *days and negotiable at the Bank of the Metropolis, which note was indorsed by the defendant to the bank. The defendant pleaded *non assumpsit*, and the statute of limitations; but on trial waived the latter plea.

The plaintiff proved the indorsement of the defendant, that the note was regularly protested for non-payment, and due notice given.

On the trial, Betty H. Blake, the maker of the note, was offered as a witness, after the defendant had executed to her a release from any responsibility on account of the costs of the suit, and the court permitted her to be sworn. Among other things, this witness gave in evidence to the jury, "that at the time of the death of her husband, Doctor James H. Blake, in the summer of 1819, there were several notes made by him, running in the Bank of the Metropolis, and that he was also indebted to other persons in various sums. That when the notary came with one of said notes, to procure payment from her, she being the sole devisee and executrix of the last will and testament of said deceased, she objected to a renewal. Witness sent to General Van Ness, who was at the time the president of the Bank of the Metropolis, and whom her deceased husband, on his death-bed, recommended her to consult. She informed him, that she did not wish to renew the notes, but he advised her to amalgamate them in bank; that she informed him, that she could not ask any one to indorse for her, and would prefer having the property sold and the debts paid. General Van Ness advised her against selling the property, as it was very valuable, and would increase daily in value, and that she had better procure some friend to indorse for her; that the indorser would incur no responsibility, as the property was so valuable. In pursuance of this advice, she procured the indorsement of her son James, who was under age, and afterwards, when he had left the city of Washington, she procured the defendant to indorse for her, on stating to him the advice and information given to her by General Van Ness." Whereupon, the counsel for the plaintiffs moved the court to overrule said evidence, and to instruct the jury, that it was incompetent upon the trial of the said issue; but the court refused to do so, and they
*16] instructed the jury, that the said evidence was *competent and proper for their consideration, to which opinion and instructions of the court, a bill of exceptions was taken.

The principle involved in this case is substantially the same that was decided by this court in the case of the *Bank of United States*, v. *Dunn*, 6 Pet. 51. In that case, the court said, "it is a well-settled principle, that no person who is a party to a negotiable instrument, shall be permitted, by his own testimony, to invalidate it;" and this doctrine is sustained by reason and authority. If an individual whose name appears upon the face of a negotiable instrument, either as drawer, indorser or acceptor, shall be a competent witness to prove facts or circumstances which lessen or destroy its value, before or at the time he gives it currency, the credit of commercial paper could not be sustained. The rule laid down in 1 T. R. 296, on this

subject is a sound one; and was sanctioned by this court in the case above cited.

On the part of the defendant in error, it is contended, that the witness objected to was not the only witness in the case; and that her testimony was competent so far as it went. That the court were not called on to decide, whether the facts stated by the witness were sufficient in law to discharge the defendant from his responsibility; but whether they conduced to prove an imposition practised on him by the bank, which ought to discharge him. If the testimony of the witness impaired the obligation of the note, it was inadmissible, under the rule stated; and that this was the tendency of the evidence, appears from the facts stated, and the argument just noticed. In the case cited, of the *Bank of United States* v. *Dunn*, this court decided that Carr, who was an indorser after Dunn, was not competent to prove facts which would tend to discharge Dunn from the responsibility of his indorsement. And is it not clear, by the same rule, that, in the case under consideration, the maker of the note is equally incompetent to prove facts which tend to discharge the indorser? In both cases, the discharge of the indorser was urged, on the ground, that certain statements had been made by the officers of the bank, which induced the indorser to sign the paper, under a belief that by doing so he incurred no responsibility. As the ground already stated is clear, it is unnecessary to add, *in this case, as was stated by the court in the case of Dunn, that the officers of the bank had no authority, as agents of the bank, to bind it by the assurances which they gave. [*17

The judgment of the circuit court is reversed, and the cause remanded for further proceedings.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said circuit court, for further proceedings to be had therein, according to law and justice, and in conformity to the opinion of this court.

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*James Erwin, Appellant, *v.* Hugh M. Blake, Appellee. [*18

Authority of attorney.

An attorney at law, in virtue of his general authority as such, is entitled to take out execution upon a judgment recovered by him for his client, and to procure a satisfaction thereof by a levy on lands, or otherwise, and to receive the money due on the execution; and thus to discharge the execution; and if the judgment-debtor has a right to redeem the property sold under the execution, within a particular period of time, by payment of the amount to the judgment-creditor, who has become the purchaser of the property, there is certainly strong reason to contend, that the attorney is implicitly authorized to receive the amount, and thus indirectly discharge the lien on the land; at least, if (as is asserted at the bar) this be the common course of practice in the state of Tennessee, it will furnish an unequivocal sanction for such an act.

Appeal from the Circuit Court of West Tennessee. In the circuit court, Hugh M. Blake, the appellee, filed a bill on the equity side of the court,

against James Erwin, the appellant, to enjoin further proceedings in an ejectment brought in that court, by Erwin, and to compel him to convey the legal title of the property described in the ejectment, according to the provisions of an act of the assembly of Tennessee, passed in 1830, which provides that "it shall and may be lawful for any debtor, whose interest in any real estate may be sold, under execution, at any time within two years after such sale, on payment or tender thereof to the purchaser or purchasers, or on payment or tender thereof to any one claiming under such purchase, the principal money bid at such sale, with ten per cent. interest per annum thereon, together with all such other lawful charges, if any there be, to redeem the interest that may have been sold; and upon payment or tender thereof as aforesaid, in such bank-notes as are receivable on executions, it shall be the duty of the then claimant, to reconvey said interest to said debtor, but at the cost and charge of such debtor."

The substance of the bill, answer and proofs, is stated in the decree of the circuit court, as follows:

"The complainant set forth in the bill, that he was a citizen of the state
*19] of Tennessee, and that on the 3d day of September *1824, he was seised and possessed, in his own right, of a tract of land, situate in Lincoln county, in said state, containing about 350 acres, bounded on the south by the land of Robert Case, on the north, by that of Robert Wilson, on the east, by the land of Joel Cummins, and the west, by the land of John Marr and John W. Blake; that on the said 3d day of September 1824, the same was sold by the proper officer, under an execution, founded on a decree of the chancery court, held at Columbia, rendered in favor of James Brittain, executor of the last will, &c., of Joseph Brittain, deceased, against complainant and others; that said James Brittain became the purchaser of said tract of land, at said sale, for the price of $162, and received the sheriff's deed therefor; that James Erwin, a citizen of the state of Louisiana, in the month of September 1823, obtained a judgment against complainant and others, sureties of one Brice M. Garner, for the sum of upwards of $1200; that on the 21st of August 1826, one John P. McConnell, having acquired an interest in said last-mentioned judgment, in pursuance of an arrangement with said James Erwin, and for the benefit of himself and said Erwin, redeemed said tract of land from said James Brittain, by advancing the purchase-money paid for the same by said Brittain, together with ten per cent. interest thereon, and offered to credit said judgment of said Erwin, against complainant, the sum of $1000, under the provisions of an act of assembly of the state of Tennessee, passed in the year 1820; and therefore, said James Brittain conveyed said tract of land to said Erwin. The bill further set forth, that the complainant, with a view to avail himself of the privilege of redeeming said tract of land from said Erwin, did, before the expiration of the term of two years from the date of said sheriff's sale, pay to James Fulton, the attorney and agent of said Erwin, $1276.70, including the amount advanced by said Erwin and McConnell to said Brittain; and also $1094.70 of the said judgment of said Erwin against complainant, leaving a balance due on said judgment of $223.55, which one Robert Dickson assumed to pay to said McConnell, who was interested in said judgment of said Erwin to the
*20] amount, as *complainant was informed and believed, said McConnell accepted said *assumpsit* in satisfaction of so much of said judgment.

The bill further charged, that said James Fulton was fully authorized to receive said money by said Erwin, on the application of complainant to redeem said land, and that McConnell was authorized and had a right to relieve complainant from the payment of so much of said judgment as said Dickson assumed to pay; that, nevertheless, he, said Erwin, had refused to reconvey said tract of land to complainant, although he had received said sum of money, paid to the said James Fulton, his agent, as said agent had informed complainant; but had commenced an action of ejectment in this honorable court to recover possession of the same. The bill prayed that complainant might be permitted to redeem said land, and that the legal title to the same might, by decree of the court, be divested out of the said James Erwin, and be vested in the complainant, and his heirs; and for further relief.

"The defendant admitted, in his answer, the purchase of the tract of land by Brittain, under execution, the day and year set forth in the bill, and for the price therein specified; that he had recovered a judgment against complainant, as set forth in the bill, and that McConnell had redeemed the land from James Brittain, as alleged by complainant, for his, the defendant's benefit, and that Brittain had conveyed the land to him. The defendant denied, that McConnell had any interest in the judgment obtained in the name of the defendant against complainant; but admitted, that he had sold the note, upon which said payment was founded, to McConnell; that he had received about $200 in part payment for the same, and that he had taken McConnell's note for the balance, upon which he had brought suit, and obtained a judgment, before September 1826, but alleged, that it was understood between him and McConnell, and before that time, that he, defendant, should have the benefit of the judgment against Garner and complainants, and, when paid, was to be in discharge of the judgment which defendant had obtained against McConnell. The defendant denied, that James Fulton, or any other person for him, was authorized to receive anything else than specie, or to make any arrangements in regard to the payment of the amount, necessary to be paid by complainant within two years from the *date of the sale of said land, than were implied in his instructions to the said Fulton, which he alleges were, that the whole sum should be paid in specie. Defendant denied, that he had received any money from said Blake, or any one else, in payment of his claim against said complainant, and insisted, that the provisions of the act of assembly had not been complied with, in such manner as to entitle complainant to redeem. [*21

"It appeared from the proofs in the cause, that, some short time before the 3d of September 1826, when it appeared the term had expired within which the complainant had a right to redeem the said tract of land, the defendant Erwin was in the county of Lincoln, where all the persons concerned, except himself, resided; and in the presence of Garner, the principal in the judgment recovered by Erwin against complainant, and who was also clerk of the county court of said county, directed James Fulton, Esq., who had been the attorney employed in prosecuting the suit, in which judgment had been obtained against complainant, to receive the money which might be tendered by complainant for the purpose of redeeming said tract of land, and if he thought it a case which was entitled to specie, to require the payment to be made in specie. It further appeared, that

Fulton, having business in another county, appointed one Francis Porterfield to attend to the business for him, in his absence, and instructed him to receive from complainant nothing but specie, or bank-notes at such a discount as would make them equivalent to specie. It also appeared, that Brice M. Garner was insolvent and unprincipled ; that a principal object of said Erwin in requesting Fulton to receive the money from complainant, was to prevent a fraudulent acknowledgment of payment of the redemption money by Garner, who, as clerk of the county court, had a right to receive it, in the absence of the creditor. For this reason, Fulton appeared to have been particular in his instructions to Porterfield, to prevent the payment of the money into the hands of Garner, and to see that he did not practice any fraud upon Erwin, in the county court. It further appeared, that, on the 2d day of September 1826, the complainant paid into the hands of Porterfield, under the instructions of Fulton, the sum of $900, the principal part thereof in specie, and the balance in such bank-notes, as made them equivalent to specie ; *that said Porterfield agreed to accept *22] the promise or *assumpsit* of William Husbands, the sheriff of the county, for the payment of $300, in satisfaction of so much, and that J. P. McConnell agreed, that he would look to one R. Dickson for the $200, the amount to which he alleged he was entitled out of the judgment against complainant. Porterfield, at the same time, pledged himself, that Fulton, the lawyer and agent of Erwin, would sanction the arrangement, and that the complainant should sustain no injury in consequence of it. It appeared, that Fulton, the agent, did sanction what had been done by Porterfield, in his absence, and on the 7th day of September 1826, gave complainant a receipt, in the name of said Erwin, for the sum of $1276.76, and at the same time, recognised the right of said McConnell to control so much of said judgment as he claimed an interest in. It further appeared to the court, by the testimony of the witness present, that when Erwin requested Fulton to attend to the receipt of the redemption money, he had given him full authority to act for him, and that whatever he might do, would be acquiesced in. It also appeared, that Erwin, by his letter of the 8th of September 1826, to Fulton, written after he had been informed, by a letter from McConnell, of many of the most material particulars of the arrangement of the 2d of September, admitted the authority of Fulton to bind him by anything done under his, Fulton's, instructions or authority, or by any one appointed by him and acting under his instructions. It further appeared, that McConnell continued to have an interest in the judgment obtained against complainant, up to the 2d of September 1826 ; and that he had employed counsel, and had the management of the whole business, until the instructions were given to said Fulton by Erwin, a short time before the day on which the money was paid. It also appeared, that said Erwin had notice of the appointment of said Porterfield by Fulton, to act in the matter for him, before the 2d of September 1826, and that he did not object to his appointment. It did not appear, that the complainant had any notice of the instruction of Erwin to his agent, that nothing but specie would be received. The money received by Fulton appeared to have been paid over to the agent of Erwin, but it did not appear *23] that Erwin *had ever received it. The balance of the amount he

had a right to demand, and for which Husbands became accountable, Erwin refused to receive."

The case was argued by *Hardin*, for the appellant; and by *Bell*, for the appellee.

Hardin contended, that the appellee had not complied with the requisites of the act of assembly; that he had instructed his attorney and agent to insist on the redemption money being paid in specie, and had never waived his right to be thus paid. If a waiver had taken place, it was without his authority, or that of any one who had a right to do so. He cited Sugden on Vendors, 175, 470, 472. The right to redeem, under the act of assembly, depends on conditions precedent, and must be strictly complied with. 2 Bl. Com. 111, 119.

As to the contract under which the debt arose, he said, it was made before the act of assembly authorizing the payment of debts on judgments in bank-notes was passed; and so far as the law affected such contracts, it had been decided to be unconstitutional, in Tennessee. But a part of a law may be unconstitutional, and a part not; and a party may avail himself of the part which is valid, and reject that which is void. The appellant had a right to insist on a full compliance with the act, as to redemption of the property sold under the execution, notwithstanding the unconstitutional provision as to bank-notes. The case is not like a forfeiture, but is one of an absolute sale, liable to be defeated by payment of the purchase-money, and this in money, not in bank-notes. The provision for redemption is by statute; and time was essential, and could not be dispensed with.

The whole question in the case turns on the power of Fulton, and the ratification of his acts by the appellant; he denied both, as claimed by the appellee.

Bell, for the appellee, argued, that Blake could not be called upon to pay specie. The money to redeem the land was, by the law of Tennessee, to be any money in which the *debt could be collected in bank-notes. If this part of the law was unconstitutional, the whole act was void; [*24 and there could be no right to redeem at all. The appellant must abide by the law in all its parts. The contract was not that payment should be made in specie; it was not such a contract; and the validity of the law of Tennessee, relative to payment in bank-notes, is not involved in this case; because, as Erwin claimed the benefit of the same, he was bound by all its provisions, and to accept his debt in bank-notes.

He also contended, that the evidence showed, that Fulton, the attorney of Erwin, had full authority from his principal to waive the demand of specie, and to delegate that authority to another, which he had done. Under this delegation, confirmed by Erwin, the arrangement by which the redemption took place was made and was ratified.

The deed from the sheriff is to be considered as a guarantee for the debt due on the judgment, and in the nature of a mortgage; and the right to redeem resting entirely on equitable principles, and time not being material, if compensation can be made for it, the case is with the appellee. It is not within the rule, that the condition must be performed, unless prevented by

absolute necessity. As to the powers of an attorney, he cited, 12 Ves. 282; as to equity jurisdiction, Martin 83.

Story, Justice, delivered the opinion of the court.—The principal question in the case is, whether the plaintiff, Blake, has entitled himself to a reconveyance of the land in controversy, against the judgment-creditor, Erwin; the same land having been sold upon execution, and being, by the laws of Tennessee, redeemable by the owner, at any time within two years after the sale; and that question turns upon this, whether the judgment has been, according to those laws, duly discharged, within two years, by the judgment-debtor. It is clear, from the evidence, that Fulton, as attorney of Erwin, did give a receipt discharging the whole of the claim under the judgment, amounting, on the last day, when the land was redeemable, to
*25] $1501.17; and if he either had an original authority so *to do, or his acts have since been confirmed by Erwin, then Blake is entitled to the relief sought by the bill.

It is material, in the first place, to state, that the original demand on which the judgment was rendered, was, before the suit was brought, assigned by Erwin to one McConnell; and that the suit was commenced and carried on through all its stages by Fulton, for and under the direction of McConnell, although in the name of Erwin; and the latter never interfered in the suit, until after the judgment had, by the redemption of Brittain's prior judgment, been levied, and fixed as a lien on the land. Now, it cannot be doubted, that if the assignment to McConnell was never rescinded, he alone had a right to control the judgment and the levy, and the subsequent proceedings as to the redemption by Blake. And in point of fact, he was not only conusant of, but party to, the arrangement made by Fulton with Blake, by which the judgment-claim against the land was discharged. Was then the assignment antecedently rescinded? Erwin, in his answer, affirms that it was, but the evidence in the cause does not support his averment; on the contrary, it is established by Erwin's own acknowledgment, in his letter of the 6th of September 1826, that McConnell continued to have an interest in it, until long after all these transactions; and McConnell, in his testimony, asserts his own claim in the most positive manner; so that, at most, the case cannot be judicially treated as one where there had been a total rescission of the assignment; but only subsequent negotiations, out of which other equities connected with it arose between the parties.

But, assuming that the assignment had been rescinded, still it is clear, that Erwin adopted the acts of McConnell in regard to the suit, and recognised Fulton as his attorney, in the conduct of it. He never repudiated him as his attorney, and never gave any notice to Blake that he had not as complete authority in the premises as any other attorney in the management of a suit at law. Now, it is not denied, that an attorney at law, in virtue of his general authority as such, is entitled to take out execution upon a judgment recovered by him for his client, and to procure a satisfaction thereof by a levy on lands or otherwise, and to receive the money due on the execution; and thus to discharge the execution. And if the judg-
*26] ment-debtor has a *right to redeem the property sold under the execution, within a particular period of time, by payment of the amount to the judgment-creditor who has become the purchaser of the property,

there is certainly strong reason to contend, that the attorney is impliedly authorized to receive the amount, and thus indirectly to discharge the lien on the land. At least, if (as is asserted at the bar) this be the common course of practice in the state of Tennessee, it will furnish an unequivocal sanction for such an act.

But it is not necessary, in the present case, to rely on this ground, if Erwin did, in fact, give an express general authority to Fulton to act in the premises, if he has since ratified the acts of Fulton in discharging the judgment. Some of the judges are of opinion, that the evidence in the case establishes that Erwin expressly delegated to Fulton general authority to act in the premises, and to receive the money due under the judgment, according to his own discretion ; and that the direction of Erwin to Fulton to demand the payment in specie, was not intended to operate as a positive restriction upon that discretion, but was merely a strong expression of the wishes of Erwin on the subject. Fulton, in his deposition, states, that Erwin "called upon Kincannon to bear witness, that he had appointed me his attorney in the business, and that I was authorized to receive the money upon the claim ; and that whatever I should do upon the subject, he would abide by." Kincannon fully confirms this statement, in his deposition ; and says "Mr. Erwin did call on me to bear witness, that Mr. Fulton was duly authorized to transact the whole business for him. From all that was said by Mr. Erwin, I did believe, that any course taken by Mr. Fulton would be sanctioned by him, and that he would be bound to all intents and purposes by his act." And he adds, in another place, "it was my understanding, and I thought from all that was said by Mr. Erwin, that it was so under stood by himself and all others present, that Mr. Fulton was fully authorized to act for Mr. Erwin in relation to the whole matter. Mr. Erwin did say, that he would ratify or sanction Mr. Fulton's acts, or words of that import." The conversation here detailed is a part of the same conversation between the parties, in which the direction was given by Erwin to Fulton to demand specie in payment ; and therefore, it *may properly be taken into consideration, as a qualification of that direction. [*27

Others of the judges are of opinion, that, taking the fair scope of the language of Erwin, in his letters to Fulton, after the transaction, it amounts to a ratification of the acts of Fulton. Thus, in his letter of the 8th of September 1826, written after McConnell (as it admits) had given him information of what had been done, he says, "this, of course, is not a compliance with the law, and I am induced to think, they cannot now have even a probable right to claim the land, as the deed is now in my name. They cannot claim any indulgence granted by any one except you and myself, no one else having authority to grant any, whatever you may (have) authorized others to do, in your absence, in accordance with my instructions, or yours, of course, will be adhered to by me ; but nothing more." Now, these expressions are very significant as to the extent of the original authority given to Fulton. They show that specie was not absolutely to be insisted upon, or payment at the time absolutely required ; for it is admitted, that indulgence might be granted by Fulton ; "no one else having authority to grant any." And as to the point of ratification, the language is still more direct, for it is declared, that whatever had been done in Fulton's absence, in accordance with his instructions, would be adhered to. Now, at this time,

Fulton had ratified all Porterfield's acts, and indeed, except as to the giving time for a small part of the money, Porterfield had not deviated from his original instructions. On the 9th of September, Fulton wrote to Erwin, giving him a full account of all the transactions, and why he had deviated "from the strict letter of his instructions." And he also sent to Erwin the $1305 received by him; and offered to pay him the remaining sum of $200 then due. In the reply of Erwin to this letter, on the 12th of September, he declines receiving the money, for reasons, which (he says) he will explain, when he has the pleasure to see Fulton; and adds, "my course I am sure, on explanation, will be satisfactory to you, Major Porterfield and to McConnell." But he nowhere in that letter expresses any disapprobation of the conduct of Fulton; and he does not attempt to qualify the language of his former letters, or to disavow the acts of Fulton as a breach of his
*28] *instructions. His object seems to have been, without returning the money to Fulton or to Blake, or doing any positive act, to retain the whole affair in its then state, that he might make use of any doubts as to his extinguishment of his claim, for his own advantage in other business. "The judgment" (says he) "is in my name, and I alone can control it. I am fully aware of the hold I now maintain over Garner, or rather over Blake's land, and I am determined to use it towards the security of my other claims." Under these circumstances, the evidence is deemed fairly to establish the conclusion, that the acts of Fulton were ratified by Erwin; and never were intended to be repudiated by him.

Upon these grounds, and for these reasons, it is the opinion of the court, that the plaintiff is entitled to the relief sought by his bill. But it ought not to be granted, except upon the terms, that all the money due at the time when the land was redeemed by the plaintiff, should be paid over to the debtor. The balance of $200 does not appear ever to have been paid by Dickson; and the $1305.17, for aught that appears in the record, is still in the hands of Talbert, and never has been received by Erwin. The decree of the circuit court, granting relief, must, therefore, be varied, so far as to make it dependent upon the payment of the whole $1505.17 to Erwin.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of West Tennessee, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that upon the full payment by the said Blake, of the sum of $1505.17, due on the judgment of the said Erwin against the said Blake, as in the proceedings mentioned, or so much thereof as has not been already received by the said Erwin in satisfaction thereof—the said money to be paid to the said Erwin personally, or brought into the circuit court for his use—all the estate, right, title and interest in the said tract of land, in the proceedings mentioned, which was vested in the said Erwin by the deed executed to him by James Brittain, bearing date the 21st day of August
*29] *1826, in the proceedings mentioned, and under and in virtue of the judgment of the said Erwin, levied on the same, as in the same proceedings mentioned, ought to be, and hereby is, declared to be restored to, and revested in him, the said Blake, and his heirs and assigns, in the same manner as if the same tract of land had not been sold to satisfy the judgment of the said Brittain in the proceedings mentioned. And it is further

ordered, adjudged and decreed, that the said Erwin, upon the payment of the said money as aforesaid, do forthwith, by a suitable deed and conveyance, convey the same estate, right, title and interest in and to the same tract of land, to the said Blake and his heirs and assigns accordingly. And it is further ordered, adjudged and decreed, that upon the payment of the said money as aforesaid, all further proceedings in the action of ejectment, brought for the recovery of the said tract of land in the proceedings mentioned, be and the same are hereby perpetually stayed and enjoined; and that in the meantime, and until such payment, no further proceedings be had in the said action. And it is further ordered, adjudged and decreed, that the decree of the circuit court, so far as it differs from this decree, be and the same is hereby reversed, and that in all other respects, it be and is hereby affirmed; and that this cause be and the same is hereby remanded to the circuit court for further proceedings, to carry the present decree into effect.

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*Margaret Dick and others, Appellants, *v.* Stephen B. Balch [*30
and others.

Recording of deeds.

The acts of 1715 and of 1766, of Maryland, require that all conveyances of land shall be enrolled in the records of the same county where the lands, tenements and hereditaments conveyed by such deed or conveyance do lie, or in the provincial court, as the case may be, the courts of Maryland are understood to have decided, that copies of deeds thus enrolled may be given in evidence.

Copies of deeds that are not required to be enrolled, cannot be admitted in evidence; but deeds of bargain and sale are, by the laws of the state, required to be enrolled; and by the uniform tenor of the decisions of the courts of the state, exemplifications of records of deeds of bargain and sale are as good and competent evidence as the originals themselves.

A mortgage was executed and recorded in 1809, and the mortgagee took no measures to enforce the payment of the money due upon it until 1821; in the meantime, the property mortgaged was sold by the mortgagor, the mortgagee having given no notice to the purchaser of his lien. If the mortgagee never did assert any claim, or intimate its existence to the purchaser or her friends, he was not restrained from doing so, by having released it; but the mortgage deed was recorded, and this is considered in law, as notice to all the world, and dispenses with the necessity of personal notice to purchasers; a deed cannot with any propriety be said to be concealed, which is placed upon the public record, as required by law; nor can a previous conveyance and delivery of title deeds to a purchaser, be justly denominated collusion, because a subsequent incumbrance is taken on the same property. Common prudence would have directed the purchaser to search the records of the county, before she paid the purchase-money; had she done so, she would have found the deed on record. It is not in proof, that he has done any act to deceive or mislead her; he has been merely silent respecting a deed which was recorded as the law directs.

Beale's Executors *v.* Dick, 4 Cr. C. C. 18, affirmed.

Appeal from the Circuit Court of the district of Columbia, and county of Washington.

In the circuit court, a bill was filed to foreclose a mortgage, dated on the 4th of August 1809, and executed by John Peter to Thomas B. Beale, to secure the payment of three promissory notes for $1000 each, given by the mortgagor to the mortgagee. The original mortgage having become lost or mislaid, the complainants in the circuit court, gave in evidence a certified copy thereof, taken from the land records of the county of *Washington, in which office the said mortgage had been duly recorded. [*31

The premises conveyed by the mortgage were a house and lots in Georgetown, which the said John Peter, afterwards, on the 16th of April 1810, sold and conveyed in fee to Elizabeth Peter, who then paid $6500, the purchase-money therefor, and under whom the defendants claimed and held the premises.

The answers of the defendants set up this title, and called upon the complainants to prove the mortgage-debt, and insisted, that at the death of the complainants' testator, there was no such subsisting mortgage-debt. That if it ever subsisted, it had been released by the testator in his lifetime; and further, that he knew of the sale to Elizabeth Peter, and suffered her to buy and pay the purchase-money, in ignorance of his mortgage; and that he also, in his lifetime, treated the debt as extinguished, and gave the defendants reason to believe that no such debt subsisted.

The defendants, in order to prove that the mortgage-debt, if it ever existed, was released by the testator, Thomas B. Beale, produced an instrument, dated 27th April 1820, which was signed and sealed by several of the creditors of John Peter, and by Thomas B. Beale among them. This instrument, the complainants alleged, in their bill, was only to take effect in case all the creditors of John Peter should sign it, and that all the creditors not having signed it, the same never took effect. They produced two witnesses, Francis Dodge and Clement Smith, to which latter witness, the defendants objected as incompetent from interest; who proved, that they so understood it, and that they believed it was so understood by the other creditors, and by John Peter. They produced also a deed from John Peter to said Smith, dated April 24th, 1820, referring to the deed of release, and in consideration of which, the said deed of release was to be subsequently executed, which, they proved by the same witness, was never carried into full execution, but set aside and revoked by a decree of the court, on certain chancery proceedings subsequently instituted by said John Peter and certain of his creditors, against said Smith. They also relied on the imperfect and incomplete execution of *the instrument called a release, to show that it never took effect.

*32]

The defendants produced two witnesses, John Peter, to whom the complainants objected as incompetent from interest, and George Peter, who proved, that they understood there was no such condition to the operation of the release; and it was so understood (as they believed) by all the parties; and they proved it was so expressly declared and represented by the testator, Thomas B. Beale. And they relied on the instrument itself, and the deed of trust to C. Smith, as conclusive of its intended operation; and denied that parol evidence was admissible to contradict it. They relied also on the proof of John Peter's having possession of the release, as showing it was delivered and treated as the deed of the parties. They relied also on the said Beale's statement to the persons interested in the property, of his having relinquished an old debt to said Peter, as precluding his executors from setting up this claim against it, even if the release had not the operation they contended for. Also, upon his suffering John Peter to have and keep possession of the release, by which he was enabled to show it to the defendants, as releasing the property from the claim of this mortgage.

The circuit court gave a decree in favor of the complainants, from which this appeal was prosecuted. In the opinion of this court, those facts which

were particularly relied upon in the argument, are stated more at large by the court.

The case was argued by *Key*, for the appellants; and by *Coxe*, for the appellees.

Marshall, Ch. J., delivered the opinion of the court.—The bill filed in this case is for the foreclosure of a mortgage, dated on the 4th of August 1809, to secure the payment of three promissory notes, given by the mortgagor, John Peter, to the mortgagee Thomas B. Beale, the testator of the complainants. The mortgaged premises were a house and several lots in Georgetown, which the mortgagor afterwards, on the 16th of *April 1810, sold and conveyed to Elibabeth Peter, who then paid the [*33 purchase-money. The bill is filed in 1821, against John Peter and Elizabeth Peter. Soon after the service of process, Elizabeth Peter departed this life, and the suit was revived against her devisees. These defendants, in their answer, do not admit the mortgage, and require proof of its existence. The proof offered by the plaintiffs is an office-copy of the deed, and the first question in the cause is on the admissibility of this copy.

The law of Maryland is the law of this part of the district of Columbia. The acts of 1715 and 1766 require that all conveyances of land shall be enrolled in the records of the same county where the lands, tenements or hereditaments conveyed by such deed or conveyance do lie, or in the provincial court, as the case may be. The courts of Maryland are understood to have decided, that copies of deeds thus enrolled may be given in evidence. In a case reported, 6 Har. & Johns. 276, the defendant offered in evidence the record of a deed, to the admission of which the plaintiff objected; but the court overruled the objection. A bill of exceptions was taken, and the judgment, which was in favor of the defendant, was carried before the court of appeals. The counsel for the plaintiff in error contended, that as the acts requiring the enrolment of conveyances do not say, that a copy of the enrolment shall be evidence, the general principle of law is, that the deed itself, unless shown to have been lost, must be produced. Chief Justice Buchanan, delivering the opinion of the court, said, "this case comes before us on three bills of exceptions. The first presents the question, whether the enrolment of a deed of bargain and sale is competent evidence of title to lands, in the trial of an action of ejectment, or whether the original must be produced? The court before whom the cause was tried, decided that it was, and that the original need not be produced; and certainly, it is too late, at this day, to question the correctness of that decision. Copies of deeds that are not required to be enrolled, cannot be admitted in evidence; but deeds of bargain and sale are, by the laws of the state, required *to be enrolled, [*34 and by the uniform tenor of the decisions of the courts of the state, exemplifications of records of deeds of bargain and sale are as good and competent evidence as the originals themselves."

In the circuit court, the plaintiff offered testimony to account for the absence of the original deed. Objections were made to the reception and sufficiency of this testimony; but as, by the settled law of Marlyland, the copy of the deed was admissible, without proving the loss of the original, it is unnecessary to examine the validity of these objections.

The original existence of the mortgage being established, we proceed to

inquire into the validity of the objections raised to its being still in force, so as to avail the plaintiffs in the circuit court. These objections are: 1st. That it has been released. 2d. That the silence of the said mortgagee, during his whole life, respecting his claim, thus concealing it from Elizabeth Peter for more than eleven years, whereby she and her representatives have lost all possibilty of recovering the purchase-money from John Peter, has forfeited his right, both in law and equity, to proceed againt the mortgaged premises.

The instrument by which, as the defendants in the court below contend, this debt was released, is dated the 27th of April 1820. It was signed and sealed by several of the creditors of the mortgagor, and among others, by Thomas B. Beale, the mortgagee. John Peter, who was engaged extensively in commerce, had sustained heavy losses by fire. Several of his friends and creditors agreed to receive a conveyance of all his remaining property, to be distributed ratably among them, and to advance him a considerable sum of money to set him up again in business. The defendants in error allege, that this agreement was on the condition, that all his creditors should sign a release of his debts, so as to leave his future acquisitions exonerated from their claims; and that some of his creditors refused to sign the release, in consequence of which refusal, the whole became inoperative. The deed conveying his property to a trustee, for the use of his creditors, and the instrument of release, were both produced, and appear in the record.

*35] The deed of release enumerates *the creditors of John Peter, some of whom have not executed it. It is absolute on its face, and the plaintiffs in error deny that it was intended to be conditional. They also contend, that no parol evidence is admissible to vary a written contract, by introducing into it a condition which entirely changes its character; the argument has turned chiefly on the admissibility of this testimony. The court will not inquire, whether the parol evidence offered in this case can be introduced to vary the contract, because a preliminary question arises to which the testimony is, they think, certainly applicable. That question is—has the contract been executed? It is set up by the defendants in their answer, and the general replication puts it in issue. It was, therefore, incumbent on those who sought to avail themselves of it, to prove it.

Thomas Nevit, the subscribing witness to the signature of Thomas B. Beale, has not been examined. If this omission can be accounted for, inferior evidence would undoubtedly be admissible, to establish this all-important fact; but the whole of this evidence must be examinable. The delivery itself, and the circumstances under which it was made, are open to both parties. The questions whether the instrument ever became a deed? whether it was delivered as an escrow, whose completion depended on subsequent events, which never happened, or was a complete contract when signed by those whose signatures are affixed to it? are entirely distinct from the question how far a written contract may be varied by parol evidence.

The plaintiffs in error rely on the fact, that the instrument was left in possession of Mr. Peter. This circumstance is certainly entitled to consideration; but it is not conclusive. It is open to explanation; and all the testimony shows, that it was placed in his hands to obtain the signature of his creditors. Clement Smith expressly avers it. The deposition of Mr. John Peter was taken, on the part of the plaintiffs in error, for the purpose

of showing, among other things, that the release was unconditional. But he is a party to the suit on the record, and his deposition is not admissible. The deposition of George Peter, one of the creditors of John Peter, who executed the deed of release, is also taken for the same purpose. He was one of the devisees of Elizabeth Peter; *but released his interest in the property, before he gave his deposition. He also is a party on the record, and this objection is made to his testimony. All objections to the competency and admissibility of these depositions were reserved by the defendants in error, and may be now made. They cannot, therefore, be read. [*36

The defendants in error produced the record of a suit in chancery, in which John Peter and George Peter, among others, were plaintiffs, for the purpose of showing, that the release was not fully executed. But the devisees of Elizabeth Peter were not parties to that suit, and cannot be affected by it. They also produced several depositions. Francis Dodge was one of the creditors of John Peter, but did not execute the release. He was applied to by Mr. Peter to sign it, who stated, as well as the deponent recollects, "that if any one of his creditors objected to sign, the whole arrangements would fail." Clement Smith, who was trustee of the effects of John Peter, which were assigned for the benefit of his creditors, was asked, "Was it not a part of the said scheme, that it should be inoperative and void in respect of all parties, including the said John Peter, his friends, and releasing creditors, in case any of his creditors should refuse to release said John Peter from his debts?" He says, "I answer without hesitation, that such was my impression. I did then, and do now, believe, that it was so understood by all the parties, who on that condition alone signed the release." This witness signed the deed of release, as attorney for some of the releasing creditors. He also states several circumstances confirmatory of the opinion, that the release was not to take effect, unless signed by all the creditors of John Peter.

The record also contains two letters, addressed while the transaction was pending, to William Fowle & Co., who were among his creditors. The first is dated the 25th of April 1820. In that, speaking of his friends, he says, "They have come forward and agreed to loan me a cash capital of $15,000; but on the special condition that I obtain a release from all my creditors, and keep my old and new business entirely separate." *His second letter, dated the 28th of April, expresses his regret that William Fowle & Co. were not at liberty to sign the release; repeats the idea, that his friends, who had promised him a loan of $15,000, had made a condition, that he should obtain a release from all his creditors; and after renewing his application respecting the release from Fowle & Co. adds, "every day's delay may diminish the zeal of my friends, therefore, let me hear from you by return of mail, with an authority, I hope, to Clement Smith to release as it respects me." Clement Smith says, that "J. Peter called on him for the notes and funds which his friends had deposited with Smith, to be delivered to Peter, when the condition on which they were to be delivered should be performed. The deponent declined complying with this request, because he understood that some of the creditors had rufused to sign the release." He left the room, and returned in a few moments with a letter in his hand, and [*37

said, "The business is all at an end." "Mr. Fowle, or some other person to whom he had written, having refused to sign or release his debt."

The letter to Mr. Fowle, and that part of the deposition of Mr. Smith which has just been cited, refer particularly to the contract for advancing money to enable Mr. Peter to recommence business; but they are not without influence on the question, whether the release was completely executed. That instrument was dated on the 27th of April 1820. It purports to be made between John Peter and his creditors, indorsers and sureties; that is, all his creditors, &c. It states the assignment made by Peter of all his remaining effects to Clement Smith, for their benefit; their purpose to advance him a sum of money, that he may again go into business; but their unwillingness to do so, so long as the new capital of the said J. P. may be liable to his former debts; that they "are willing, in consideration of the premises, to release him from all his debts and liabilities, so that he may hold his future property and stock in trade exempt from their respective claims." After reciting the names of the creditors, and stating the amount of their several claims, it proceeds to say, that "in consideration of the premises, the creditors, &c., have released, &c., and do release, &c., the said John Peter, his heirs, &c., from all their aforesaid several claims, &c."

*38] The same instrument proceeds to appoint Clement *Smith, who is a party thereto, trustee of all the estate and effects assigned by John Peter, for their benefit. The release is in consideration of the assignment. The advance of money and the release are obviously parts of the transaction, and are closely connected with each other. The purpose intended by all those who signed the release could not be accomplished, unless it should be signed by all. It is in evidence, too, that the failure of the release prevented the trustee from carrying the deed of assignment, which constituted its consideration, into execution.

On a full consideration of these circumstances, we are of opinion, that the release was never fully executed, and did not become the deed of the parties.

The plaintiffs in error also contend, that Thomas B. Beale, by his conduct, in his lifetime, forfeited his right to enforce the payment of the mortgage-debt against the said Elizabeth Peter, or her representatives. The answer alleges: 1st. That though he lived more than eleven years after the execution of the mortgage, he never did assert any claim, or even intimate to the said Elizabeth, or to any of her friends or advisers, the existence of such claim. 2d. That by concealment of the said mortgage-debt, lapse of time, and collusion with the said John, in the said sale to said Elizabeth, he and his representatives have lost all claim, either in law or equity. These objections, it may be observed, cannot be connected with the release. That bears date in 1820, and the mortgage-deed was executed in 1809. If, therefore, he never did assert any claim, nor intimate its existence to the said Elizabeth, or her friends, he was not restrained from doing so by having released it. But the mortgage-deed was recorded, and this is considered in law, as notice to all the world, and dispenses with the necessity of personal notice to purchasers. A deed cannot, with any propriety, be said to be concealed, which is placed upon the public record, as required by law; nor can a previous conveyance and delivery of title deeds to a purchaser, be justly denominated collusion, because a subsequent incumbrance is taken on

the same property. Common prudence would have directed Mrs. Peter to search the records of the county, before she paid the purchase-money. Had she done so, she would *have found the deed to Mr. Beale. It [*39 is not in proof, that he has done any act to deceive or mislead her; he has been merely silent respecting a deed which was recorded as the law directs.

We are of opinion, that there is no error in the decree of the circuit court. It is affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is the opinion of this court, that there is no error in the decree of the said circuit court in this cause; whereupon, it is considered, ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs and damages, at the rate of six per cent. per annum.

Morgan Byrne, Plaintiff in error, *v.* State of Missouri. [*40

Error to state court.—Bills of credit.

The case of Craig *v.* Missouri, 4 Pet. 410, in which it was decided, that the act of the legislature of the state of Missouri, passed 27th July 1821, entitled an act for establishing loan-offices, was repugnant to the constitution of the United States, revised and confirmed.

The pleadings in the cause bring the question, whether the act of the state of Missouri, by virtue of which the certificates which form the consideration of the writing obligatory, on which the judgment of the state court was rendered, be constitutional or not, directly and plainly before the court; and the decision of the state court was in favor of its validity; consequently, the case is within the 25th section of the judiciary act.

Error to the Supreme Court for the fourth judicial district of Norfolk in the state of Missouri.

This case was submitted to the court, by *Benton*, for the defendant. No counsel appeared for the plaintiff in error.

Marshall, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment rendered in the supreme court for the state of Missouri.

In 1826, an action of covenant was instituted in the circuit court for the county of Cape Girardeau, by the state of Missouri, against Morgan Byrne, the plaintiff in error. The declaration charges, that the defendant, on the 26th of October 1822, executed his certain writing obligatory, by which he promised to pay to the state of Missouri, on the 26th day of October, in the year 1823, the sum of $135, and the two per centum per annum on the said amount, it being the interest accruing on the certificates borrowed (by the said Byrne, of the state), from the first day of October 1821, at the Jackson loan office, for value; which said sum the defendant refuses to pay, &c.

The defendant appeared and pleaded in bar of the action, that the said state of Missouri, by an act of the legislature thereof, entitled an act for the establishment of loan-offices, *approved by the governor of the said state on the 27th day of June 1821, divided said state into five dis- [*41 tricts, in each of which districts was established a loan-office; and by said

act the auditor of public accounts and treasurer of said state, under the governor thereof, were required to issue certificates, signed by the said auditor and treasurer to the nominal amount of $200 000, of denominations not exceeding ten dollars, nor less than fifty cents, in the following form, to wit, "This certificate shall be receivable at the treasury, or any of the loan-offices of the state of Missouri, in discharge of taxes or debts due to the state, for the sum of ——— dollars, with interest for the same, at the rate of two per centum from this date, the —— day of —— ;" and that by said act, said certificates were made receivable at the treasury of said state, and by all the tax-gatherers and other public officers, in payment of taxes, and other moneys, then due or to become due to said state, or any county or town therein, and by all officers, civil and military, in said state, in discharge of salaries ; and by said act, it was further made the duty of said auditor and treasurer, according to the provisions of said act, to deliver to the clerk of said general loan-offices a proportional amount of the certificates, by the said act required to be issued as aforesaid ; and certain commissioners, by said act required to be appointed, were, by said act, empowered to loan said certificates to the citizens of said state, residing whithin their respective districts, at interest not exceeding six per centum per annum on the amount, and to secure the repayment of the said loans by mortgages or personal security ; and by said act, the salt-springs belonging to the state were to be leased out, on the condition that the lessee or lessees should receive said certificates in payment for salt, not exceeding that which might be prescribed by law ; and that the proceeds of said salt-springs, the interest accruing to the state, and all estates purchased by the said loan-offices under the provisions of said act, and all debts then due and to become due to the said state, were, by said act, pledged and made a fund for the redemption of the said certificates ; and by the same act, the faith of the state was also pledged for the same purpose. And the defendant further saith, &c., a large sum was deposited at the loan-office at Jackson, &c., and that he has
*43] received from said loan-office *the nominal sum of $135 in said certificates, for the loan of which certificates, and no other consideration whatever, the said defendant made and executed to said state said writing obligatory mentioned. And said defendant avers, that said loan-office certificates, so loaned to said defendant as aforesaid, were bills of credit, emitted by said state, in violation of the constitution of the United States ; all which said defendant is ready to verify : wherefore, &c.

The plaintiff demurred generally to this plea, and the defendant joined in demurrer. The court sustained the demurrer, and rendered judgment for the plaintiff. This judgment was brought by writ of error into the supreme court of the judicial district in which it was rendered, the highest tribunal in that state which could take cognisance of it, where it was affirmed. The defendants have prosecuted this writ of error, under the 25th section of the judiciary act.

The pleadings in the cause bring the question, whether the act of the state of Missouri, by virtue of which the certificates which form the consideration of the writing obligatory, on which the judgment of the state court was rendered, be constitutional or not, directly and plainly before the court ; and the decision of the state court was in favor of its validity. Consequently, the case is within the 25th section of the judiciary act ; and

the only question before this court is, did the state court err in pronouncing that judgment? Is the act in question repugnant to, or consistent with, the constitution of the United States?

This question was ably argued, and fully considered by the court in the case of *Craig* v. *State of Missouri*, 4 Pet. 410. In that case, a majority of the court were of opinion, that the act was repugnant to the constitution; and the judgment of the state court was reversed. That decision is expressly in point, and on its authority, the judgment in this case also must be reversed and the cause remanded, that judgment may be rendered for the defendant in that court, the plaintiff in error.

This cause came on to be heard, on the transcript of the *record from the supreme court of the state of Missouri for the fourth judicial district, and was argued by counsel: On consideration whereof, this court is of opinion, that there is error in the rendition of the judgment of the said court, in this, that in affirming the judgment rendered by the circuit court of the county of Cape Girardeau, in the state of Missouri, that court has given an opinion in favor of the validity of the act of the legislature of Missouri, passed on the 27th of June 1821, entitled "an act for the establishment of loan-offices," which act is, in the opinion of this court, repugnant to the constitution of the United States: whereupon, it is considered by the court, that the said judgment of the said supreme court of the state of Missouri for the fourth judicial district, ought to be reversed and annulled; and the same is hereby reversed and annulled, and the cause remanded to that court, with directions to enter judgment in favor of the defendant to the original action. [*43

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*Samuel Lee and Barbara Lee, Plaintiffs in error, *v.* Elizabeth Lee. [*44

Slavery.

The plaintiffs in error filed a petition for freedom, in the circuit court of the United States for the county of Washington, and proved, that they were born in the state of Virginia, as slaves of Richard B. Lee, now deceased, who moved, with his family, into the county of Washington, in the district of Columbia, about the year 1816, leaving the petitioners residing in Virginia, as his slaves, until the year 1820, when the petitioner Barbara was removed to the county of Alexandria, in the district of Columbia, where she was hired to Mrs. Muir, and continued with her, thus hired, for the period of one year; that the petitioner Sam was, in like manner, removed to the county of Alexandria, and was hired to General Walter Jones, for a period of about five or six months; that after the expiration of the said periods of hiring, the petitioners were removed to the said county of Washington, where they continued to reside as the slaves of the said Richard B. Lee, until his death, and since, as the slaves of his vidow, the defendant.

On the part of the defendant in error, a preliminary objection was made to the jurisdiction of this court, growing out of the act of congress of the 2d of April 1816, which declares, that no cause shall be removed from the circuit court for the district of Columbia to the supreme court, by appeal or writ of error, unless the matter in dispute shall be of the value of $1000 or upwards.

The matter in dispute in this case is the freedom of the petitioners; the judgment of the court below is against their claims to freedom; the matter in dispute is, therefore, to the plaintiffs in error, the value of their freedom, and this is not susceptible of a pecuniary valuation. Had the judgment been in favor of the petitioners, and the writ of error brought by the party claiming to be the owner, the value of the slaves, as property, would have been the matter in dispute, and affidavits might be admitted to ascertain such value; but affidavits, estimating the value

of freedom, are entirely inadmissible; and no doubt is entertained of the jurisdiction of the court.

The circuit court refused to instruct the jury, that if they should believe from the evidence, that the bringing the petitioners from Virginia to Alexandria, by their owner, and hiring them there was merely colorable, with intent to evade the law, then the petitioners were entitled to their freedom.

By the Maryland law of 1796, it is declared, that it shall not be lawful to import or bring into this state, by land or water, any negro, mulatto or other slave, for sale, or to reside within this state; and any person brought into this state as slave, contrary to this act, if a slave before, shall thereupon cease to be the property of the person so importing, and shall be free. And by the act of congress of the 27th of February 1801, it is provided, that the laws of the state of Maryland, as they then existed, shall be and continue in force in that part of the dis-

*45] trict, which was ceded by that state to the United States. *The Maryland law of 1796 is, therefore, in force in the county of Washington; and the petitioners, if brought directly from the state of Virginia into the county of Washington, would, under the provisions of that law, be entitled to their freedom.

By the act of congress of the 24th of June 1812, it is declared, "that hereafter, it shall he lawful for any inhabitant or inhabitants, in either of the said counties (Washington and Alexandria), owning and possessing any slave or slaves therein, to remove the same from one county into the other, and to exercise, freely and fully, all the right of property, in and over the said slave or slaves therein, which would be exercised over him, her or them, in the county from whence the removal was made."

The court erred in refusing to give the fourth instruction prayed on the part of the petitioners all that was asked by this instruction was, to submit to the jury, whether, from the evidence, the bringing of the petitioners from Virginia to Alexandria, and the hiring them there, was not merely colorable, with intent to evade the law.

When the intention with which an act is done becomes the subject of inquiry, it belongs exclusively to the jury to decide. Whatever is done in fraud of law, is done in violation of it. The cases of United States *v.* Quincy, 6 Pet. 466, and The William King, 2 Ibid. 153, cited.

Lee *v.* Lee, 4 Cr. C. C. 643, reversed.

ERROR to the Circuit Court of the District of Columbia, and county of Washington.

This case was argued by *Coxe*, for the plaintiffs in error; and by *Lee* and *Jones*, for the defendant. In the opinion of the court, the facts are fully stated.

Coxe cited, Act of Congress of May 3d, 1802 (2 U. S. Stat. 193); Act of Congress of 1801 (Ibid. 103); Act of June 1812, § 12 (Ibid. 755). These citations referred to the question of slavery. As to the question of intention being exclusively for the jury, he cited, 6 Pet. 466; 2 Cranch 258, 390; 1 Wheat. 151, 121; 2 Ibid. 149, 153.

Lee and *Jones* referred to the same provisions of the laws of Maryland and of the United States, as were cited by the counsel for the plaintiffs in error.

THOMPSON, Justice, delivered the opinion of the court.—The plaintiffs in

*46] error presented their petition to the circuit *court of the United States for the county of Washington, in the district of Columbia, setting forth, that they are persons of color who are entitled to their freedom, and are now held in a state of slavery by the defendant in error, in the said county of Washington, contrary to law, and praying process, &c. The defendant in the court below appeared and pleaded, that the petitioners are not entitled to their freedom as they have alleged, and issue being thereupon joined, the cause was tried by a jury.

Upon the trial, the petitioners proved, that they were born in the state of Virginia, as slaves of Richard B. Lee, now deceased, who moved, with his family, in the county of Washington, in the district of Columbia, about the year 1816, leaving the petitioners residing in Virginia, as his slaves, until the year 1820, when the petitioner Barbara was removed to the county of Alexandria, in the district of Columbia, where she was hired to Mrs. Muir, and continued with her thus hired for the period of one year. That the petitioner Sam was, in like manner, removed to the county of Alexandria, and was hired to General Walter Jones, for a period of about five or six months. That after the expiration of the said periods of hiring, the petitioners were removed to the said county of Washington, where they continued to reside as the slaves of the said Richard B. Lee, until his death, and since as the slaves of his widow, the defendant. Upon which evidence the petitioners' counsel prayed the court to give to the jury the following instructions.

1. If the jury shall believe from the evidence aforesaid, that the said petitioners, or either of them, were slaves, born in Virginia, and that Mr. Lee, their master, removed from Virginia, in 1817, with his family, to the county of Washington, and left said petitioners residing in Virginia; and subsequently to the year 1820, the petitioners, or either of them, were removed from Virginia, directly to the county of Washington, they would be entitled to their freedom in the present suit.

2. If the jury shall believe from the said evidence, that the petitioners, or either of them, were originally brought by their master, an inhabitant and citizen of Washington county in this district, from Virginia to Alexandria county, and thence to Washington county; they are also entitled to their, his or her *freedom, unless the jury shall also believe from the evidence aforesaid, that the residence in Alexandria county was not merily transitory, but was *bonâ fide* and permanent. [*47

The court gave the first instruction as prayed, but refused to give the second in the form asked, and in lieu thereof gave the following. That if the petitioners were *bonâ fide* hired to persons residing in Alexandria, and served their regular terms of hire there, the petitioner Barbara, for a year or more, and the petitioner Sam, from three to six months, and upon the expiration of their respective terms of hire, were brought from Alexandria to Washington; such hiring and residence in Alexandria constituted a residence sufficiently permanent to authorize such removal. That such removal from Alexandria to Washington, upon the expiration of such terms of hire, does not infer such preconceived intent to bring them from Virginia to Washington, as to render their intermediate residence in Alexandria merely transitory and *malâ fide*, and their subsequent removal thence to Washington equivalent to a removal direct from Virginia to Washington. The petitioners' counsel then prayed the court to instruct the jury:

3. That if they shall believe from the evidence aforesaid, that the bringing the petitioners from Virginia to Alexandria, by their owner, and hiring them there, was merely colorable, with intent to evade the law, that then the petitioners are entitled to their freedom. The court refused to give this instruction, being of opinion, that there was no evidence in the case tending to prove, that the bringing of the petitioners from Virginia to Alexandria and hiring them there, was merely colorable, and with intent to evade the law. A further instruction was prayed by the petitioners' counsel, and

refused by the court, but which it is unnecessary here particularly to notice. To these several refusals a bill of exceptions was duly taken. A verdict and judgment were thereupon rendered for the defendant; and the cause comes here upon a writ of error.

On the part of the defendant in error, a preliminary objection has been made to the jurisdiction of this court, growing out of the act of oongress of the 2d of April 1816 (13 U. S. Stat. 261), *which declares, that no cause shall be removed from the circuit court for the district of Columbia to the supreme court, by appeal or writ of error; unless the matter in dispute shall be of the value of $1000, or upwards. The matter in dispute in this case is the freedom of the petitioners. The judgment of the court below is against their claims to freedom; the matter in dispute is, therefore, to the plaintiff in error, the value of their freedom, and this is not susceptible of a pecuniary valuation. Had the judgment been in favor of the petitioners, and the writ of error brought by the party claiming to be the owner, the value of the slaves, as property, would have been the matter in dispute, and affidavits might be admitted to ascertain such value. But affidavits, estimating the value of freedom, are entirely inadmissible; and we entertain no doubt of the jurisdiction of the court.

*48]

The questions on the merits of the case arise upon the refusal of the court to give the instructions prayed on the part of the petitioners. By the Maryland law of 1796 (Herty's Dig. 384), it is declared, that it shall not be lawful to import or bring into this state, by land or water, any negro, mulatto, or other slave, for sale, or to reside within this state. And any person brought into this state as a slave, contrary to this act, if a slave before, shall thereupon cease to be the property of the person so importing, and shall be free. And by the act of congress of the 27th of February 1801 (2 U. S. Stat. 103), it is provided, that the laws of the state of Maryland, as they then existed, should be, and continue in force in that part of the district, which was ceded by that state to the United States. The Maryland law of 1796 is, therefore, in force in the county of Washington; and the petitioners, if brought directly from the state of Virginia into the county of Washington, would, under the provisions of that law, be entitled to their freedom. This has not been denied on the part of the defendant in error, and, indeed, is fully recognised by the court below, in the first instruction given to the jury. And the question turns upon the refusal of the court to give the instructions prayed, in relation to the hiring of the petitioners, in the county of Alexandria, before being brought into the county of Washington.

*By the act of congress of the 24th of June 1812, § 9 (2 U. S. Stat. 757), it is declared, "that hereafter, it shall be lawful for any inhabitant or inhabitants, in either of the said counties (Washington and Alexandria) owning and possessing any slave or slaves therein, to remove the same from one county into the other, and to exercise, freely and fully, all the rights of property, in and over the said slave or slaves therein, which would be exercised over him, her or them, in the county from whence the removal was made."

*49]

Upon the construction to be given to this act, a difference of opinion is entertained by the judges. Some are of opinion, that to bring a case within this act of 1812, the slave must continue in the actual possession of the owner, being an inhabitant of one of the counties, in order to make the

removal into the other county lawful. They give a limited and literal construction to the words *owning* and *possessing*. And that the hiring in Alexandria, did not so change the situation of the petitioners, as to prevent their removal from Virginia being considered a direct removal into the county of Washington; and which, of course, made them free, under the act of 1796. The other judges are of opinion, that actual possession by the owner, in his own family, is not necessary. But that a hiring out, *bonâ fide*, and without intention to evade the act of 1796, would so interrupt the continuity of the removal, as to take the case out of the act, and make the subsequent removal into the county of Washington lawful. That this law (1812), for the purpose of authorizing the removal of slaves from one county into the other, considers the district composed of the two counties as entire; and gives the owner the full exercise of all his rights of property over his slave, in each county; in the same manner as if the district was not divided into two counties.

We think, however, the court erred in refusing to give the forth instruction prayed on the part of the petitioners. All that was asked by this instruction was, to submit to the jury, whether, from the evidence, the bringing of the petitioners from Virginia to Alexandria, and the hiring them there, was not merely colorable, with intent to evade the law. The court had instructed the jury, that a removal of the petitioners direct from Virginia to the county of Washington, *would have entitled them to their freedom. The object and purpose of the hiring in Alexandria, [*50 would seem necessarily to have been open to inquiry. And if open at all, it was matter of fact, consisting of circumstances, from which an inference was to be drawn; and this properly belonged to the jury. The court was not requested to instruct the jury as to the sufficiency of the evidence to justify the conclusion sought to be drawn from it; nor to express any opinion as to the weight of the evidence. If, in the opinion of the court, the verdict of the jury should be found against the evidence, the proper correction, if at all to be applied by the court, would by by granting a new trial. But the refusal to give the instruction prayed was taking from the jury the right of judging upon the intent. If intention was at all open to inquiry, it was certainly matter for the jury.

In the case of the *United States* v. *Quincy* (6 Pet. 466), this court said, that when the intention with which an act is done, becomes a subject of inquiry, it belongs exclusively to the jury to decide. And in the case of *The William King* (2 Wheat. 148), it is laid down as a general rule, that whatever is done in fraud of a law, is done in violation of it. That if a vessel, with an original intention to go to a foreign port, complied with the requisition necessary to obtain a clearance on a voyage coastwise; this is but the device by which she eludes the force that would otherwise have prevented her departure from the port.

These are principles which have a direct bearing upon the present question. If the original intention of the owners of the slaves was to bring them into the county of Washington, the hiring of them in Alexandria might have been thought by the jury a device to evade the law of 1796. It can hardly be said, that such a conclusion would have been entirely without color. The owner of these slaves resided in the county of Washington, and no reason is assigned for their remaining a short time in Alexandria, or why they were

not wanted in Washington county, as much before, as after, the hiring in Alexandria. Suppose, the hiring had been for one week, or one day, would any one doubt, that it would have been done with a view to take the case out of the law of 1796, and would have been a fraud upon the law? And
*51] who, in *such a case, would judge of the intention? The court, or the jury? The answer cannot admit of a doubt. The time of hiring in the present case, lessens the weight of the evidence, but does not transfer the weight of deciding upon it, from the jury to the court.

The judgment of the court below is accordingly reversed, and the cause sent back with directions to issue a *venire de novo.*

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo.*

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*52] *Kosciuszko Armstrong, Appellant, *v.* Benjamin L. Lear, Administrator of Thaddeus Kosciuszko and others.

Practice in equity.

A bill was filed in the circuit court of the district of Columbia, claiming a legacy under an alleged codicil made in Paris, to a will made in the United States; the testator was a native of Poland; at the time of the making of the codicil, he resided in France; and when he made the will, to which the instrument, upon which the legacy was claimed was said to be a codicil, he was in the United States; he went to Europe, soon after he made the will, and many years afterwards, he died in Switzerland. The bill alleged, that the instrument on which the legacy was claimed had been duly proved in the orphans' court of Washington county, in the district of Columbia, where the administrator with the will annexed, resided; there was no allegation that the codicil had been established to be a valid will, by the law of France, the place of the domicil of the testator where the same was made. The administrator submitted to the court, whether it would decree the payment of the money to the complainant, "upon an instrument made under the circumstances, and authenticated in the manner that the aforesaid instrument is, and whether the said instrument shall have effect to revoke or alter any part of said testator's will, solemnly executed and left in the hands of his executor in this country," &c. This is certainly a very informal and loose mode of putting in issue (if upon the bill such a question can be tried) the validity of a will made in a foreign country, whose laws are not brought before the court, either by averment or evidence.

The answer contained an allegation, that certain persons residing in Europe had filed a bill in the circuit court of the district of Columbia, against him, the administrator, claiming a large portion of the assets, if not the whole, as creditors, or mortgagees of the testator; and certain persons, also residing in Europe, had filed another bill against him (it was probably meant in the same court), claiming the whole assets, as heirs-at-law of the testator, and therefore, as distributees of the said assets; none of the parties to either of these latter bills are made parties to the present bill. The persons claiming as heirs of the testator should be made parties, that they may have an opportunity to test the plaintiff's title, as the real parties in interest, the administrator being but a mere stockholder.

The heirs and legal representatives of the testator filed a bill in the circuit court, claiming from the administrator of the testator with the will annexed, the funds which had come into his hands; which bill was still pending. The allegations in the bill went to defeat the validity of the will made in the United States, and also asserted other grounds of claim. All the bills ought, if possible, to be brought to a hearing, at the same time, in the circuit court, in order

that a final disposition may, at the same time, be made of all the questions arising in all of them.

If the intention is to put in issue (as it seems to be), not only the construction and operation of the testamentary instrument in favor of the plaintiff, but its validity and effect as a will, it is material, that the law of France, the *place of the domicil of the testator, at the time of its execution, should be brought before the court, and established as matter of fact; for the court cannot judicially take notice of foreign laws, but they must be proved by proper evidence. The present allegations of the bill and answer are quite too loose for this purpose, and they should be amended and made more distinct and direct. [*53

There may arise some nice questions of international law, in which the fact of the domicil of the testator, at the time of his birth, at the time of his making the will made in the United States, and at the time of his death, may become material. The court do not mean to say, what is the rule that is to govern in cases of wills of personalty, whether it be the rule of the native domicil or of the domicil at the time of the execution of the will, or of the domicil at the death of the party, where there have been changes of domicil; these are points, which ought, under the circumstances of this case, to be left open for argument; but the facts on which the argument should rest, ought to be distinctly averred in the bill, and met in the answer.

The place of domicil of the testator, at the time of his death, may also become material, under another aspect of the case, viz., the question, who are his heirs, entitled to the succession, *ab intestato*, or under the other will or wills executed by him, to which reference is made in some of the papers of the case. The persons claiming as such heirs, must establish their title under and according to, the law of his domicil, at the time of his death; so, perhaps, it may become material, if Switzerland was the domicil of the testator, at the time of his death, to bring the law of that country distinctly, as matter of fact, before the court.

Appeal from the Circuit Court of the district of Columbia, for the county of Washington.

On the 1st day of April 1829, the appellant, Kosciuszko Armstrong, filed a bill in the circuit court, setting forth his citizenship of the state of New York, and that Thade Kosciuszko, late an officer in the service of the United States, in the war of their revolution, and of the republic of Poland, on or about the 5th day of May, in the year 1798, placed a large sum in the hands of Thomas Jefferson, Esq., late president of the United States, far exceeding the sum of $10,000, and executed a will and testament, a copy of which was therewith filed, and marked exhibit A, and which the complainant prayed might be taken as a part of his bill. That afterwards, to wit, on or about the 28th day of June, in the year 1806, the said Thade Kosciuszko, being then domiciled in Paris, in the kingdom of France, executed a certain instrument of writing, being in the nature and of the effect of a last will or writing testamentary, whereby he willed and directed, that at his decease, the sum of $3704, *current money, should be possessed by, and delivered over to, the full enjoyment and use of the complainant; [*54 and the said testator thereby instructed and authorized his only lawful executor in the United States, the said Thomas Jefferson, to reserve, in trust for that special purpose, of the funds he held belonging to the testator, the aforesaid sum of $3704, in principal, to the complainant, to be paid by him, the said Thomas Jefferson, immediately after his decease, to the complainant, and in case of his death, to the use and benefit of his surviving brothers. That the said testator, on the day and year aforesaid, duly signed and sealed the said instrnment of writing, in the presence of two competent witnesses, who attested the same, and acknowledged the same, on the same day, before Fulwar Skipwith, commercial agent, and agent for prize causes, for the said United States, at Paris; and then delivered the same, under his hand and seal, to John Armstrong, father of the complainant. That afterwards, to wit, on the 15th day of October, in the year 1817, the said Thade Kosciuszko

departed this life, leaving the said instrument of writing unrevoked ; and the same was, after the death of the said Thade Kosciuszko, admitted to probate, and duly proved in the orphans' court of Washington county ; a copy whereof, exhibit B, he prayed might be taken as a part of his bill.

That he was advised, and believed, that the said instrument of writing was, to all intents and purposes, a last will and testament, and must operate as such, and revoked *pro tanto* the bequests and appropriation made in the will first mentioned ; that the said Thomas Jefferson, named as executor in the will first mentioned, refused to take our letters testamentary on the estate of the said Thade Kosciuszko, and renounced all claim and right so to do, according to law ; and Benjamin L. Lear, whom the complainant prayed might be made defendant to his said bill, was duly appointed administrator, with the will annexed, on the said estate ; which had since come into the hands of the said Benjamin L. Lear, far exceeding, as aforesaid, $10,000. That the said Benjamin L. Lear had been frequently applied to by the complainant for the payment of the afore-mentioned legacy of $3704, *55] together with the interest thereon, *which the said Lear refused to pay, until the order and decree of this court had upon the premises ; and the said defendant, combining and confederating with one Major Estho a subject of his imperial majesty, the emperor of all the Russias, and Monsieur Zeltner, formerly minister plenipotentiary of the Helvetic Republic at Paris, and now residing at Soleure, in Switzerland, whom the complainant prayed might be made parties to his said bill of complaint ; the said confederates sometimes pretended, that the said Thade Kosciuszko never executed the said last-mentioned writing testamentary, and sometimes they pretended, that the said Major Estho was the heir-at-law of the said Thade Kosciuszko, and as such, entitled to all his said estate ; and sometimes they pretended, that the said Thade Kosciuszko, during his lifetime, made some disposition of his said estate in favor of the children and other relatives of the said Zeltner, whereas, the said last-mentioned writing testamentary was duly executed as aforesaid ; and that the said Major Estho was not the heir-at-law of the said Thade Kosciuszko, or if he was, that he was not entitled to receive distribution of the said personal estate, and that the said Thade Kosciuszko made no testamentary or other disposition in favor of the said Zeltner, or his children or relatives, which could affect the claim of the complainant under the said writing testamentary. All which actings and doings, and pretences of the said confederates, were contrary to equity and good conscience, and tended to the manifest injury and oppression of the complainant.

Complainant's exhibit A.

I, Thaddeus Kosciuszko, being just on my departure from America, do hereby declare and direct that, should I make no other testamentary disposition of my property in the United States, I hereby authorize my friend, Thomas Jefferson, to employ the whole thereof, in purchasing negroes from among his own or any others, and giving them liberty, in my name ; in giving them an education in trades, or otherwise, and in having them instructed, for their new condition, in the duties of morality, which may make them good neighbors, good fathers or *moders*, husbands or wives, and in their duties as citizens, teaching them to be defenders of their liberty and

country, *and of the good order of society, and in whatsoever may make them happy and useful. And I make the said Thomas Jefferson my executor of this.

5th day of May 1798. T. Kosciuszko.

Complainant's exhibit B.

Know all men, by these presents, that I, Thade Kosciuszko, formerly an officer of the United States of America, in their revolutionary war against Great Britain, and a native of Lilourui, in Poland, at present residing at Paris, do hereby will and direct, that, at my decease, the sum of three thousand seven hundred and four dollars, currency of the aforesaid United States, shall of right be possessed by, and delivered over to, the full enjoyment and use of Kosciuszko Armstrong, the — son of General John Armstrong, minister plenipotentiary of the said states at Paris. For the security and performance whereof, I do hereby instruct and authorize my only lawful executor in the said United States, Thomas Jefferson, president thereof, to reserve in trust for that special purpose, of the funds he already holds belonging to me, the aforesaid sum of three thousand seven hundred and four dollars, in principal; to be paid by him, the said Thomas Jefferson, immediately after my decease, to him, the aforesaid Kosciuszko Armstrong; and in case of his death, to the use and benefit of his surviving brothers. Given under my hand and seal, at Paris, this 28th day of June 1806.

In presence of Thade Kosciuszko. [seal.]

Charles Carter,
James M. Morris.

Commercial Agency of the United States, Paris.

On this 28th day of June, in the year of our Lord 1806, and of the independence of the United States of America, the thirtieth, before the undersigned, commercial agent, and agent of prize causes, for the United States of America, at Paris, personally appeared Thade Kosciuszko, late officer of the said United States, who, in his presence, signed and sealed the foregoing *transfer in favor of Kosciuszko Armstrong, the —— son of General John Armstrong, minister plenipotentiary of the United States at [*57 Paris, and in case of his death, to the use and benefit of his surviving brothers; and did acknowledge it as his own act and deed for the purposes therein specified. In testimony whereof, he, the said undersigned as aforesaid, has hereunto signed his name, and affixed his seal of office, at Paris, the day and year above written.

[L. s.] Fulwar Skipwith.

Orphans' Court, Washington county, District of Columbia, to wit:

Be it remembered, that on this 26th day of September, in the year 1827, Richard Forrest, of the county and district aforesaid, made oath on the Holy Evangels of Almighty God, that he is well acquainted with the handwriting of Fulwar Skipwith, late United States commereial agent at Paris, having often seen him write; and that he verily believes the signature, "Fulwar Skipwith," to the certificate to the annexed instrument of writing, purporting to be the will of Thade Kosciuszko, is the proper handwriting

of said F. Skipwith ; and that he believes the seal attached to said certificate is the official seal of the United States consulate at Paris.

Sworn in open court.

Teste—HENRY C. NEALE, Reg'r Wills.

And now, on this 8th day of May, in the year 1828, in the orphans' court of Washington county and district aforesaid, Joseph C. Cabell, of Nelson county, in the state of Virginia, makes oath on the Holy Evangels of Almighty God, that he is well acquainted with the handwriting of Charles Carter, one of the subscribing witnesses to the annexed paper, purporting to be the will and testament of Thade Kosciuszko, deceased, having often seen him write ; and that he verily believes the signature, "Charles Carter," as witness to said will, to be the proper handwriting of said Charles Carter now deceased ; and that he is well acquainted with the handwriting of Fulwar Skipwith, late commercial agent of the United States at Paris, having often seen him write ; and that he verily believes the signature, "F. Skipwith," to the annexed certificate to the instrument of writing, purporting to be the will of Thade *Kosciuszko, is the proper handwriting of the aforesaid Fulwar Skipwith, who now resides near Baton Rouge, Mississippi.

*58]

Sworn in open court.

Teste—HENRY C. NEALE, Reg'r Wills

District of Columbia, Washington county, to wit :

The 19th day of November 1828, James M. Morris, one of the subscribing witnesses to the aforegoing instrument of writing, purporting to be the last will and testament of Thaddeus Kosciuszko, deceased, made oath on the Holy Evangels of Almighty God, that he did see the testator therein named sign and seal this will ; that he published, pronounced and declared the same to be his last will and testament ; that at the time of his so doing, he was, to the best of his apprehension, of sound and disposing mind, memory and understanding ; and that he, together with Charles Carter, the other subscribing witness, respectively subscribed their names as witnesses to the will, in the presence, and at the request of the testator, and in the presence of each other.

Sworn in open court.

Teste—HENRY C. NEALE, Reg'r Wills.

District of Columbia, Washington county, to wit :

I certify, that the aforegoing last will and testament of Thaddeus Kosciuszko is truly copied from the original, filed and recorded in my office. Witness my hand and seal of office, this 5th day of March in the year 1829.

[SEAL.] HENRY C. NEALE, Reg'r Wills.

The bill prayed a *subpœna* against the defendants, and the marshal returned, that he had summoned B. L. Lear, and "*non sunt*" the rest. Mr. Lear appeared to the bill. The circuit court made the following order of publication as to the absent defendants.

Kosciuszko Armstrong *v.* Benjamin L. Lear, administrator, with the will annexed, of Thade Kosciuszko, Major Estho, a subject of his imperial majesty, the emperor of all the Russias, and Monsieur Zeltner, formerly

minister plenipotentiary of the Helvetic Republic at Paris, and now residing at Soleure, in Switzerland.

*The bill in this case states, that the said Thade Kosciuszko, about the 5th of May 1798, placed a large fund in the hands of [*59 Thomas Jefferson, late president of the United States, exceeding the sum of $10,000 ; and executed a will ; that on or about the 28th of June 1806, the said Kosciuszko executed, at Paris, an instrument of the nature of, and effect of, a last will, or writing testamentary, whereby he willed and directed that, at his decease, the sum of $3704 should be possessed by, and delivered over to, the full enjoyment and use of the complainant, to be paid by the said Thomas Jefferson to the complainant, immediately after the said Kosciuszko's decease, out of the said funds ; that the said Kosciuszko, on the said 28th of June 1806, duly signed and sealed the said instrument of writing, in the presence of two competent witnesses, who attested the same, and acknowledged the same, on the same day before Fulwar Skipwith, commercial agent, and agent for prize causes, for said United States, at Paris, and then and there delivered the same under his hand and seal to John Armstrong, father of the complainant. That afterwards, to wit, on the 15th day of October 1817, the said Kosciuszko departed this life, leaving the said instrument of writing unrevoked, and the same has since been duly admitted to probate, and proved in the orphans' court of Washington county. That the said Thomas Jefferson, named as executor in the will first mentioned, refused to take out letters testamentary on the estate of the said Kosciuszko ; and thereupon, the defendant Lear was duly appointed administrator with the will annexed. The bill further charges, that the said Lear refuses to pay the said sum of $3704, because, among other reasons, a claim to the whole of the funds of said estate has been made by said Major Estho, as heir-at-law of said Kosciuszko, and another claim by the said Monsieur Zeltner, under another will, which he alleges the said Kosciuszko to have made in Europe, in favor of himself or some of his relations ; and the complainant states the object of his said bill to be to enforce a discovery, by said Lear, of the funds and effects which have come to his hands, as administrator as above named, and the payment by him to the complainant, of said sum of $3704, *with interest, &c. And it appearing to the [*60 court that two of the defendants in this case, viz., the said Major Estho and Monsieur Zeltner, are not within the jurisdiction of this court, and do not reside within the United States, but, as far as appears to the court, one of said defendants resides in Poland, and the other in Switzerland: it is, therefore, by this court here, on motion of the complainant's solicitor, ordered, this 3d day of August 1829, that the said absent defendants be and appear before this court here, in person or by solicitor, on or before the second Monday of December next, and answer the complainant's said bill, or show cause why a decree should not be passed as prayed by said bill ; otherwise, the same will be taken for confessed against them : provided a copy of this order be published in the National Intelligencer, twice a week, for six weeks successively, the first publication thereof to be at least four months previous to said second Monday of December next.

By order of the court. *Teste*—William Brent, Clerk.

3d August 1829.

In December 1831, Benjamin L. Lear, as administrator of Thaddeus Kosciuszko, filed an answer, stating, that in the character of administrator of Thaddeus Kosciuszko, with the will annexed, he has assets for such administration amounting to more that $10,000. That on or about the 8th of January 1823, the complainant, by John Armstrong, his next friend, the complainant being then an infant, filed in this court his bill of complaint against the respondent for the same purpose, and in substance the same as his bill in this case. That the respondent, on the 22d of January 1823, filed his answer to the bill, with certain exhibits, which he asks to be considered as part of his answer to the bill.

The answer of Benjamin L. Lear to the bill of complaint of Kosciuszko Armstrong, an infant, under the age of twenty-one years, by his father and next friend, John Armstrong, of the county of Dutchess, in the state of New York: This respondent, saving and reserving to himself, now, and at all times hereafter, all and all manner of benefit and advantage of exception
*61] to the manifold uncertainties and imperfections *in the said complainant's said bill contained, for answer thereunto, or unto so much thereof as materially concerns this defendant to make answer unto, saith, that he is the administrator, with the will annexed, of Thaddeus Kosciuszko; that he has no knowledge of a fund having been placed, by the late General Thade Kosciuszko, in the hands of Thomas Jefferson; and a will having been executed by him, excepting such as he has derived from a letter of said Thomas Jefferson to Mr. Pierre de Poletica, the envoy from Russia to the United States of America, and a copy of the record of the court of Albemarle county, in Virginia; a copy of which letter and record he received, among the other papers, from said Thomas Jefferson, which were put into his hands as relating to the administration of the estate of the said Thaddeus Kosciuszko; and a copy of which letter is herewith exhibited to the court, marked defendant's exhibit A, which this defendant prays may be taken as part of this his answer. That this respondent admits that the instrument mentioned in the complainant's bill, and exhibited to this court by him, marked exhibit B, was executed and authenticated, as it purports to be, at Paris, in the kingdom of France, the said Thade Kosciuszko being domiciled and resident at said Paris, at the time said instrument was executed and bears date; but this defendant submits to this honorable court, and prays its decision thereon, whether it will decree him to pay the said sum of $3704 to the said complainant, upon an instrument made under the circumstances, and authenticated in the manner that the aforesaid instrument is; and whether said instrument shall have the effect to revoke or alter any part of said Kosciuszko's will, solemnly executed, and left in the hands of his executor in this country, to be carried into execution at his death, and especially, when it appears, from this defendant's exhibit A, that the said executor had received, from his testator, a letter of so late date as the 15th of September 1817, in which he says of this fund, "after my death you know its invariable destination." And this defendant submits to the decision of this honorable court, whether, if the instrument aforesaid, being genuine and properly authenticated, is of the nature and effect of a will or testament, the said letter of the testator to his executor does not operate as a revoca-
*62] tion of said instrument, *and a re-establishment and republication of his former will? And this defendant, further answering, saith, that

he believes it to be true, that the said Thomas Jefferson, named as executor in said Kosciuszko's will, refused to take out letters testamentary on his estate, and renounced all claim and right so to do, according to law. And this defendant saith, that he was, on the 14th day of August, in the year 1821, appointed by the orphans' court of the county of Washington, district of Columbia, the administrator, with the will annexed, of the estate of the said General Thaddeus Kosciuszko, and received from the said orphans' court, letters of administration, with said will annexed, a copy of which is herewith exhibited to this court, marked defendant's exhibit C, and which this defendant prays may be taken as part of this his answer. That, after receiving said letters of administration, there came to the hands of this defendant from the said Thomas Jefferson, as the estate of said Kosciuszko, two certificates of the six per cent. stock of the United States—one of $11,363.63, and the other of $1136.36, and one certificate of stock of the Bank of Columbia, of forty-six shares, amounting, at their par value, to $4600. That the appraisers appointed by the aforesaid orphans' court to estimate the value of said stocks, appraised them both at par, taking into consideration the advance of the market price of the one, and the depreciation of that of the other, and their respective amounts, and appraising them both together. That, after the receipts of said certificates, there came to the hands of this defendant, dividends upon said stocks to the amount of $4104, which he invested, with the consent of said orphans' court, in six per cent. stocks of the said United States, and which purchased of said stock of the United States a certificate of $3794.24, and that there have since come to his hands, as dividends upon all of said stocks, $580.82, making the whole amount of the estate of said Kosciuszko, which has come to his hands, $20,894.23 of stocks estimated at their par value, *and $580.82 in cash. This defendant, further answering to the bill of said complainant, saith, that among the papers which came to his hands, as hereinbefore mentioned, is a letter from the aforesaid Mr. De Poletica, to the said Thomas Jefferson, inclosing a copy of a dispatch from the viceroy of Poland to him, a copy of which letter and dispatch is herewith exhibited to this honorable court, marked defendant's exhibit D; and by which this defendant understands, that the whole estate of said Kosciuszko may be claimed by a Major Estho, of Poland, as the heir-at-law of said Kosciuszko. That this respondent communicated to said Poletica, in April last, such information as he possessed in relation to said estate, and was informed by said Poletica, that the same would be transmitted to the said viceroy of Poland. That there were also, among the papers aforesaid, two letters from a Mr. Zeltner to said Thomas Jefferson, copies of which are herewith exhibited, marked "defendant's exhibit E, and defendant's exhibit F," by which this defendant understands, that the said Kosciuszko has disposed of the greater part of his fortune in favor of the children, nieces, brothers and sisters of the said Zeltner, and that his (said Kosciuszko's) parents were living in Poland, at the date of the first of said letters. [*63

Exhibit A.

Monticello, June 12, 18—.

Sir:—I have received your favor of May 27, on the subject of the property of the late General Kosciuszko, vested in our funds, and left under

my care and direction. A little before the departure of the general from America, in 1798, he wrote a will, all with his own hand, in which he directed, that the property he should possess here, at the time of his death, should be laid out in the purchase of young negros, who were to be educated and emancipated; of this will, he named me executor, and deposited it in my hands. The interest of his money was to be regularly remitted to him in Europe. My situation in the interior of the country, rendered it impossible for me to act personally in the remittances of the funds, and Mr. John Barnes, therefore, of Georgetown, was engaged, under a power of attorney, to do that, on commission; which duty he regularly *and faithfully performed, until we heard of the death of the general. We had, in the meantime, by seasonably withdrawing the greater part of his funds from the bank in which he had deposited them, and lending them to the government, during the late war, augmented them to $17,159.63: to wit, $12,499.63 in the funds of the United States, and $4600 in the Bank of Columbia, in Georgetown. I delayed, for a considerable time, the regular probate of the will, expecting to hear from Europe, whether he had left any will there, which might affect his property here. I thought that prudence and safety required this, although the last letter he wrote me, before his death, dated September 15, 1817, assured me of the contrary in these words, "*nous avancons tous en âge, c'est pour cela, mon cher et respectable ami, que je vous prie de vouloir bien (et comme vous avez tout le pouvoir) arranger qu'après la mort de notre digne ami Mr. Barnes, quelqu'un d'aussi probe que lui prenne sa place, pour que je eecoive les inátrêts ponctuellement de mon fonds; duquel, après ma mort, vous savez la destination invariable, quant à présent faites pour le mieux comme vous pensez.*" After his death, a claim was presented to me on behalf of Kosciuszko Armstrong, son of General Armstrong, of $3704, given in Kosciuszko's lifetime, payable out of this fund; and subsequently, came a claim to the whole from Mr. Zeltner, of Soleure, under a will made there. I proceeded, on the advice of the attorney-general of the United States, to prove the will in the state court of the district in which I reside, but declined the executorship. When the general named me his executor, I was young enough to undertake the duty, although, from its nature, it was like to be of long continuance; but the lapse of twenty years more, had rendered it imprudent for me to engage in what I could not live to carry into effect: finding now, by your letter of May 27, that a relation of the general's also claims this property, that it is likely to become litigious, and age and incompetence to business admonishing me to withdraw myself from entanglements of that kind, I have determined to deliver the will and whole subject over to such court of the *64] *65] *United States as the attorney-general of the United States shall advise (probably it will be that of the district of Columbia), to place the case in his hands, and to petition that court to relieve me from it, and to appoint an administrator with the will annexed. Such an administrator will probably call on the different claimants to interplead, and let the court decide what shall be done with the property. This I shall do, sir, with as little delay as the necessary consultations will admit, and when the administrator is appointed, I shall deliver to him the original certificates which are in my possession: the accumulating interest and dividends remain untouched, in the treasury of the United States and Bank of Columbia.

I learnt with much pleasure your return to the United States, and in a character, which enables you to do much good to your own, as well as to our country. The peace and friendly intercourse of nations depend much on the personal characters of their diplomatic agents, whose views of things, in black or in white, cannot fail to tinge that of their respective governments. Your friendly dispositions give us entire confidence, that everything from you will be conciliatory, and its effects the greater, as the proofs we have had of the friendship of your great and good emperor, give us confidence, that whatever seed you sow, will fall "neither by the way-side, nor in stony places, nor among thorns, but on good ground, which will bring forth fruit to a hundred fold." We all recollect with pleasure the favor of your former visit to Monticello, and a repetition will be equally gratifying, should your affairs permit. The country cannot, like the cities, furnish the amusements of varied society; a varied scene is all it can offer to its guests, and a view of the tranquil current of domestic life. In presenting to you the souvenirs of the family, I tender my salutations also, and the assurance of my high respect and consideration.

H. E. M. De Poletica, Ambassador of Russia. TH. JEFFERSON.

Exhibit B.

Red Hook, 4th Jan. 1818.

Dear sir:—Some years before I left Paris, General Kosciuszko put into my hands the paper, of which the inclosed is a copy. *Undertaking that it was not to be used till the general's death, it has been in my [*66 cabinet, unopened, from that day till this, and is now recurred to on the information brought by the mails of the day, that the general had died in Switzerland, on the 15th of October last, and that his funeral was celebrated in Paris, on the 31st of that month. I beg to know from your kindness, whether you have any information from Switzerland or France, in relation to this event, and (if it corresponds with mine) what other steps, if any, besides furnishing the original document, will be necessary or proper to give effect to the general's will, so far as my son is concerned. The young man is now fifteen or sixteen years old. I beg you to accept assurances of my great respect and esteem.

Thomas Jefferson, Monticello. JOHN ARMSTRONG.

The will and probate, as contained in pages *55–8, *ante*, were also annexed as exhibits; together with the following correspondence.

Washington City, le 27 Mai, 1819.

Monsieur:—Peu avant mon départ de Paris en Février dernier j'ai reçu du vice-roi de Pologne, Prince Lajanceck, la lettre dont j'ai l'honneur de vous transmettre ci jointe la copie avec celles des pièces qui l'accompagnoient. Le tout indique clairement la nature des renseignements que me demande le gouvernement de Pologne, et que je n'ai pas hésité de lui promettre, comptant d'avance sur votre obligeance, malgré tous les motifs qui m'engageoient à respecter vos loisirs si précieux par les souvenirs aux quels ils se rattachent. Je saisis avec empressement cette occasion pour vous exprimer, Monsieur, mon vif desir d'obtenir la permission de me présenter

encore une fois à Monticello, pour vous y renouveller de vive voix l'expression de la haute consideration avec laquelle j'ai l'honneur d'être, Monsieur, Votre très humble et très obeissant serviteur,

PIERRE DE POLETICA.
Envoyé de Russie près les U. S. d'Amérique.

Thomas Jefferson, Monticello.

*67] *Copie d'une dépêche du Vice-roi du Royaume de Pologne, à Mr. de Poletica, datée de Varsovie, du 17 Nov. 1818.

Le sieur Estho, ci devant major à l'armée Polonaise, neveu de fue le général Kosciuszko, se trouvant dans le cas d'avoir besoin d'une information exacte sur l'état de la fortune que le dit général a pu délaisser, a reclamé l'intervention de son gouvernement à l'effet de lui procurer les éclaircissements nécessaires à cet égard par l'entremise de la mission de S. M. I. et R. notre Auguste Maitre près la cour de France. La correspondance dont M. le Gl. Pozzo di Borgo a bien voulu se charger à cet effet avec des personnes qui lui sembloient être le plus à meme de connoître les moyens pécuniaires de feu Kosciuszko, a donné pour résultat deux lettres ci-jointes en copies, portant quelques renseignements sur l'objet ci-dessus mentionné. Il conste de ces deux pièces et votre excellence voudra bien s'en convaincre, que le Gl. Kosciuszko, outre les fonds déposés etre les mains de différents banquiers en France et en Suisse en possédoit de plus considerables encore chez MM. Thomson et Bonar, à Londres, et chez Jefferson et Barnes, à Washington. Le sieur Estho met d'autant plus d'interêt à obtenir des notions précises relativement aux fonds de son oncle placés en Amerique, qu'il a tout lieu de supposer qu'ils ne sont point compris parmi les sommes dont de défunt a disposé par son testament.

Faisant par conséquent droit aux plus vives instances du pétitionaire j'ose vous supplier, Monsieur, de daigner faire les démarches nécessaires pour cet effet, auprès des sieurs Jefferson et Barnes, citoyens des Etats Unis, et de vouloir bien m'en communiquer le résultat dès qu'il aura été porté à votre connoissance. Je saisis avec empressement cette occasion pour offrir à V. Ex. l'expression de ma très haute considération.

(Signé) LAJONCECK.

Conforme à l'original—POLETICA.

Copie d'une lettre de Mr. Hottinguer à S. Ex. le Gl. Pozzo di Borgo, datée de Paris, du 2 Juillet, 1818.

*68] En réponse à la lettre que V. Ex. nous a fait l'honneur de *nous écrire le 29 Juin, nous la prévenons qu'aux époques du 5 Avril et du 4 Juin, 1818, les fonds déposés chez nous par feu le Gl. Th. Kosciuszko, s'élevoient en principal à la somme de fr. 99.775, et que le 1er. Octobre 1817, la solde lui revenant sur nos livres, étoit de f. 102.400, à peu de chose prés et intèrêts compris.

D'après quelques renseignements que nous avons reçus et dont nous ne pouvons garantir l'exactitude, il paroit qu' au décès du Gl. Kosciuszko (15 Octobre, 1817), il avoit en depôt environ :

f. 100,000, chez Messrs. T. Thomson, T. Bonar et Cie. à Londres,
6,000, chez Mr. G. Esher, à Zurich,
5,000, chez Mr. Belt en à Soleure,

111,000 ensemble.

Armstrong v. Lear.

Le général Kosciuszko a fait deux testaments : l'un daté de Soleure, le 4 Juin 1816 ; l'autre également daté de Soleure, le 10 Octobre 1817. Par le premier il a légué sur ces fonds en nos mains,

f. 60,000, en faveur de Mlle. Thadea Ernine Wilhelmina Zeltner, sa Filleule,

35,000, en faveur de Mlle. Marie Charlotte Zaïre Marguerite Zeltner,

5,000, en saveur de M. Bonisant père, notaire à Moret exécuteur testamentaire,

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190,000, total portant intérêts à 5 p. c. du jour du décès.

Par l'autre testament le Gl. a disposé de tous ses fonds chez Messrs. T. Thomson, T. Bonar et Cie, F. G. Esher, et Beltin en faveur de divers. Il a aussi disposé du reste de son avoir chez nous et a nommé M. Havier Armetly de Soleure pour exécuteur du 2d testament.

Ces deux exécuteurs testamentaires s'etant mis en règle vis-a-vis de nous, nous avons payé f. 102,430.10, le 9 Avril, dernier à MM. Bonissant, en execution du testament du 4 Juin 1816 ; principal et interêts 2700 ; le 2 Juin à M. Havier Amieth pour balance du compte du Gl. Kosciuszko, chez nous *f. 105,130.10 ensemble, au moyen de quoi nous n'avons plus aucuns fonds appartenant à la succession du général. [*69

Nous avions lieu de croire que les autres Maisons se sont également dessaisies des fonds en leurs mains, en exécution du second testament.

Quant aux fonds que pouvoit avoir le Gl. Kosciuszko en Amérique nous avons su que vers l'année 1810 il avoit :

$12,500, environ placés chez Mr. Jefferson, ancien Président des Etats Unis,

4,500, environ chez un Mr. Barnes à Washington.

$17,000 ——— Soit à peu-pres quatre vingt cinq mille francs, mais nous ignorons entierement s'il en a disposé.

(Signé) HOTTINGEUR.

Conforme à l'original—POLETICA.

Copie d'une lettre de Bonissant père, Notaire à Moret à S. Ex. M. le Gl. Pozzo di Borgo, datée de Moret, du 2 Juillet 1818.

Je n'ai pas été à même de connoitre la fortune de M. le général ; il etoit retiré tout près d'ici dans la famille de Mr. Zeltner dont j'ai la confiance. Voila comme j'ai fait sa connoissance et que par suite il m'a donné des marques d'amitié, et m'a rendu aussi dépositaire de son testament. Environ dixhuit mois avant de mourir il avoit fait un testament dont il m'avoit confié un double ; le testament aussitôt son decés a été ouvert suivant les formes légales ; il a légué à plusieurs personnes les sommes en argent qu'il avoit a Paris entre les mains de la Maison Hottinguer et Comp. Il m'avoit choisi pour son exécuteur testamentaire, et j'ai fait acquitter les legs. Quant à ce qui concerne les autres moyens pécuniaires de ce respectable général, je ne puis vos donner aucun renseignement ; je ne sais même pas s'il avotu d'autres fonds ou des biens ailleurs.

Je présume que vous pourriez le savoir, en vous addressant à M. Zeltner, chez lequel il demeurait : Il serait plus à même de vous satisfaire sur cette demande. Mr. Zeltner est parti il y a environ trois mois pour accompagner les précieux restes de ce digne général à Cracovie, et doit être de retour sous peu de jours. J'ai l'honneur d'être, etc., BONISSANT.

Conforme à l'original—POLETICA.

*Exhibit F.

Soleure en Suisse, le 14 Avril 1819.

Monsieur :—J'ai reçu il y a peu de jours, le lettre que vous m'avez fait l'honneur de m'écrire le 23 Juillet, 1818, et au moment que je me suis addressé à vos autorités pour me faire donner un extrait mortuaire du général Kosciuszko duement légalisé, pour vous l'envoyer par votre Ministre à Paris, j'apprens que votre chargé d'affaires en France, vient d'en faire la demande au nom de Monsieur Gallatin, afin de pouvoir exécuter dans les Etats Unis de l'Amerique, et que cet acte alloit être expédié. Je regrette que le retard qu'éprouve votre lettre ne m'ait pas permis de satisfaire plutôt à votre desir de mettre en execution les volontés bienfaisantes et philantropiques du grand homme, que nous pleurons. J'ai l'honneur de vous remercier du détail interessant que vous me donnez dans votre lettre au sujet de vos émigrés et vous prie d'agréer l'assurance de ma plus haute estime et de mon respectueux dévouement. F. X. Zeltner.

Exhibit E.

Monsieur :—Ayant eu l'avantage de jouir pendant plus de vingt années de l'amitié toute particulière de l'illustre défunt, qui en a passé plus de quinze dans ma maison, je n'ai pu ignorer les relations amicales qu'il cultivé avec vous : une amitié fondée sur l'estime réciproque, ne pouvoit qu'être durable ; aussi suis je bien persuadé des regrets que vous causera la nouvelle de son décès si peu attendu. Il en avoit quitté en Mai, 1815, pour répondre aux desirs que lui avait temoigné l'Empereur de Russie de conférer avec lui a Vienne sur le sort de la Pologne ; de Vienne il est revenu jusqu'é Soleure en Suisse, ou il a demeuré chez mon frère en attendant que les circonstances decident s'il doit aller dans sa patrie ou revenir ici dans l'asile qu'il s'était choisi ; il était sur le point de prendre le dernier parti quand la mort vint l'enlever a sa patrie, il a aussi de nombreux amis parmi lesquels je sais que vous êtes au premier rang. C'est cette considération qui m'a fait un devoir de vous annoncer directement cette nouvelle.

Comme le général Kosciuszko a disposé de la majeure partie de sa fortune
*71] en faveur de mes enfans, dames, nièces, *freres et belle sœur et que je suis en outre très lié avec ses parents que je compte aller voir en Pologne, je vous prie de vouloir donner des renseignements sur le capital qu'il a laissé entre vos mains et autres objets qui pourraient être à votre connaissance : vous obligerés infinement celui qui a l'honneur d'être, avec estime et haute consideration, Monsieur, votre très humble et obéissant serviteur. P. J. Zeltner.

The circuit court dismissed the bill of the complainant, and he prosecuted this appeal.

This case was argued by *Key*, for the appellant ; and by *Wirt* and *Z. C. Lee*, for the appellee.

For the appellant, it was contended, that when this case was before the court in 1817 (12 Wheat. 169), it was then decided without prejudice, in order that probate might be taken, in the proper court, of the testament

exhibited. This having been now done, probate being made in the orphans' court of Washington county, of the paper exhibited as the last will and testament of Thaddeus Kosciuszko, it will be contended for the appellant, that the same is to be considered as a valid testamentary act, and that the appellant was entitled to a decree against the administrator with the will annexed, for the amount of the legacy and interest.

As the court gave no opinion upon the merits, nor on the principles of law governing the facts, of the case, the arguments of the counsel are not reported.

STORY, Justice, delivered the opinion of the court.—This cause was formerly before the court, and the decision then had is reported in 12 Wheat. 169. The bill is now substantially the same with the former bill, except that there is an allegation, that the instrument set forth as a testamentary instrument, executed at Paris, on the 28th of June 1826, in favor of the plaintiff, "has been admitted to probate, and duly proved in the orphans' court of Washington county," in this district. But the bill does not go on to state, that it has been duly established by that court as a valid will, according to the law of France, though that is averred to be the place of *domicil of Kosciuszko, at the time of its execution. The bill, however, does [*72 assert, that the instrument is a last will and testament, to all intents and purposes, and must operate as such, and revoke, *pro tanto*, the bequests and appropriation in the prior will, of which Mr. Jefferson was named executor.

The answer of the administrator (Lear) is substantially the same as his former answer, admitting the execution of the instrument, but submitting to the court (without denying in a formal and direct manner, the validity of the will as such, according to the law of France), whether it will decree the defendant to pay the money to the plaintiff "upon an instrument made under the circumstances, and authenticated in the manner that the aforesaid instrument is, and whether the said instrument shall have effect to revoke or alter any part of said Kosciuszko's will, solemnly executed and left in the hands of his executor in this country," &c. This is certainly a very informal and loose mode of putting in issue, if, upon the bill, such a question can be tried, the validity of a will made in a foreign country, whose laws are not brought before the court, either by averment or evidence. But the answer contains a new allegation, that certain persons residing in Europe have filed a bill in the circuit court of the district of Columbia, against him, the administrator, claiming a large portion of the assets, if not the whole, as creditors or mortgagees of the said Kosciuszko; and certain persons, also residing in Europe, have filed another bill against him (it was probably meant in the same court), claiming the whole assets, as heirs-at-law of the said Kosciuszko, and therefore, as distributees of the said assets. None of the parties to either of these latter bills are made parties to the present bill. And we are of opinion, that the persons claiming as heirs of Kosciuszko, should be made parties, that may have an opportunity to contest the plaintiff's title, as the real parties in interest, the administrator being but a mere stakeholder. Indeed, we think, that all three of the bills ought (if possible) to be brought to a hearing at the same time, in the circuit court, in order that a final disposition may, at the same time, be made of all of the questions arising in all of them.

We wish also to attract the attention of counsel to some other considera-
*73] tions, which may become important in future *stages of the cause; and especially, in the aspect under which the present bill and answer are framed. In the first place, if the intention is to put in issue (as it seems to be), not only the construction and operation of the testamentary instrument in favor of the plaintiff, but its validity and effect as a *will*, it is material, that the law of France, the place of the domicil of Kosciuszko, at the time of its execution, should be brought before the court, and established as matter of fact; for the court cannot judicially take notice of foreign laws; but they must be proved by proper evidence. The present allegations of the bill and answer are quite too loose for this purpose; and they should be amended, and made more distinct and direct. We do not mean to express any opinion, whether this court can examine into the point of the validity of the instrument as a will, according to the law of France, or whether it belongs exclusively to the orphans' court of the county of Washington That is a question, which it may be fit hereafter to examine, if it should be pressed in argument.

In the next place, there may arise some nice questions of international law. in which the fact of the domicil of Kosciuszko, at the time of his birth, at the time of his making the will of which Mr. Jefferson was named executor and at the time of his death, may become material. We do not mean to say, what is the true rule that is to govern in cases of wills of personalty; whether it be the rule of the native domicil, or of the domicil at the time of the execution of the will, or of the domicil at the death of the party, where there have been changes of domicil. These are points, which ought, under the circumstances of this case, to be left open for argument. But the facts on which the argument should rest, ought to be distinctly averred in the bill and met in the answer.

The place of domicil of Kosciuszko at the time of his death, may also become material, under another aspect of the case, viz., the question, who are his heirs, entitled to the succession *ab intestato*, or under the other will or wills executed by him, to which reference is made in some of the papers in the case. The persons claiming as such heirs, must establish their title under, and according to, the law of his domicil at the time of his death. So that, perhaps, it may become material, if Switzerland was the domicil of
*74] Kosciuszko, at the time of his death, *to bring the law of that country distinctly, as matter of fact, before the court. The court have, in another case (*a*) expressed their desire to have the other will or wills made by Kosciuszko, put regularly upon the record, to ascertain, whether they have any bearing upon the merits of the present case.

It is also material to observe, that the answer of the administrator relies on a letter written by Kosciuszko to Mr. Jefferson, in September 1817, as a revocation of the supposed testamentary paper in favor of Armstrong, and a republication of the first will; and yet that letter is not produced in evidence, nor even the extract verified; so that there is a total deficiency of proof as to this most material fact. This defect ought to be supplied. These observations have been thought fit by the court to be suggested to the counsel on both sides, on the present occasion. Under the complicated

(*a*) Estho *v.* Lear, 7 Pet. 130.

circumstances of the present case, and the important bearings of foreign law upon it, it is very desirable, that if it should come again before us, all the facts, and all the lights necessary for a final decision may be furnished, without submitting it to farther embarrassments.

The court decree, that the decree of the circuit court dismissing the bill be reversed, and that the cause be remanded, with leave to make new parties, and for other proceedings.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said circuit court, dismissing the bill in this cause, be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said circuit court, with leave to make new parties, and for other proceedings to be had therein, according to law and justice, and in conformity to the opinion of this court.

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*Reuben M. Garnett *et al.*, Heirs of Reuben Garnett, deceased, Appellants, *v.* Henry Jenkins *et. al.* [*75

Land-law of Kentucky.

The following entry of lands in Kentucky is invalid: "May 10th, 1780, Reuben Garnett enters 1164 2-3 acres, upon a treasury-warrant, on the seventh big fork, about thirty miles below Bryant's station, that comes in on the north side of North Elkhorn, near the mouth of said creek, and running upon both sides thereof for quantity."

It is a well-settled principle, that if the essential call of an entry be uncertain as to the land covered by the warrant, and there are no other calls which control the special call, the entry cannot be sustained. In the case under consideration, there are no calls in the entry, which control the call for the "seventh big fork," and that this call would better suit a location, at the mouth of McConnell's, than at Lecompt's run, has been shown by the facts in the case; this uncertainty is fatal to the complainant's entry.

To constitute a valid entry, the objects called for must be known to the public, at the time it was made, and the calls must be so certain as to enable the holder of a warrant to locate the vacant land adjoining; it is not necessary, that all the objects called for shall be known to the public, but some one or more leading calls must be thus known, so that an inquirer, with reasonable diligence, may find the land covered by the warrant.

If an object called for in an entry is well known by two names, so that it can be found by a call for either, such a call will support the entry.

Some of the witnesses say, that being at Bryant's station, with the calls of Garnett's entry to direct them, they could have found his land on Lecompt's run, without difficulty; if this were correct, the entry must be sustained, for it is the test by which a valid entry is known.

If the complainants clearly sustain their entry by proof, their equity is made out, and they may well ask the aid of a court of chancery to put them in possession of their rights; but, if their equity be doubtful, if the scale be nearly balanced, if it do not preponderate in favor of the complainants, they must fail.

Appeal from the Circuit Court of Kentucky. This case was commenced by a bill in chancery filed by Reuben Garnett, a citizen of Virginia, on the 30th of December 1815, against Henry Jenkins and others, citizens of the state of Kentucky, in the seventh circuit court of the United States for the district of Kentucky, for the purpose of asserting his claim to $1164\frac{2}{3}$ acres of land. Since which time, the *complainant died, and the suit had been revived in the name of his representatives. The only [*76

question put in the issue by the bill and answers, was the validity of the following entry under which the complainants claimed :

"May 10th, 1780, Reuben Garnett enters one thousand one hundred and sixty-four and two-third acres, upon a treasury-warrant, on the seventh big fork, about thirty miles below Bryant's station, that comes in on the north side of North Elkhorn, near the mouth of said creek,and running up both sides thereof for quantity."

(A copy.) Richard Higgins, F. C.

The defendants exhibited no title papers, and by consent of the parties, the validity of this entry was the only question submitted to the court below, as will appear by the following agreement.

" Reuben Garnett's heirs *v.* Christopher Greeup's heirs and others : In Chancery. The counsel for the complainants in this cause, and the counsel in the defence, believing that the case, so far as it depends on the validity or invalidity of the entry of the complainants, to wit, the entry in the name of Reuben Garnett, deceased, is as fully prepared as it can be at this day. For the purpose of saving costs, the parties agree to try the cause as relates to the validity or invalidity of the entry, and that the complainants, in case the entry is sustained by the court, shall be permitted to make such further preparations by survey, revival against the heirs or representatives of deceased parties, if necessary, &c., as may be necessary to carry into effect the opinion of the court. Therefore, for the present, it is conceded, that the patent boundary of Garnett covers the claim of each of defendants in part."

The court below dismissed the complainant's bill ; to reverse which decree, this appeal was prosecuted.

The case was submitted to the court, on an argument by *Allan*, for the appellants.

McLean, Justice, delivered the opinion of the court.—This suit in chancery comes before this court, by an appeal from the circuit court of the United states for the district of Kentucky. By the bill and answers, and the agreement of the parties, the validity of the following entry is the only point presented *for the decision of the court. " May 10th, 1780, Reuben Garnett enters one thousand one hundred and sixty-four and two-third acres, upon a treasury-warrant, on the seventh big fork, about thirty miles below Bryant's station, that comes in on the north side of North Elkhorn, near the mouth of said creek, and running up on both sides thereof for quantity."

*77]

To constitute a valid entry, the objects called for must be known to the public, at the time it was made, and the calls must be so certain as to enable the holder of a warrant to locate the vacant land adjoining. It is not necessary that all the objects called for shall be known to the public, but some one or more leading calls must be thus known, so that an inquirer, with reasonable diligence, may find the land covered by the warrant.

Respecting the above entry, a great number of depositions were taken, and, with the view of tracing accurately the calls of the entry, several surveys were executed. The principal objections to the validity of the entry are, that the call for the seventh fork does not designate the creek, on which the claimants allege the land is situated, and that the beginning cor-

ner is not only uncertain, but no marked lines or corners of the survey have been found. The proof in the case is as follows:

Patrick Jordan states, that in 1775, he passed up Elkhorn, near where Bryant's station was afterwards built, but was never at the station until August 1780, when he acted as a guard; and he recollects of hearing James Forbes, or some one of the men belonging to the station, ask certain hunters, if they had been as low down as the seventh big fork, or the seventh fork. The witness then inquired, which of the forks was called the seventh fork, and was told by the hunters that it was the creek that was also called Lecompt's run. That in the year 1779, he knew the creek by that name, having, in the year 1775, assisted Charles Lecompt in building his cabin near the creek, but never heard it called by that name, until 1779. In the year 1780, the witness states, that Bryant's station was a place of general notoriety, and he presumes it is twenty-five or thirty miles above Lecompt's run. This run falls into Elkhorn, on the north side, and it was generally called Lecompt's run, as early as May 1780.

*John Ficklin states, that he has been acquainted with Bryant's station, ever since the year 1781, and was well acquainted with the [*78 waters of North Elkhorn, as low down as Lecompt's run, and he frequently heard this run called the seventh big fork, though not earlier, that he recollects, than 1782. Both Bryant's station and North Elkhorn were places of great notoriety at that time. Lecompt's run falls into Elkhorn, on the north side; and the witness thinks the distance from the station to the run was computed at about thirty miles. Witness states, that seventh big fork was generally known by that name at Bryant's station.

Jacob Stucker says, that since the year 1780, he has been acquainted with the waters of Elkhorn, that Bryant's station stands near the creek, which was a stream of notoriety, when he first knew it. He frequently heard Lecompt's run called the seventh big fork, by hunters, as early as the year 1780 and 1781; but until the year 1782, he never saw the creek. It is the seventh big fork, on the north side of Elkhorn, below Bryant's station; the first one being David's fork; the second Little North fork; the third, Cherry's run; the fourth, Miller's run; the fifth, Dry run; the sixth, McConnell's run; and the seventh, Lecompt's run. There is a small branch between David's fork, and the Little North fork, colled Opossum run, and another between Miller's run and Dry run, called Lane's run; and another between Dry run and McConnell's run, called McCracken's run; but these branches are small in comparison with the seven branches first named, and have the appearance of spring branches. There are also two other branches, called Mile branch and the Blue Spring branch, but they are small, and not more than a mile and a half long. The witness states, that had he been called, as early as the year 1780, to direct Garnett's survey, he should have been led to the mouth of Lecompt's run, which is about thirty miles below Bryant's station.

Robert Hortness, a witness, states, that in the year 1784, he became acquainted with North Elkhorn, which was then a creek of notoriety, and that, at that time, David's fork, Little North fork, Cherry's run, Miller's run, Dry run, McConnell's run, and Lecompt's run, were the seven largest forks falling into Elkhorn, on the north side, below Bryant's station. At that time, the runs, called Opossum run, Lane's run, and *Mc- [*79

Cracken's run, were too small to be considered large forks, not being larger, if so large, as the branches or forks of some of the seven forks. The witness thinks, the calls of Garnett's entry were sufficient to lead an inquirer to Lecompt's run.

Hugh Shannon states, that Lecompt's run has been known and called by that name, by hunters and others, since 1776. He was well acquainted with Lecompt's improvement, made on this creek in 1775, and ever since the year 1776, it has been known as Lecompt's improvement. Never heard this run called the seventh big fork. Witness became acquainted with Byrant's station, in the winter of 1779.

Ash Emerson states, that he is well acquainted with North Elkhorn, and that if he had been called on, in the year 1780, to name the seven big forks or big runs, falling into North Elkhorn, on the North side, below Bryant's station, he should have named the following: David's fork, Little North fork, Cherry's run, Miller's run, Lane's run, and McCracken's run, which would be the seventh. In 1776, the witness knew McConnell's run, by that name, and also the Dry run; he and his company gave Miller's run and Cherry's run their names; and some of the creeks were called by different names. Never heard Lecompt's run called the seventh big fork; McCracken's run and Lane's run were not so large as the other forks, but Lane's run heads as far up in the ridges as any other one. Lewis Valandingham, since 1782, has been well acquainted with the water-courses above named, and he corroborates the statement of Emerson.

John Miller states, that in the spring of 1776, he became acquainted with Lecompt's run; and ever since, it has been known by that name. He does not count himself a judge of what would be big forks or runs, but he would call them David's fork, Little North fork, Cherry's run, Miller's run, McCracken's, McConnell's, and Lecompt's.

John Williams says, that he was acquainted with North Elkhorn, in the year 1775, and if, on the 10th of May 1780, he had been required to point out the seventh big fork, below Bryant's station, he could not have done it, as he never knew a creek called by that name. Since the year 1776, Lecompt's run has been generally called and known by that name.

*80] James McConnell became acquainted with Lecompt's run in *1776, and has never heard it called by any other name; until of late years, it has been called by some, the seventh run.

John Smith, in the year 1773, became acquainted with the waters of North Elkhorn, and early in the spring of 1775, knew Lecompt's run; and he never knew it called by any other name, until lately he was informed, that certain persons were about calling it the seventh big fork or branch. Had the witness been called on to designate the seventh big fork, falling into North Elkhorn, on the north side, he should have named McCracken's run. He thinks, that Lecompt's run is one or two and twenty miles below Bryant's station. In 1775, Lane's run and McCracken's had their names given to them. These runs, at their mouths, are some smaller than the others, but they branch out into a body of very good land, as large as the others, though the witness does not think they are as long. On the north side of Elkhorn, the route usually travelled, the witness supposes the distance from Bryant's station to Lecompt's run, is about thirty miles.

Anthony Lindsay says, that in the year 1791, he became acquainted with

the general boundary of Garnett's claim of land, on Lecompt's run; that in the year 1793, John Perkins made a settlement on a part of the claim, under James Ferguson, who had purchased Lecompt's title. Witness has a perfect recollection of hearing the early settlers speak of Lane's run, as one of the principal branches falling into Elkhorn, below Bryant's station.

Henry Herdon also states, that he resided at Bryant's station, in 1781, and became well acquainted with the principal branches of Elkhorn, and that Lane's run was always considered as one of the principal branches or forks. James Bell says, that as early as 1787, Lane's run and the others were called large branches. And James Jones states, that McCracken's run and Lane's run were both called large runs, in 1789.

James Connelly states, that in 1794, he purchased from Colonel Johnson the land on which he now lives, which is about a quarter of a mile below McConnell's run; and the witness always considered Lane's run a big branch. He was twice called on by the agent of Garnett, and they searched all around the mouth of Lecompt's run, to find Garnett's beginning corner, and examined every tree and stump, but could find no marks, *until they went up the run to a small bottom near where some cedars stood; there they found an ash marked, but he does not recollect what the marks were. [*81

William Mosby states, that he has lived at the mouth of Lane's run, for forty years; that Lane's run is among the largest falling into North Elkhorn, on the north side, that its source is in the dividing ridge. Its mouth is circumscribed by a mill-dam across Elkhorn, just below, which has obstructed the channel at the mouth, but it discharges more water than any of the adjacent streams which fall into Elkhorn.

John Payne states, that he has resided near North Elkhorn, since 1788, that in the year 1792, he was appointed surveyor of Scott county, within which the land in controversy is situated, and that he became well acquainted with the forks and runs falling into Elkhorn, on the north side, between Bryant's station and Lecompt's run: the first is David's fork; the second, Little North fork; third, Cherry's run; fourth, Miller's run; fifth, Lane's run; sixth, Dry run; seventh, McCracken's run; the eighth, McConnell's run; and the ninth, Lecompt's run.

Joseph R. Lee has been acquainted with Lecompt's run for thirty-two or three years; when he first knew it, there was a considerable growth of cedar and other timber near the mouth of the run, and about half a mile up it. Between the years 1802 and 1806, he lived within half a mile of the mouth of this run, and understanding a reward was offered to any one who should find the line trees or corner of Garnett's claim, he made diligent search, but was unable to find either, and he thinks, that if a corner had been marked, within fifty or sixty yards of the mouth of the run, he should have found it. John Garnett lived near the mouth of Lecompt's run, and, as witness understood, lived under his brother's claim, but he heard John say, that he did not know where the lines and corners were. About thirty-three or four years ago, he left the land.

Joseph S. Norris, under an order of court, measured the runs below Bryant's station, which fall into Elkhorn, on the north side, and he considers Cherry's, Miller's and Dry run are larger than Lane's; Cherry's run has a large fork, near its mouth, and he believes that either of these forks is as

large as Lane's run. And the same may be said of the forks of Dry *run. If witness had been called to make the location, at the mouth of the seventh big fork, as called for in Garnett's entry, he does not know whether he would have made it at the mouth of Lecompt's or McConnell's run. Witness surveyed Garnett's claim, and at the time made diligent search for corners where there was timber. but found none. The first and second line terminated in cleared lands, the third in timbered land. He has known Lane's run, since 1804 ; when he first saw it, it was perhaps twice as wide as it now is.

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John Garnett states, that he was present forty-five or six years ago, when the original survey of Reuben Garnett's entry was made, and, according to his best recollection, and indeed he is positive, the survey commenced about one hundred and fifty yards, more or less, above the mouth of Lecompt's run, at a large cedar which stood in the cliff of Elkhorn. By the direction of the surveyor, he marked this line as a corner. From this tree, the surveyor ran to a willow, oak and another tree, which were marked as the second corner, and the witness marked the line with a tomahawk. The surveyor then ran the same corner further on, and made lines and corners for Peter Samuel's claim, which adjoins Garnett's. After running Samuel's claim, and coming back to Garnett's second course, the third line of Garnett's claim was run and regularly marked, and the corner also, but the line between Garnett and Samuel was not marked. About thirty-two years ago, witness became acquainted with Lane's run, and it was not to be compared to the others as to size ; it was so narrow, that, at times, the witness could jump across it. The witness took possession of Garnett's claim, thirty-eight years ago, and remained on it about twelve years. He was turned out of possession, by a judgment in ejectment, obtained on a title of Hodges. He was to have two hundred acres of the land, to be surveyed for him, and if it overpaid him for his services, he was to pay his brother.

Lewis Valandingham became acquainted with Lane's run, in 1780 or 1782, and it was then considered a stream of the same magnitude, as Lecompt's run, Miller's run, Cherry's run, and other runs which head in the dividing ridge. In 1782, Lecompt's run was known by that name. Between Bryant's station and Lecompt's run, the following runs fall into *North Elkhorn : Little North fork, Cherry's run, Miller's run, David's fork, Lane's run, McCracken's run, Dry run, McConnell's run, and then Lecompt's run.

*83]

John Burns states, that about thirty or thirty-three years ago, Samuel Ayres offered him a reward, if he could find a line or corner of Garnett's survey, and he hunted frequently, but could find neither, and on inquiring of John Garnett, if he could show either a line or corner of the survey, he answered, that he could never find either, but he supposed the land must be there. There was much cedar about the mouth of Lecompt's creek, and it entered upon the creek, between a half and three quarters of a mile. William Poindexter says, that John Garnett claimed his land about three quarters of a mile below Lecompt's run, on Elkhorn.

Joseph S. Norris, a surveyor, under the order of the circuit court, made the following report as to the magnitude of the streams of water which fall into Elkhorn on the north side below Bryant's station. 1. David's ford, at the mouth, is four poles and eleven links wide ; higher up, beyond back

water, three poles and eighteen links. 2. Opossum run meanders at the mouth one pole at high-water mark; higher up, at common water mark, eighteen links. 3. Little North Elkhorn is four poles wide at the mouth; higher up, beyond back water, four poles; and still higher, three poles and twenty links. 4. Cherry's run is two poles and twenty links wide at the mouth; above back water, three poles and five links; and still higher, three poles. 5. Miller's run is two poles wide and ten links at the mouth; above back water, two poles and eight links; still higher up, two poles and twenty links. 6. Lane's run is 2106 poles in length, equal to six miles one half and twenty-six poles, and measures, at the mouth, two poles and ten links high water; common water, one pole three links; above back water, one pole and eight links; still further further up, one pole and twenty links. 7. Dry run measures at the mouth, high-water mark, five poles; common water, four poles; and higher up, four poles. 8. McCracken's run is three miles and a half and twelve poles long, and measures at the mouth one pole, and the same just below the forks. 9. Mile branch is a small *branch, measures the whole length, 516 poles. 10. Blue Spring run is 965 [*84 poles long, and one and a half poles wide at the mouth; higher up, one pole. 11. McConnell's run is four poles and twenty-one links wide at the mouth, high-water mark; higher up, three poles four links, common water mark. 12. Lecompt's run measures at the mouth, four poles and eighteen links; with high banks higher up, six poles.

This evidence establishes several points which are essential to the validity of Garnett's entry. At the time it was made, no doubt exists, that Bryant's station was settled, and that North Elkhorn was generally known in the country. These two important calls in the entry could have been easily found; and the inquiry must be made, whether the locative or special call has been established. The calls for Bryant's station and North Elkhorn, and the distance to the seventh big fork, are descriptive, and were designed to lead the inquirer to the locative or special call; which was intended to show, with certainty, the land covered by the entry. This call is "near the mouth of the seventh big fork, falling into the north side of the north fork of Elkhorn." Perhaps, the words, "near the mouth," in this call, under the decisions of the Kentucky courts, might be construed to mean, at the mouth, which would give them reasonable precision, and this will leave the call for the "seventh big fork," the only point for investigation. Is this call certain? Would it lead an inquirer, with reasonable diligence, to the land now in controversy? If it would not, the entry cannot be sustained. The call for the "seventh big fork" is, in reality, sufficiently specific; but does it designate Lecompt's run, as insisted on by the complainants?

It appears from the evidence, that this stream of water was called Lecompt's run, from the year 1776, and that this name was given to it by a man called Lecompt, who, in the preceding year, made an improvement on it. The other runs falling into the north fork of Elkhorn, on the north side, between Bryant's station and Lecompt's run, were named about the same time, but some of them were called by different names. If an object called for in an entry is well known by two names, so that it can be found by a call for either, such a call will *support the entry. It is, there- [*85 fore, no substantial objection to the call for the "seventh big fork,"

that it was as well, or better known by the name of Lecompt's run, if this run be the "seventh big fork." Had the call been for Lecompt's run, instead of the "seventh big fork," the evidence in the case would have established the entry, for the proof is clear, that he run was known by that name, generally, before the entry ; but it must rest upon the call for this run, as the "seventh big fork." Some of the witnesses state, that this stream of water was known by the name of the "seventh big fork" at the time of the entry ; and others testify, that it is in fact the seventh. Taking the whole of the evidence together, it does not appear that the name of this run, as the "seventh big fork," is established ; it may have been called by that name, by a few persons, but many of the witnesses well acquainted with the country, and with this stream of water, before the entry was made, and ever since, and who knew it well by the name of Lecompt's run, never heard it called the "seventh big fork."

Is it, in fact, the "seventh big fork?" This is a call which may now be ascertained, nearly with as much certainty, as when it was made. It is true, the course of streams of water may change by time, and their currents and volume of water may be contracted or expanded, but such calls generally contain greater certainty, and can be more easily established, than those which are artificial. A natural boundary is more certain, in most cases, than an artificial one, and is less liable to be altered by fraud or accident.

Several of the witnesses swear, that Lecompt's run is the seventh big fork, but they are contradicted by others, equally respectable, and whose knowledge of the different streams of water about which they testify, was at least equal to the knowledge of those whom they contradict. Some of the witnesses say, that being at Bryant's station, with the calls of Garnett's entry to direct them, they could have found his land on Lecompt's run, without difficulty. If this be correct, the entry must be sustained, for it is the test by which a valid entry is known. But other witnesses, equal in number, say, that they would have been led by these calls to look for Garnett's land on McConnell's run, or some one above that of Lecompt's.

*86] *Here are differences of opinion among the witnesses, in regard to an essential fact, and if there were no other guide than the opinion of the witnesses, as stated in their depositions, it might be difficult for the court to come to a satisfactory conclusion. It is true, the affirmative facts must be proved by the complainants, before they can affect the rights of the defendants. The defendants are in possession of the land, and have been for many years, some or all of them, under legal titles, and the complainants seek to recover the land, on the ground of their superior equity. Interests thus acquired, and which have been so long enjoyed, ought not to be disturbed by an equitable claim which is not clearly established. If the complainants clearly sustain their entry by proof, their equity is made out, and they may well ask the aid of a court of chancery to put them in possession of their rights. But, if their equity be doubtful, if the scale be nearly balanced, if it do not preponderate in favor of the complainants, they must fail.

The court are not under the necessity of deciding this important point by a reference to the depositions alone, but they are aided by the report of the surveyor, who states the magnitude of the different streams of water

falling into the north side of Elkhorn, which he ascertained from actual measurement. This presents the facts to the court in a more satisfactory manner than could be done by the opinion of witnesses. It makes certain that which before rested on opinion. From this report, it appears, that Lane's run, which the complainants contend does not form one of the big forks that fall into North Elkhorn, is as large at the mouth as Miller's run, which is admitted to be one of those forks ; and is as wide as Cherry's run, except ten links, which is also admitted to be a large fork. Lane's run is six and a half miles long, and, according to one of the witnesses, discharges more water than some of the adjacent branches. If the call for the seventh big fork does not designate Lecompt's run, the entry cannot be held valid. And if Lane's run be as large as Miller's, and within ten links as wide at the mouth as Cherry's run, how can an inquirer, by following the directions in Garnett's entry, look for his land at the mouth of Lecompt's run. By what rules is he to pass over, without *counting, Lane's run, while he counts Miller's run and Cherry's. If the latter be ten links wider at [*87
the mouth than Lane's, the same cannot be said of Miller's. And if Lane's run be not counted as one of the big forks of Elkhorn, must not Miller's be passed over on the same ground? But if Miller's run be counted, must not Lane's be counted also? And if they be placed in the same class, as they must be, from their size, it is equally fatal to Garnett's entry, whether they be counted or not counted. If counted, Lecompt's run would be the eighth "big fork;" if not counted, it would be the sixth ; so that, in either case, the call does not fix the land of Garnett on Lecompt's run.

John Garnett, one of the witnesses, states, that the survey of Garnett's entry was made at the mouth of this run, and all the lines and corners regularly marked, except the line which was common to Garnett and Samuel. But, after the most diligent search, no trace of this survey can be found ; and, from other facts proved in the case, it is probable, that this witness has mistaken the place where the survey was made. But if this survey were fully established, as stated by the witness, it could not aid the defect in the special call of the entry. It is a well-settled principle, that if the essential call of an entry be uncertain as to the land covered by the warrant, and there are no other calls which control the special call, the entry cannot be sustained. In the case under consideration, there are no calls in the entry which control the call for the "seventh big fork," and that this call would better suit a location at the mouth of McConnell's than at Lecompt's run, has been shown by the facts in the case. This uncertainty is fatal to the complainant's entry, and the decree, therefore, of the circuit court which dismissed the bill, must be affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*Jane Watson and others, Plaintiffs in error, *v.* John Mercer and Margaret Mercer.

Constitutional law.—Obligation of contracts.

In 1785, M. and wife executed a deed conveying certain lands of the wife to T., who immediately reconveyed them to M.; the object of the conveyance was, to vest the lands of the wife in the husband. The deed of M. and wife to T. was not acknowledged according to the forms established by the law of Pennsylvania of 20th February 1770, to pass the estates of *femes covert;* and after the death of the wife of M., the land was recovered in an ejectment from the heirs of M., in a suit instituted against him by the heirs of the wife of M. In 1826, after the recovery in ejectment, the legislature of Pennsylvania passed an act, the object of which was to cure all defective acknowledgments of this sort, and to give them the same efficacy as if they had been originally taken in the proper form. The plaintiffs in the ejectment claimed title to the premises, under James Mercer, the husband; and the defendants, as heirs-at-law of his wife, who died without issue; this ejectment was brought after the passage of the act of 1826.

The authority of this court to examine the constitutionality of the act of 1826, extends no further than to ascertain, whether it violates the constitution of the United States; the question, whether it violates the constitution of Pennsylvania, is, upon the present writ of error, not before the court.

This court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that if divests antecedent vested rights of property; the constitution of the United States does not prohibit the states from passing retrospective laws generally; but only *ex post facto* laws. It has been solemnly settled by this court, that the phrase, *ex post facto* laws, is not applicable to civil laws, but to penal and criminal laws; which punish a party for acts antecedently done, which were not punishable at all, or not punishable to the extent or in the manner prescribed; *ex post facto* laws relate to penal and criminal proceedings which impose punishments or forfeitures; and not to civil proceedings which affect private rights retrospectively.

The act of 1826 does not violate the obligation of any contract, either in its terms or its principles; it does not even affect to touch any title acquired by a patent or any other grant; it supposes the titles of the *femes covert* to be good, however acquired; and even provides that deeds of conveyance made by them shall not be void, because there is a defective acknowledgment of the deeds, by which they have sought to transfer their title. So far, then, as it has any legal operation, it goes to confirm and not to impair the contract of the *femes covert;* it gives the very effect to their acts and contracts which the intended to give; and which, from mistake or accident, has not been effected.[1] The cases of Calder *v.* Bull, 3 Dall. 386; Fletcher *v.* Peck, 5 Cranch 138; Ogden *v.* Saunders, 12 Wheat. 266; and Satterlee *v.* Matthewson, 2 Pet. 380, fully recognise this doctrine.

Mercer *v.* Watson, 1 Watts 330, affirmed.

*89] *Error to the Supreme Court of the state of Pennsylvania. In 1826, the defendants in error, John Mercer and Margaret Mercer, instituted an action of ejectment in the district court of the city and county of Lancaster, against Jane Watson and others, the plaintiffs in error, for the recovery of a tract of land in Lancaster county, and a verdict and judgment, under the charge of the court in favor of the plaintiffs, were rendered in their favor. The plaintiffs prosecuted a writ of error to the supreme court of Pennsylvania, and in 1832, that court affirmed the judgment of the district court.

The land in controversy was part of a tract held under a patent granted by the proprietaries of Pennsylvania to Samuel Patterson, on the 19th October 1743; and by regular descent, became vested in Margaret Patterson, the daughter of the patentee, who afterwards intermarried with James Mercer; who had five children by a former wife, now represented by the

[1] Randall *v.* Kreiger, 23 Wall. 137.

defendants in error. For the purpose of vesting the land in controversy in her husband in fee-simple, Margaret Mercer, on the 30th May 1785, together with her husband, James Mercer, executed a conveyance thereof to a certain Nathan Thompson, who, on the same day, reconveyed the said land to James Mercer in fee. This deed was not acknowledged by Margaret Mercer, according to the forms prescribed by the act of assembly of Pennsylvania, of 1770, enacted for the purpose of making the conveyances of real estate by femes covert valid.

After the death of Margaret Mercer, in 1805, David Watson, in right of his wife, the heir-at-law of Margaret Mercer, to whom, if the conveyance of 30th May 1785 was invalid, the land in controversy had descended, instituted an ejectment for the same, alleging that the acknowledgment of the deed being defective, the same was absolutely void. In this suit, Watson and wife recovered the premises, and went into possession thereof. Afterwards, John and Margaret Mercer instituted an ejectment against Watson, then in possession of the premises, and in 1823, that suit was decided in the supreme court of Pennsylvania, in favor of the defendants in the ejectment; thus affirming the decision in the first case.

*On the 3d day of April 1826, the legislature of Pennsylvania made the following law. [*90

"A supplement to an act entitled 'an act for the better confirmation of the estates of persons holding or claiming under *feme coverts*, and for establishing a mode in which husband and wife may hereafter convey their estates.'

"Whereas, by the act of assembly, to which this is a supplement, it is enacted, that the estate of *feme coverts* may be transferred by deed executed by the husband and wife, and by them acknowledged before certain officers: And whereas, under this act, estates of great value have been *bonâ fide* sold by husband and wife, for a legal and sufficient consideration, and the deeds therefor have been by them acknowledged before the proper officer; but in many cases, the mode of making such acknowledgment hath been imperfectly set forth in the certificate: And it hath been held by the supreme court, that deeds transferring the rights and interests of *feme coverts* are invalid and void, unless certain requisites of the acknowledgment of such deeds provided by the said act, shall appear upon the face of the certificate of such acknowledgment to have been pursued; and in all such cases, it is but just and reasonable, that persons who hold such estates, should not, in any case, be disturbed in the enjoyment of them, thus equitably acquired, nor divested thereof under any pretence whatsoever: Now, for the purpose of carrying into effect the real intent of the parties, and of quieting and securing the estates so transferred:—

"§ 1. Be it enacted, that no grant, bargain, sale, feoffment, deed of conveyance, lease, release, or other assurance of any lands, tenements and hereditaments whatsoever, heretofore *bonâ fide* made and executed by husband and wife, and acknowledged by them before some judge, justice of the peace, or other officer authorized by law within this state, or an officer in one of the United States, to take such acknowledgment, or which may be so made, executed and acknowledged as aforesaid, before the 1st day of September next, shall be deemed, held or adjudged invalid, or defective or insufficient in law, or avoided or prejudiced, by reason of any informality

or omission in *setting forth the particulars of the acknowledgment made before such officers as aforesaid, in the certificate thereof, but all and every such grant, bargain and sale, feoffment, deed of conveyance, lease, release, or other assurance so made, executed and acknowledged as aforesaid, shall be as good, valid and effectual in law, for transferring, passing and conveying the estate, right, title and interest of such husband and wife, of, in and to the lands, tenements and hereditaments mentioned in the same, as if all the requisites and particulars of such acknowledgment mentioned in the act to which this is supplementary, were particularly set forth in the certificate thereof, or appeared upon the face of the same."

In 1829, the defendants in error, John and Margaret Mercer, instituted another ejectment for the land, claiming, that the deed of 20th of May 1785 had been made valid by the act of assembly of 1826, and a verdict for the plaintiff was rendered in the district court of the city and county of Lancaster, the judgment of which court upon the verdict was affirmed in the supreme court of Pennsylvania. From that judgment of the supreme court the case came before this court by writ of error.

The case was presented to the court on printed arguments, by *Hopkins* and *Montgomery*, for the plaintiffs in error; and by *Rogers*, for the defendants. As the court decided no other points but those in which the constitutionality of the act of 1826, was presented, the arguments upon the other questions raised in the case are omitted.

The counsel for the plaintiffs in error contended. 1. That, under the laws and constitution of Pennsylvania, and the constitution of the United States, the title and possession of the plaintiffs in error to the land in dispute was sacred, and could be disturbed or violated by no judicial proceedings known to the said laws and constitution; and *à fortiori*, by no legislative enactment. 2. That the act of 3d April 1826, as applied to this case, was unconstitutional and void; divesting the vested rights of the plaintiffs in error to the property in dispute, and impairing the obligation of the contracts under which they recovered and held the same; transcending the power of the legislative branch *of government; and subverting all the protection guarantied to property and contracts by the constitution of the United States, as well as of the state of Pennsylvania.

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For the plaintiffs in error, it was argued by *Montgomery*, that the legislature of Pennsylvania could not, by the act of April 3d, 1806, divest the property of the Watsons, and vest it in the Mercers. For if this act be construed to be applied to this case, and be considered as a constitutional exercise of legislative power, this will be the inevitable result.

The grant of the proprietaries to Samuel Patterson, on the 19th October 1753, was recognised by the legislature on the 27th November 1779, and the act of that date (1 Sm. Laws 479–81) confirming the title of the grantees, amounted to a new grant and a contract, that Samuel Patterson should hold the land thus acquired to him, his heirs and assigns; and the obligation of this contract was, as he had fully paid for the estate, that he should hold it according to the laws of the land, and not be divested of it, except by due course of law. The legislature would have had no right to resume it, or grant it to another. *Terrett* v. *Taylor*, 9 Cranch 43, 292; *Pawlet* v. *Clark*,

Ibid. 333 ; *Fletcher* v. *Peck*, 6 Ibid. 87 ; *New Jersey* v. *Wilson*, 7 Ibid. 164 And surely, what they cannot do directly, they will not be permitted to accomplish by indirect means. Sarah Watson recovered, in the suits of 1805, by virtue of the obligation of this contract, as contained in the grant. The land was withheld from her; she applied for redress to the judicial power, whose duty it was to expound, administer and enforce the law, *Ogden* v. *Blackledge*, 2 Cranch 272 ; and she recovered her estate. Why ? Because she had a vested right to it. A vested right is defined to be "the power to do certain actions, or possess certain things, according to the laws of the land." 1 N. H. 203; 12 S. & R. 360. Immediately upon the death of her sister, the right descended to her, and it became, *eo instante*, vested in her. Whence was it derived ? From the patent, and from its confirmation by the act of the legislature, in 1779. This was a contract executed ; and it is respectfully urged, that in Pennsylvania, there can be no vested right to land, that is not derived from contract. The whole system of land titles in Pennsylvania rests on this basis, and there is no trace of any title *in that state, which did not originate in a grant, 12 S. & R. 371–3, 380 ; or was perfected by patent, after having incepted by improvement. [*93 And no vested right can be taken away or interfered with, except by impairing the obligation of the contract on which it is based, and whence it springs.

Can it be doubted, that this was a vested right ? Why, the very terms of the definition embrace it, even to the letter. In the action of ejectment, the plaintiff must show a right of entry. Sarah Watson proved she had "the power to do this thing." But the plaintiff must prove that he has a right to the possession. Sarah Watson proved, that she had a right "to possess this land, according to the laws of the land." Can any case come more completely within the very letter of the definition. The act of the 3d April 1826, surely, cannot be retrospectively construed, so as to embrace this case ; for such a construction would make the law odious and void : 2 Dall. 310 ; 3 Ibid. 388 ; 7 Johns. 477 ; 1 Kent's Com. 455 ; 12 S. & R. 360 ; 4 Ibid. 401 ; 13 Ibid. 256 ; 15 Ibid. 72 ; 2 Show. 17, 2 ; 1 Vent. 330 ; 4 Burr. 2460 ; 1 Wash. 132 ; 3 Call 218 ; 2 Cranch 272 ; 1 Hen. & Munf. 205 ; 1 Binn. 607 ; 2 Gallis. 150 ; 3 Keble 543 ; 2 Inst. 292, 474 ; 2 Ch. Rep. 302 ; Price's Ch. 77 ; 2 Atk. 87 ; 4 Wheat. 207 ; 12 Ibid. 267, 271, 295, 301, 327 ; 8 Ibid. 12 ; 8 Mass. 423, 430.

But is it applicable to it at all ? The deed of 30th May 1785, had been judicially declared to be a void thing, utterly inoperative ; and, consequently, incapable of any confirmation. Co. Litt. 295 *b* ; Gilb. Ten. 75 ; 8 Cow. 544. 588 ; 16 Johns. 110 ; 20 Ibid. 301 ; Newland on Cont. 31 ; 3 Burr. 1805 ; 2 P. Wms. 144. It would never have been enforced against Margaret Mercer, in equity. 5 Day 492 ; 7 Conn. 224. The Mercers had failed in their ejectments, not from want of proof of the due execution of the deed of 30th May 1785, as it seems to be supposed by the chief justice, but because that deed was utterly and absolutely void ; and this will be found to have been the express decision in every case in which the point was mooted. The act of 24th February 1770, imposed a high judicial duty on the examining magistrate ; and where it was not performed by him, according to *the directions of the statute, the contract was held utterly void ; not because the "grantee had failed in proof of [*94

its execution," but because the grantor, the *feme covert*, was utterly incapable of making any contract, or doing any act, except in the mode directed by the statute. 1 Binn. 470 ; 2 Inst. 515 ; 2 Kent's Com. 168.

How can the act of 3d April 1826, operate upon it at all ? If by way of confirmation, then it forms a new rule for a past case, and transcends the legislative power. 2 Cranch 272. Nay, it does more ; for Margaret Mercer, if living, could by no act recreate this deed, so as to give it validity from its date. 16 Johns. 110 ; 20 Ibid. 301 ; 4 Binn. 1. It is called an explanatory act ; but if it be true, that it introduces a new rule of construction, then it is, *quoad hoc*, a repeal of the law of 1770 ; for it is an undeniable principle, that, where a subsequent statute makes a different provision on the same subject, it is not an explanatory act, but an implied repeal of the former, 7 Johns. 496–7 ; and if it be a repeal of the act of 1770, it can have no effect in divesting rights acquired under the former act. 8 Wheat. 493. So that, *quacunque via data*, this case ought not to be held to be embraced by it. It is, therefore, respectfully submitted, that these cases are not embraced by the act of 3d of April 1826 ; and that, by applying and making it the ground of their judgment, the supreme court of Pennsylvania have given it a construction which makes it void, so far as regards them ; for it is in direct opposition to the first article of the tenth section of the constitution of the United States, which prohibits any state from passing an "*ex post facto* law, or law impairing the obligation of contracts."

A law may be constitutional in its application to some cases, and void as to others ; 3 W. C. C. 318–19 ; 12 Wheat. 261, 262, 299, 302, 304, 327 ; and all the judges of this court, it is believed, have so held. Indeed, it seems to have been conceded by all, in the great case of *Ogden* v. *Saunders*, that retrospective legislation, operating upon past contracts, so as to impair their obligation, would be unconstitutional and void. It was so held in *Sturges* v. *Crowninshield*, 4 Wheat. 122 ; *McMillen* v. *McNeill*, Ibid. 209 ; *Smith* v. *Mechanics' Bank*, 6 Ibid. 131 ; *Dartmouth College Case*, 4 Ibid. 613.

*95] Now, the act of 3d April 1826, can embrace this case *only by a retrospective operation ; and the question then arises, does it not impair the obligation of a contract, within the meaning of the constitution of the United States ? The extent of the change made in the contract, or the evidence of it, does not vary the principle. 8 Wheat. 84, 75–6 ; 12 Ibid. 327. A change in the evidence, if it go to defeat a right already vested under the contract, would equally impair its obligation. It surely could not be contended, that a will of lands, not executed according to the statute, could, by a repeal of it, or a change so as to make it conformable to the very case supposed, be made valid and operative, so as to defeat the estate of the heir, acquired and vested by descent. Similar illustrations of the principle are given by all the learned judges who delivered opinions in the case of *Ogden* v. *Saunders ;* and a most apt one upon the statute of limitations, by the chief justice, in *Sturges* v. *Crowninshield.*

It has been attempted, and, with great confidence, it is submitted, with success, to prove that Sarah Watson could never have recovered this land, but by force of a vested right acquired by contract ; and that in the same way, her grandchildren successfully resisted the claim of the defendants, and obtained a final judgment against them, on 3d of June 1820. If this act be construed to apply to this case, the inevitable consequence is, that it

divests this right, thus vested under the contracts, impairs, nay, destroys, its obligation, and takes the property from them, to give it to the Mercers, whom the supreme court twice decided had no title, or even the shadow of claim. But it is said, the effect of this act is to affirm, and not destroy a contract, and that this circumstance brings the case fully within the principle of *Satterlee* v. *Matthewson*, decided by this court. 2 Pet. 380. Now, according to the distinction taken in *Ogden* v. *Saunders*, between a contract and its obligation, it is manifest, that the contract between Satterlee and Matthewson was valid as between themselves, although the municipal law gave it no obligation. Each party was competent to make a contract, for each was *sui juris;* and the contract in that case was between the very parties to the suit. In this case, Margaret Mercer was wholly incompetent to make any contract. She was not *sui juris*, but wholly *sub potestate viri;* and everything she did was merely void. 1 Bl. Com. 444; *Litt. [*96
§ 669, 670. She would not, and could not, have been affected by this deed, after her coverture ceased. 5 Day 492.

Bnt again, this is an attempt to set up a contract, not between the parties to this suit, but between strangers. What connection is there, or ever was there, between Sarah Watson and Nathan Thompson, from whom James Mercer derived title immediately; or between her and James Mercer, who conveyed to Thompson? They are strangers in blood and estate. So that there is, it is believed, no analogy between the cases whatever. But there is another all-powerful distinction between that case and this, which must wholly refute the argument drawn from this source. No final judgment ever was rendered in that case; a *venire de novo* was awarded, after the reversal of the judgment; and it would have been perfectly competent to the court to have corrected the error of the first decision: and so the act of assembly was not essential to the validity of the claim of Mrs. Matthewson. But here, if the Mercers recovered at all, it is by mere force of the act of 3d April 1826.

It is a perversion of terms, to say that Satterlee acquired a vested right by the decision made in 1825; for no final judgment was rendered in the case at all. But how different the cause now under consideration. Here, the heir recovered by virtue of her vested right under the contract, and was put in possession of the land; the mesne profits were adjudged her as a compensation for her loss, and she was remitted to her original estate, so as to make her title, by operation of law and lapse of time, valid against the whole world. Her grandchildren had defeated the very persons now suing, and by obtaining the judgment on 3d of June 1820, acquired an additional protection from the statutory provisions of the act of the 13th April 1807.

But further, the effect of the judgment in Satterlee's case was not to impair the patent to Wharton, under which he claimed; it was left in full force, so as to afford him every remedy to which, at law, he was entitled. All that the decision of the act of assembly did, was to prevent a particular defence that affected merely the right of possession to the land in that action, without touching the titles of the respective parties at all. How different is this case. Here are no conflicting patents; if these judgments be affirmed, the consequence inevitably is, that the estate goes from the blood of Samuel Patterson and passes to strangers. *What boots it, if the patent be [*97
available against the state, if they have the power to take the land

from the heirs of the original grantee, who paid for it, and give it to strangers? Of what avail is it, that courts may recognise, and protect and enforce contract, and the rights that spring from them, if the legislature may, at pleasure, thus impair them? The act in question may be a perfectly proper and legitimate exertion of legislative power, if construed so as to protect the rights intended to be secured by it. But if the construction put upon it by the supreme court of Pennsylvania be sustained, then it is an act of legislative power, far transcending even the boasted omnipotence of the British parliament. It breaks down all the security of property derived from contract, and resolves every man's title into a tenure at legislative will; it overturns solemn decisions of the courts of the last resort, by which even these courts themselves were so bound that they could not fail to obey them; and it leaves everything relating to personal rights or private property, not under the protection of the constitution, where the people placed it, to be expounded by the judiciary, but in the variable and ever-changing mind of the popular branch of the government.

The repeal of laws, the abrogation of treaties, even the disruption of empires, have hitherto been held not to affect private rights previously acquired and vested; but if the doctrine advanced in *Mercer* v. *Watson* be sustained, all these solemnly settled principles are overturned, and a simple legislative enactment is enabled to do that which the most violent revolutions have hitherto been unable to effect; and rights heretofore considered as sacred as justice herself, are all consigned to popular will and popular excitements.

It is, therefore, respectfully submitted, that the judgments of the supreme court of Pennsylvania must be reversed, because they give to the act of the 3d of April 1826, a construction which, so far as regards this case, makes it manifestly unconstitutional and void: for it divests vested rights acquired by contract; destroys the obligation of the contracts under which the Watsons held, and gives their estate to the Mercers in a way that even Margaret Mercer herself could not do—for she could never have re-created this deed so as to make it operate from its date; subverts the judicial power; makes
*98] it subservient *to the legislative will, and directly contravenes the tenth section of the first article of the constitution of the United States; which, according to the construction given to it by this court, shields and protects all contracts, executed and executory, real and personal, from the influence of state legislation that impairs their obligation.

Rogers, for the defendants in error, argued: 1. That the act of 3d of April is not an *ex post facto* law, nor law impairing the obligation of a contract, either express or implied; and in this particular, it has nothing to do with the constitution of the United States. 2. That the act in question is an explanatory law, altering a rule of evidence merely; it does not divest titles, nor divest vested rights; and it is not unconstitutional, if it did. The consideration of these two propositions will meet the argument of the plaintiffs in error, before the supreme court of Pennsylvania, and, it is presumed, will equally answer that purpose here.

The act of the 3d of April 1826, is retrospective in its operation and so designed by its framers. It is not, for this cause, unconstitutional. The power of a legislature to pass retrospective laws, is nowhere taken away,

nor prohibited by the constitution of the United States. It is true, a state cannot pass an *ex post facto* law which is a retrospective criminal law, but it can a retrospective civil law. *Expressum facit cessare tacitum*, says a maxim of the law. This power of passing retrospective laws by a state has been repeatedly decided to be constitutional in Pennsylvania. See *Underwood* v. *Lilly*, 10 S. & R. 97; *Bambaugh* v. *Bambaugh*, 11 Ibid. 190. So also, in the supreme court of the United States, in *Satterlee* v. *Matthewson*, 2 Pet. 380. The same principle was decided in Pennsylvania, and is reported in 15 S. & R. 72; which, in the supreme court of the United States, was quoted as authority, in the case of *Livingston* v. *Moore*, 7 Pet. 469.

The act in question is constitutional, unless it is an *ex post facto* law, or law impairing the obligation of a contract. *Satterlee* v. *Matthewson*, 2 Pet. 580. It is not an *ex post facto* law, because such a law relates to criminal matters alone. **Calder* v. *Bull*, 3 Dall. 386, 396; *Fletcher* v. *Peck*, 6 Cranch 138; *Commonwealth* v. *Lewis*, 6 Binn. 271. [*99

Then, does the act violate a contract? What is a contract? It is an agreement between two or more parties to do or not to do certain acts. The contracts embraced by the clause in the constitution referred to, the first clause of tenth article, include those which are executed, such as grants, and such as are executory, and this, whether between individuals only, or between a state and individuals. This position is abundantly decided in *Fletcher* v. *Peck*, 6 Cranch 136; *Green* v. *Biddle*, 8 Wheat. 1, 92; *Providence Bank* v. *Billings*, 4 Pet. 514. The clause embraces no other contracts except those for property, or some object of value. See case of *Dartmouth College*, 4 Wheat. 637, 644. It did not embrace any other contracts than express. Implied contracts are excluded; except, perhaps, indeed, such as are implied from the nature or terms of a prior agreement. This distinction is expressly taken by the supreme court in the case of *Jackson* v. *Lamphire*, 3 Pet. 280. Judge BALDWIN says, "where there is no express contract, courts will not create a contract by implication."

But where is the contract impaired by this act of the legislature of Pennsylvania? It is contended, there is none, either express or implied. If so, where is it? How does it arise, and who are the parties to it? The inquiry is important, because the party complaining must show it. It is not sufficient, to allege that the constitution has been violated. Courts will not declare laws unconstitutional for light or trivial causes. "This power," says Chief Justice TILGHMAN, 3 S. & R. 73, "is a power of high responsibility, and not to be exercised but in cases free from doubt."

But the inquiry is important, in another sense; because, if the act of the legislature of Pennsylvania divests rights which are vested by law in an individual, if it does not violate a contract, it has nothing to do with the constitution of the United States. 2 Pet. 380. The error assigned in substance says, "the contract commenced with the patent, in 1743, by the proprietors to Samuel Patterson; descended, by the laws of intestacy, from generation *to generation, and was finally confirmed by the decision of the supreme court." [*100

1st. It is contended, that the patent is impaired by this law? Did the the state attempt to resume the grant, as in *Fletcher* v. *Peck?* Does the question arise between the state, and Patterson or his alienee? Did he sell?

The land on the contrary is derived under the patent, by both parties, and not in contradiction to it. It operates upon a state of things long subsequent to Patterson's death; upon a contest between the children. See 3 Pet. 280.

2d. Did the common law, or the statutes of descent, as the gentlemen call them, create, a contract between the *feme* and her heir-at-law, that if she died intestate, the heir should have the property? Does the common law, where a *feme covert* attempted, though imperfectly, to transfer her property, and a legislature made the attempt valid, declare, that this legislative act violated a contract between the heir and *feme* heir-in-law? Was such a contract contemplated by the clause in the constitution? Is such a contract express or implied?

3d. Did the act of 20th February 1770, create any contract which is violated by the legislative act of 1826? This is not even pretended.

4th. Then, did the supreme court, in 1809 (*Watson* v. *Bailey*), when, as the plaintiffs in error say, they declared the deed of the 30th of May 1785, void, create a contract which is violated by this act? According to this argument, the court, in this case, first destroy one contract, and then make another between different parties.

But admit, for one moment, that the deed was void, and as such declared by the court. This act of 1826 did not impair it. The legislature, say they, make a void deed a valid one: that is, set up a new contract between the parties. Did they violate the contract? There is a difference between making a new contract between parties, and impairing one. 2 Pet. 412–13.

But was the deed declared void by the court? This position is the basis of all the argument of the plaintiffs in error, and if you remove the foundation, the superstructure must fall also. The supreme court, in 1809, did not say so. 1 Binn. 480. Judge YEATES concludes by saying, "I am, there-
*101] fore, of opinion, *that this deed had no legal effect against the heir-at-law, after the death of the wife." Here, it is admitted, that the deed was good, during the life of the wife—not void *ab initio*. It failed of legal effect, says the court; and how did it fail? Because the deed was not sufficiently proven—not that it was void. The court held the certificate of the judge to be conclusive; and as, on its examination, it did not appear that the contents were made known, and the act of signing to have been her voluntary act, the deed was not received as evidence of title. And parol declarations of the wife, repeatedly made, were rejected as evidence, to supply the necessary proof of the acknowledgment.

There is another view of this case peculiarly applicable in this stage of the argument. This deed of the 30th of May 1783, was a good and valid deed at common law, that is, the common law of Pennsylvania. See *Davey* v. *Turner*, 1 Dall. 11; and *Lloyd* v. *Taylor*, Ibid. 17. These cases decide, on the principle of *communis error facit jus*, that a deed signed by husband and wife, whether she was examined separate and apart, or whether the deed was even acknowledged at all, yet it conveyed the interest of the parties. These cases furnish, if nothing more, ample corroboration of the truth and correctness of the view taken by the chief justice of Pennsylvania, in this cause, in which he considers the act of 1826, not as a law impairing a contract, but as carrying a contract into effect. Thus, validating the deed of the 30th of

May 1785, by the substitution of the intention, and carrying it into operation.

Upon the second proposition of the defendants in error, Mr. Rogers contended, that the law of 1826 is an explanatory law, altering a rule of evidence. This is the first part of the proposition which is primarily to be examined. The act of the 24th of February 1770, for which see 1 Dallas' Laws 535, and 1 Smith Laws 307, points out the mode of the acknowledgment, &c. The court, in putting a construction upon this act, construed it strictly. Deciding that the evidence, and only evidence of the acknowledgment, being in accordance with the act, was the certificate of the judge. 1 Binn. 470. So that it mattered *not how honest the intention to convey, and fair the transaction between the parties; nor whether the [*102
judge conformed to the requisitions of the act in point of fact; yet if he did not certify all the particulars, the deed could not be received. Thus violating the *maxim omnia presumuntur rite esse acta.* The act of the 3d of April 1826, which in its title is supplementary to the act of the 24th of February 1770, altered the rule thus estabilised by the court; by making the intention of the parties the legitimate subject of inquiry before courts of justice. The question then was, was the deed *bonâ fide* made and executed by the husband and wife, and acknowledged before some judge, &c. If so, then, if the acknowledgment were informal, in not setting forth all the particulars, it was not for this cause invalid, but was cured by the act.

The deed thus acknowledged, bore on its face, when exhibited in a court of justice, *primâ facie* evidence of the good faith of the parties; that is, furnished a legal presumption in favor of the deed. But the question is still left open for the opposite party to show fraud or want of good faith Fraud was not alleged, nor even pretended; but the opposite was shown by the reasons for a new trial in 1809, brought forward by the Watsons themselves. The jury found in favor of the deed, a second time, as already stated; thus furnishing a decision in point of fact and of law, in favor of Mercer.

The remaining part of the second proposition of the defendant in error, relates to the power of a state, by a legislative act, to divest rights vested by law in an individual. And here, it is contended by the plaintiff in error, that the legislature of Pennsylvania, by the passage of the act of 3d April 1826, infringed their vested rights to the land in dispute, which were guarantied by the constitution of Pennsylvania and that of the United States.

The question, whether a state law, repugnant to a state constitution, is constitutional or not, is not cognisable by the supreme court of the United States; it is exclusively confined to the state courts. *Jackson* v. *Lamphire*, 3 Pet. 280. As to the power under the constitution of the United States, of a state to take away from an individual his vested rights to property, whatever doubt there may have been before; since the case of *Satterlee* v. *Matthewson*, 2 Pet. 380, the question *has been put at rest. Such a [*103
law, if it does not impair a contract, has nothing to do with the constitution of the United States.

But the exercise of such a power, so far as it is applicable to this case,

is denied. The legislature did not divest the vested rights of the Watsons.

Hopkins, for the plaintiffs in error, contended, that the act of April 3d, 1826, was *ex post facto* in its operation, and therefore, void. The rights of the appellants were derived under the patent from the proprietaries of Pennsylvania to their ancestor; had been established by two verdicts in ejectment, and by the force of the 13th section of an act of assembly of 1807; and the ejectment in this case was conclusively barred. The section enacts, "whenever two verdicts shall, in any writ of ejectment between the same parties, be given in succession for the plaintiff or defendant, and judgment be rendered thereon, no new ejectment shall be brought, but when there may be verdict against verdict between the same parties, and judgment thereon, a third ejectment, in such case, and verdict and judgment thereon, shall be final and conclusive, and bar the right; and the plea in ejectment shall be not guilty. All these rights are, by the constitution of Pennsylvania, in its ninth article, excepted out of the general powers of government "that the general, great and essential principles of liberty and free government may be recognised and unalterably established." The first section declares, that all men have certain inherent and indefeasible rights, amongst which are those of enjoying life and liberty, of acquiring, possessing and protecting property. The ninth section declares, that no one can be deprived of life, liberty or property, unless by the judgment of his peers, or the law of the land. The sixth section provides for the due administration of justice; and the seventeenth section declares, no *ex post facto* law, nor any law impairing contracts shall be made. And § 15 and 18 protect personal security. And § 26 declares, that everything in this article is excepted out of the general powers of government, and shall for ever remain inviolate.

*104] *Absolute rights to property, are placed under the safeguard of the constitution, as completely and effectually as life and liberty, and with equal justice; as life and liberty would be dreary things to man, if he could not be secure in the enjoyment of his property, acquired by his honest industry, to make life comfortable, and liberty worth preserving. The arrangement of personal security and private property is much expanded, and differently cast, in the constitution of Pennsylvania, from that which exists in the constitution of the United States. The 15th, 16th, 17th and 18th sections, are widely different in their arrangement, and designedly so, to afford to each their fullest operation, to the whole extent of the expressions used. The imputations of crime and punishment, are wisely and studiously separated from those which expressly relate to civil rights, except when the protection to the latter would, in its generality, equally embrace the former. The 17th section associates *ex post facto* laws and laws impairing contracts, and makes them, as to their objects, on eand indivisible; as it would be all but useless, to preserve civil rights from being impaired in the least degree, when the contract itself would be destroyed by legislative enactment, by creating something to assail it, which did not exist before, or by prescribing a rule of evidence which would recreate that which had been condemned in judgment of law.

Our constitution is formed by the people, out of their original inherent

and elementary power enjoyed as a free people, seeking their security and happiness, against that despotism which sometimes springs up in the turbulence and listlessness of the best of governments. The words and phrases used are taken in their most comprehensive sense; adapted to the common understanding, excluding all technicality which would be unintelligible to ninety-nine out of a hundred of those who had the deepest interest in the protection intended and given by it. Hence the expression, *ex post facto* law, is used in its original and general sense, to prevent all retrospective legislation, and to make an act, which, when done, was innocent, criminal; or a right, which when acquiree was legal and just, illegal and unjust. The other clause of the sentence in which these expressions are found, necessarily imposes on this, from *its connection, the protection of civil rights. *Noscitur à sociis*, is a very just and rational rule of exposition of the different clauses of the same sentence, which, from the affiliation of its parts, must be intended to embrace the subject-matter of the sentence, which was the protection of property and person, otherwise, they would not be so united. A complete absolute inviolability was designed for both, which forbids restricting the terms used from their general meaning. [*105

Our courts, in conformity to this injunction and interdiction of the people, have uniformly construed acts of the legislature prospectively, even when their language would have borne a different construction. The late venerable Chief Justice Tilghman, who united all the virtues of a judge to an enlightened and profound knowledge of his profession, declares, "the rule has been, that where civil rights are affected, the act shall be confined to a prospective operation." The same doctrine was uniformly sustained before, and formed an impregnable barrier against unconstitutional power, invading the constitutional rights of the people. 4 S. & R. 401; 12 Ibid. 330; 1 Binn. 601; 3 S. & R. 169, 590; 2 Dall. 312. And even this very act of the 3d of April 1826, has been adjudged, by the unanimous opinion of the supreme court, to operate prospectively only, where civil rights are affected. This uninterrupted series of decisions, sustaining the constitutional rights of Pennsylvania, had grown with her growth and strengthened with her strength, from the first foundation of the province, resting on the benign principles of the common law.

In England, where the liberty and security of the subject has no other basis to rest upon than the common law, retrospective legislation is uniformly rejected by her courts of justice. T. Jones 108; 2 Show. 27; 2 Mod. 310; 1 Ld. Raym. 1352; 4 Burr. 2460. So, in Virginia: 1 Wash. 139; 3 Call 168, 278; 1 Hen. & Munf. 204. So, in New York: 7 Johns. 477, 501; 19 Ibid. 58. It is an invariable rule in Massachusetts, never to construe a statute retrospectively, unless it be so positively expressed. 10 Mass. 437; 12 Ibid. 383. *The same rule has uniformly prevailed in the courts of the United States, where it has ever been held, that no law is to be construed, so as to impair rights previously vested. [*106

This interdiction, by judicial power, of retrospective legislation upon civil rights, on account of its tyrannous and despotic character, might be extensively shown in the judicial code of most, if not of all our sister states, wherever it has been attempted. But as the sovereign will of the people has excepted this power out of the grant of legislative power, and has

declared, that our bill of rights, contained in the ninth article of the constitution, shall for ever remain inviolate, its extinction in Pennsylvania will not occur, while the constitution is maintained by our courts of justice.

The act of the 3d of April 1826, does not embrace our case. This is a supplement to the act of 24th of February 1770, with which it must be construed, to discover its meaning. The original act is both confirmatory and declaratory. The mode of conveying by man and wife, had been according to certain customs and usages, by which "a very great number of *bonâ fide* purchasers for a valuable consideration, were become the just and equitable owners," and "to remove some doubts" about the validity of such conveyances, the act confirms the title of such purchasers. It stopped, upon protecting *bonâ fide* parchasers for valuable consideration, who had become the just and equitable owners; and left husbands, who used their situation to become the owners of their wives' property, where they were. To that extent, *communis error facit jus*, would probably have supported the custom, because, at the early period of the province, and until 1760, inchoate titles to land, such as warrants, locations, &c., not perfected by patents, were transferred by bill of sale, as chattels. The confirmatory part of the supplement, just goes the same length and no further. And that was going much further than the former, where common error made a strong case, with the custom, and the unimproved and uninformed state of the province, at that early period; whereas, the declaratory part of the original law prescribed a mode for the husband and wife to convey the estate, which would prevent injury to purchasers *bonâ fide* and for full value, who were not guilty of gross neglect. The legislature, in the supplement, set forth the object to be the same for its *enactment as was declared in the original act; that
*107] estates of great value have been *bonâ fide* sold by husband and wife for a legal and sufficient consideration, and that, in all such cases, the persons who hold, should not be disturbed in the enjoyment of them, thus equitably acquired. This specific declaration of the object and intent, could not, by any just rule of construction, be expanded, by the verbiage of the enactment, to embrace this case.

But if this act of the 3d of April 1826, upon its true construction, embraces this case, it is void by the constitution of the state and of the United States. The title of the plaintiff in error originates in the patent, granted by the late proprietaries of Pennsylvania, for full value, to Samuel Patterson, their great-grandfather, on the 19th of October 1743, and is the highest contract known to the laws of Pennsylvania, of title to real estate. The act of November 1779, which divested the proprietaries of their estate in the province, and vested it in the commonwealth, confirmed all the grants and contracts made by them to individuals. This title to the lands in dispute came by succession, through several courses of descent, to Margaret Patterson, who married James Mercer, and on her death, in his lifetime, without issue, came, by three successive descents, to the plaintiff in error, under the act directing the descent of intestates' real estate, passed the 19th of April 1794. The first of these descents was established by the judgment of the supreme court, in the ejectment brought by David Watson and Sarah his wife, the heir-at-law, against the executors of James Mercer, on the 31st of December 1808, against the deed of the 30th of May 1785, and the last two, by the judgment rendered on the 3d of June 1820, in the ejectment

brought by John and Margaret Mercer, against Samuel P. Watson, and on his death, continued against his heirs, plaintiffs in error, against the said deed.

Margaret Mercer died before the 1st of February 1802, and our recovery on the descent, on the 31st of December 1808, remitted to us the possession, according to our title, against the deed of the 20th of May 1785, and we continued in possession until the 3d of April 1826—twenty-four years, two months and three days. *By the act of the 26th of March 1785, twenty-one years is the limitation of actions for real estate in Pennsylvania. By the 20th section of the act of the 13th of April 1791, no writ of error can be brought to reverse any judgment, given in any action, real, personal or mixed, after seven years. By the 4th section of the act of the 13th of April 1807, after two verdicts and judgments in succession, no new ejectment shall be brought. Under this statement, the following points are submitted : [*108

1st. This is an *ex post facto* law, impairing the obligation of contracts ; destroying and impairing our vested rights under the grant contained in this patent, both by the constitution of Pennsylvania, and of the United States.

2d. It is an *ex post facto* act, impairing our vested rights, which descended under the intestate law of the 19th of April 1794, by virtue of the grant contained in the patent, and deprived the plaintiff in error of the protection of that law.

3d. The act is *ex post facto*, and impairs the vested right derived to us under our patent, and the three descents cast upon us, and confirmed by the two judgments of the supreme court, sustaining the said descents against the deed of the 30th of May 1785, and adjudicating it to be void, on points put to the court, involving its validity, which judgments are conclusive evidence of said deed being no deed—and of our rights acquired by the three descents being absolute vested rights.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the supreme court of the state of Pennsylvania, brought under the 25th section of the judiciary act of 1789, ch. 20. The original suit is an ejectment by the defendants in error, for certain lands in Lancaster county, in the state of Pennsylvania, upon which a final judgment was rendered in their favor. The facts, so far as they are material to the questions over which this court has jurisdiction, are these. On the 8th of May 1785, James Mercer and Margaret his wife executed a deed of the premises, then being the property of the wife, to Nathan Thompson, in fee, who afterwards, on the same day, reconveyed the same to James Mercer, the husband, in fee ; the object of the deeds being to vest the estate in the husband. *The certificate of the acknowledgment of the deed of Mercer and wife to Thompson, by the magistrate who took the same, does not set forth all the particulars, as were required by the law of Pennsylvania of the 24th of February 1770, respecting the acknowledgment of deeds of *femes covert*. The legislature of Pennsylvania, on the 26th of April 1826, passed an act, the object of which was, to cure all defective acknowledgments of this sort, and to give them the same efficacy as if they had been originally taken in the proper form. The plaintiffs in the ejectment claimed title to the premises under James Mercer, the husband ; and the defendants, as heirs-at-law [*109

of his wife, who died without issue. The ejectment was brought after the passage of the act of 1826.

In the case of the *Lessee of Watson and wife* v. *Bailey* (1 Binn. 470), the acknowledgment of this very deed from Mercer and wife to Thompson, was held to be fatally defective to pass her title. But the act of 1826 has been repeatedly held by the supreme court of Pennsylvania to be constitutional, and to give validity to such defective acknowledgments. It was so held in *Barnet* v. *Barnet* (15 S. & R. 72), and *Tate* v. *Stooltzfoos* (16 Ibid. 35); and again, upon solemn deliberation and argument, in the case now before this court. The object of the present writ of error is, to revise the opinions thus pronounced by the highest state court.

Our authority to examine into the constitutionality of the act of 1826, extends no further than to ascertain, whether it violates the constitution of the United States; for the question, whether it violates the constitution of Pennsylvania, is, upon the present writ of error, not before us.

The act of 1826 provides, "that no grant &c., deed of conveyance, &c., heretofore *bonâ fide* made and executed by husband and wife, and acknowledged by them before some judge, &c., authorised by law, &c., to take such acknowledgment as aforesaid, before the first day of September next, shall be deemed, held or adjudged, invalid or defective, or insufficient in law, or avoided or prejudiced, by reason of any informality or omission in setting forth the particulars of the acknowledgment made before such officer as aforesaid, in the certificate thereof; but all and every such grant, &c., deed of conveyance, &c., so made, executed and acknowledged as aforesaid, shall *110] be *as good, valid and effectual in law, for transferring, passing and conveying the estate, right, title and interest of such husband and wife of, in and to the lands, &c., mentioned in the same, as if all the requisites and particulars of such acknowledgment mentioned in the act, to which this is supplementary, were particularly set forth in the certificate thereof, or approved upon the face of the same."

The argument for the plaintiffs in error is, first, that the act violates the constitution of the United States, because it divests their vested right as heirs-at-law of the premises in question: and secondly, that it violates the obligations of a contract, that is, of the patent granted by the proprietaries of Pennsylvania to Samuel Patterson, the ancestor of the original defendants, from whom they trace their title to the premises, by descent through Margaret Mercer.

As to the first point, it is clear, that this court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The constitution of the United States does not prohibit the states from passing retrospective law, generally; but only *ex post facto* laws. Now, it has been solemnly settled by this court, that the phrase, *ex post facto* laws, is not applicable to civil laws, but to penal and criminal laws, which punish a party for acts antecedently done, which were not punishable at all, or not punishable to the extent or in the manner prescribed. In short, *ex post facto* laws relate to penal and criminal proceedings, which impose punishments or forfeitures, and not to civil proceedings, which affect private rights retrospectively. The cases of *Calder* v. *Bull*, 3 Dall. 386; *Fletcher* v. *Peck*,

5 Cranch 138; *Ogden* v. *Saunders*, 12 Wheat. 266; and *Satterlee* v. *Matthewson*, 2 Pet. 380, fully recognise this doctrine.

In the next place, does the act of 1826 violate the obligation of any contract? In our judgment, it certainly does not, either in its terms or its principles. It does not even affect to touch any title acquired by a patent or any other grant. It supposes the titles of the *femes covert* to be good, however acquired; and only provides that deeds of conveyance made by them shall not be void, because there is a defective acknowledgment *of the deeds by which they have sought to transfer their title. So far, then, as it [*111 has any legal operation, it goes to confirm, and not to impair, the contract of the *femes covert*. It gives the very effect to their acts and contracts which they intended to give; and which, from mistake or accident, has not been effected. This point is so fully settled by the case of *Satterlee* v. *Matthewson*, 2 Pet. 380, that it is wholly unnecessary to go over the reasoning upon which it is founded.

Upon the whole, it is the unanimous opinion of the court, there is no error in the judgment of the supreme court of Pennsylvania, so far as it is subject to the revision of this court, and therefore, it is affirmed with costs.

This cause came on to be heard, on the transcript of the record from the supreme court of the commonwealth of Pennsylvania, for the Lancaster district, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said supreme court in this cause be and the same is hereby affirmed, with costs.

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*James Brown, Plaintiff in error, *v.* Richard R. Keene. [*112

Averment of citizenship.

A petition filed in the district court of Louisiana, averred, that the plaintiff, Richard Raynal Keene, was a citizen of the state of Maryland, and that James Brown, the defendant, was a resident of the state of Louisiana, holding his fixed and permanent domicil in the parish of St. Charles.

The decisions of this court require, that the averment of jurisdiction shall be positive; that the declaration shall state expressly the fact on which jurisdiction depends; it is not sufficient, that jurisdiction may be inferred, argumentatively, from its averments.

A citizen of the United States may become a citizen of that state in which he has a fixed and permanent domicil; but the petition does not aver that the plaintiff is a citizen of the United States.

The constitution extends the judicial power to "controversies between citizens of different states;" and the judiciary act gives jurisdiction, "in suits between a citizen of the state where the suit is brought, and a citizen of another state."

The cases of Bingham *v.* Cabot, 3 Dall. 382; Abercrombie *v.* Dupuis, 1 Cranch 343; Wood *v* Wagnon. 2 Ibid. 9; Capron *v.* Van Noorden, Ibid 126; cited.

Error to the District Court for the Eastern District of Louisiana. In the district court, the defendant in error, Richard R. Keene, filed a petition in which he stated himself to be a citizen of the state of Maryland, against James Brown, a citizen or resident of the state of Louisiana, holding his fixed and permanent domicil in the parish of St. Charles, in the district aforesaid, claiming damages for an alleged non-performance of a contract relating to the conveyance of a lot of ground, part of the batture at New Orleans.

To this petition, Mr. Brown filed an answer, by his attorney, Isaac T. Preston, Esq., in which he objected to the jurisdiction of the district court, on the ground, that the plaintiff, as well as the respondent, was a citizen of the state of Louisiana. The answer then proceeded to deny all the material allegations in the petition. The district court made a decree in favor of the petitioner; from which the respondent prosecuted a writ of error to this court.

*113] *The case was argued on the question of jurisdiction, and on the merits, by *Clay*, for the plaintiff in error; and by *Brent*, for the defendant. As no point was decided but that which was presented on the question of jurisdiction, the arguments of counsel on the other points are omitted.

Clay, upon the question of jurisdiction, argued, that it did not exist, on account of the character of the parties. The petition states Keene to be a citizen of Maryland, and James Brown to be a citizen or resident of Louisiana; the fact ought not to have been stated in the alternative. The constitution limits the jurisdiction, in this respect, to a controversy between citizens of different states; and that must be shown; nothing can supply the want of that relative attitude of the litigants. Suppose, Keene had simply alleged himself to be a resident of the state of Maryland, and had brought his suit against Brown, a resident of Louisiana; the jurisdiction could not have been maintained, because residence and citizenship are not synonymous. If he had stated himself a citizen or resident of Maryland, and brought the suit against Brown as a citizen or resident of Louisiana; the jurisdiction could not be sustained. It must appear, positively, to the court, that the parties stand to each other in the relation required by the constitution.

Nor is this defect cured by Brown's answer to the petition. It is true, he there states himself to be a citizen of Louisiana; but he also states Keene to be a citizen of Louisiana. The whole of the answer, in this particular, is to be taken as true, or no part of it can be relied on; and, if received as true, the court had no jurisdiction, because both parties were citizens of the same state.

If residence and citizenship mean the same thing, there is abundant proof on the record, that Keene is a citizen of Louisiana. The deed from him to the Browns, dated on the 21st of August, styles him "of the city of New Orleans," that deed is a part of his petition. He is again so styled, in a deed to the Browns, of the 28th September 1807. And in his petition,

*114] filed near twenty-three years after, in March 1830, he *describes himself "Richard Raynal Keene, a resident of the city of New Orleans."

The rule made in the inferior court, requiring an oath to the plea to the jurisdiction, is beyond the authority of such a court. Could a prosecution for perjury be sustained on such an oath, if falsely made? Nor does the rule of court apply to such a case as this. The defect of jurisdiction is apparent on the record. Mr. Brown is stated to be a citizen or resident of Louisiana: residence is not citizenship. The allegation is in the alternative, which admits the difference; and there is not, therefore, a distinct allegation of citizenship.

Brent, in reply, contended, that, in his answer, Mr. Brown admitted that he was a citizen of Louisiana. The answer says, "that the plaintiff, as well as the the respondent, is a citizen of Louisiana." This is sufficient to maintain the jurisdiction; and the plaintiff in error cannot contradict this admission, and, by an objection only technical, take the case from the power of this court over it. The objection to the jurisdiction should have been sustained by the affidavit of the plaintiff in error. This is required by a rule, made in 1830, by the district court of the United States for the eastern district of Louisiana; and no such affidavit was made. It is said, that this rule of court does not operate, because the judiciary act does not require an affidavit. To this it is answered, that no rules of practice are prescribed by the act of congress, and courts have full authority to establish such as they consider proper and necessary. This rule was made to prevent a dilatory plea, and was such as the court had a full right to make. As to the objection, that the allegation is in the alternative, this does not affect its sufficiency. Connected with the statement, that the plaintiff in error was domiciled in the parish of St. Charles, enough is shown, to sustain the proceedings. But if these are not sufficient, the defendant in the district court, by appearing to and answering the petition, has waived the objection.

MARSHALL, Ch. J., delivered the opinion of the court.—*This [*115
appeal is from a decree of the court of the United States for the district of Louisiana. The first error assigned in the proceedings is, that the petition, which, in the practice of Louisiana, is substituted for a declaration, does not show, with sufficient certainty, that the parties were within the jurisdiction of the court. If this objection be well founded, it is undoubtedly fatal.

The petition avers, that the plaintiff, Richard Raynal Keene, is a citizen of the state of Maryland; and that James Brown, the defendant, is a citizen or resident of the state of Louisiana, holding his fixed and permanent domicil in the parish of St. Charles. The petition, then, does not aver positively, that the defendant is a citizen of the state of Louisiana, but in the alternative, that he is a citizen or a resident. Consistently with this averment, he may be either. The additional words of description, "holding his fixed and permanent domicil in the parish of St. Charles," do not aid this defective description. A citizen of the United States may become a citizen of that state in which he has a fixed and permanent domicil; but the petition does not aver that the plaintiff is a citizen of the United States. The question is, whether the jurisdiction of the court is sufficiently shown by these averments.

The constitution extends the judicial power to "controversies between citizens of different states;" and the judiciary act gives jurisdiction, "in suits between a citizen of the state where the suit is brought, and a citizen of another state." The decisions of this court require, that the averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient, that jurisdiction may be inferred, argumentatively, from its averments.

In *Bingham* v. *Cabot*, 3 Dall. 382, the court held clearly, that it was necessary to set forth the citizenship (or alienage, when a foreigner was concerned) of the respective parties, in order to bring the case within

the jurisdiction of the court, and that the record was, in that respect, defective. In *Abercrombie* v. *Dupuis*, 1 Cranch 343, the plaintiffs below
*116] averred, "that they do severally reside without *the limits of the district of Georgia, to wit, in the state of Kentucky." The defendant was called "Charles Abercrombie, of the district of Georgia, aforesaid." The judgment in favor of the plaintiff below was reversed, on the authority of the case of *Bingham* v. *Cabot*. In *Wood* v. *Wagnon*, 2 Cranch 9, the judgment in favor of the plaintiff below was reversed, because his petition did not show the jurisdiction of the court. It stated the plaintiff to be a citizen of the state of Pennsylvania, and James Wood, the defendant, to be "of Georgia, aforesaid." *Capron* v. *Van Noorden*, 2 Cranch 126, was reversed, because the declaration did not state the citizenship or alienage of the plaintiff in the circuit court. The same principle has been constantly recognised in this court.

The answer of James Brown asserts, that both plaintiff and defendant are citizens of the state of Louisiana. Without indicating any opinion on the question, whether any admission in the plea can cure an insufficient allegation of jurisdiction in the declaration, we are all of opinion, that this answer does not cure the defect of the petition. If the averment of the answer may be looked into, the whole averment must be taken together. It is, that both plaintiff and defendant are citizens of Louisiana.

The decree of the court for the district of Louisiana is to be reversed, that court not having jurisdiction; and the appeal to be dismissed. The cross-appeal, *Keene* v. *Brown*, is to be dismissed, the court having no jurisdiction.

This cause came on to be heard on the transcript of the record from the district court of the United States for the eastern district of Louisiana, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the said district court could not entertain jurisdiction of this cause, and that, consequently, this court has not jurisdiction in this cause, but for the purpose of reversing the judgment of the said district court entertaining said jurisdiction: whereupon, it is ordered and adjudged by
*117] this court, that the judgment of *the said district court be and the same is hereby reversed, and that this writ of error be and the same is hereby dismissed, for the want of jurisdiction. All of which is hereby ordered to be certified to the said district court, under the seal of this court.

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*118] *George Briscoe and others, Plaintiffs in error, *v.* The Commonwealth Bank of the State of Kentucky.

The Mayor, Aldermen and Commonalty of the City of New York, Plaintiffs, *v.* George Miln.

Practice.

In cases where constitutional questions are involved, unless four judges of the court concur in opinion, thus making the decision that of a majority of the whole court, it is not the practice of the court, to deliver any judgment, except in cases of absolute necessity.

Four judges not having concurred in opinion as to the constitutional questions argued in these cases, the court directed that the cases shall be re-argued at the next term.

Briscoe v. Commonwealth Bank.

GEORGE BRISCOE and others, Plaintiffs in error, *v.* The COMMONWEALTH BANK of the STATE of KENTUCKY.

ERROR to the Court of Appeals of the state of Kentucky. The legislature of the state of Kentucky, on the 29th November 1820, incorporated a "Bank of the Commonwealth," the whole capital stock of which, amounting to $2,000,000, belonged exclusively to the state, and consisted of certain funds, moneys, stocks, &c., enumerated in the act. The bills and notes of this bank were made receivable in all payments for taxes and other demands of the state; the interest arising from loans and discounts, after the payment of expenses, became part of the annual revenue, and the revenue of the state was made part of the capital of the bank. The management of the institution was intrusted to a president and twelve directors, chosen annually, by joint ballot, of both houses of the general assembly. See 2 Littell and Swigert's Digest of the Laws of Kentucky, §§ 1, 3, 5, 17, 24, 35, pp. 155, 156, 159, 162, 163.

On the 25th of December 1820, the legislature passed another act, making it lawful, when any execution should issue, for the plaintiff to indorse thereon, that notes of the Bank of Kentucky or its branches, or notes of the Bank of the *Commonwealth or its branches, would be received in [*118 payment; whereupon, such execution should be collected and replevied agreeable to the laws then in force, allowing three months' replevin only. But if any execution issued, without such indorsement, such execution was allowed to be stayed two years, on giving bond with approved security, &c. 2 Littell and Swigert's Digest, 459, 500, § 1, 2.

This was an action brought in March 1831, in the circuit court of Mercer circuit, Kentucky, by the bank so incorporated, against George H. Briscoe and others, to recover the sum of $2048.37, the amount of a promissory note given by them to the bank. The defendants in the court below the plaintiffs in error, pleaded, in substance, that the note sued on was given in renewal of another note, and that, of a preceding one; and that the only consideration given for the original note, by the said bank, was bills of credit issued by the state of Kentucky, through and by means of the said bank, contrary to the constitution of the United States. To the pleas of the defendants, the plaintiffs demurred, and the circuit court sustained the demurrers, and gave judgment against the defendants for the amount of the note, with interest and costs. The defendants appealed, and the court of appeals, at May term 1832, affirmed the judgment of the circuit court.

The court of appeals being the highest court of law of the state of Kentucky, in which a decision on the case could be had, and there being drawn in question rights attempted to be derived under a law of a state, impugned on the ground of its repugnance to the constitution of the United States, the case was removed from the court of appeals of Kentucky, to the supreme court of the United States, by writ of error, pursuant to the provisions of the 25th section of the judiciary act of 1789.

For the plaintiffs in error, three points were insisted on. 1. That the record shows a proper case for the jurisdiction of this court, within the provisions of the 25th section of the judiciary act of 1789. 2. That the act of the legislature of Kentucky establishing *the Bank of the Common- [*120 wealth, is unconstitutional and void; being repugnant to the provis-

ion of the constitution of the United States, which declares that no state shall emit bills of credit. 3. That the Bank of the Commonwealth has no right to recover on the promissory note which is the foundation of this suit, because the consideration was illegal.

The case was argued by *White* and *Wilde*, for the plaintiffs in error; and by *Hardin* and *Bibb*, for the defendant.

The opinion of the court was given on this, and on the following case, together.

The Mayor, Aldermen and Commonalty of the City of New York, Plaintiffs, *v.* George Miln.

Certificate of Division from the Circuit Court of the United States for the Southern District of New York.

The plaintiffs instituted an action against the defendant, George Miln, in the circuit court, to recover certain penalties and forfeitures alleged to have been incurred by him, for a violation of the provisions of an act of the legislature of the state of New York, entitled "an act concerning passengers in vessels coming to the port of New York," passed February 11th, 1824, by which it was, among other things, enacted, that every master or commander of any ship or other vessel, arriving at the port of New York, from any country out of the United States, or from any other of the United States than this state, shall, within twenty-four hours after the arrival of such ship or vessel in the said port, make a report, in writing, on oath or affirmation, to the mayor of the city of New York, or, in case of his sickness or absence, to the recorder of the said city, of the name, place of birth, and last legal settlement, age and occupation of every person who shall have been brought as a passenger in such ship or vessel, on her last voyage from *121] *any country out of the United States into the port of New York, or any of the United States, and from any of the United States, other than this state, to the city of New York, and of all passengers who shall have landed, or been suffered or permitted to land from such ship or vessel, at any place during such her last voyage, or have been put on board, or suffered or permitted to go on board of any other ship or vessel, with the intention of proceeding to the said city, under the penalty on such master or commander, and the owner or owners, consignee or consignees of such ship or vessel, severally and respectively, of seventy-five dollars for every person neglected to be reported as aforesaid, and for every person whose name, place of birth, and last legal settlement, age and condition, or either or any of such particulars, shall be falsely reported as aforesaid, to be sued for, and recovered as hereinafter provided. And further, that it shall be lawful for the said mayor, or, in case of his sickness or absence, for the said recorder, to require, by a short indorsement on the aforesaid report, every such master or commander of any ship of vessel to be bound, with two sufficient sureties (to be approved by the said mayor or recorder), to the mayor, aldermen and commonalty of the city of New York, in such sum as the said mayor or recorder may think proper, not exceeding three hundred dollars for each passenger not being a citizen of the United States, to indemnify, and save harmless, the said mayor, aldermen and commonalty, and the overseers of

the poor of the said city, and their successors, for all and every expense or charge, which shall or may be incurred by them for the maintenance and support of every such person, and for the maintenance and support of the child or children of any such person which may be born after such importation, in case such person, or any such child or children shall, at any time within two years from the date of such bond, become chargeable to the said city: and that if any such master or commander shall neglect or refuse to give such bond within three days after such vessel shall have so arrived at the said port of New York, every such master or commander, and the owner or owners, consignee or consignees of such ship or vessel, severally and respectively, shall be subject to a penalty of five hundred dollars for each and every person, not being a citizen of the United States, for whom the mayor or recorder shall *determine that bonds should have been given as aforesaid, to be sued for and recovered as hereinafter provided. And further, that all and singular the aforesaid penalties and forfeitures shall and may be sued for and recovered, with full costs of suit, by action of debt, in any court having cognisance thereof, in the name of the said mayor, aldermen and commonalty. [*122

To the declaration on this act the defendant entered a demurrer, and the case came on to be argued before the circuit court. The judges of that court were divided in opinion on the following point, presented on the part of the defendant, and this division was certified to the supreme court.

"That the act of the legislature of the state of New York, mentioned in the plaintiff's declaration, assumes to regulate trade and commerce between the port of New York and foreign ports, and is unconstitutional and void."

The case was argued by *Ogden*, for the plaintiffs; and by *Jones*, for the defendants.

Marshall, Ch. J., delivered the opinion of the court in this and the preceding case.—The practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court. In the present cases, four judges do not concur in opinion as to the constitutional questions which have been argued. The court therefore direct these cases to be re-argued at the next term, under the expectation that a larger number of the judges may then be present.(*a*)

(*a*) Mr. Justice Johnson and Mr. Justice Duvall were absent, when these cases were argued.

*William Yeaton, Thomas Vowell, Jun., William Brent, Augustine Newton and David Reckets, and others, Administrators of William Newton, and others, Appellants, *v.* David Lenox and others, and Elizabeth Watson and Robert J. Taylor, Administratrix and Administrator of James Wilson, deceased.

Second appeal.—Parties in equity.—Joinder of causes of action.

A party may, after an appeal has been discussed for informality, if within five years, bring up the case again.

The plaintiffs united severally in a suit, claiming the return of money paid by them on distinct promissory notes given to the defendants. They are several contracts, having no connection with each other; these parties cannot join their claims in the same bill.

Several creditors may not unite in a suit to attach the effects of an absent debtor; they may file their separate claims, and be allowed payment out of the same fund, but they cannot unite in the same original bill.

Appeal from the Circuit Court of the United States of the district of Columbia, and county of Alexandria.

At an early day in the term, *Coxe*, as counsel for the appellees, moved to dismiss the case, as he alleged it had been already twice discussed by the court, 7 Pet. 220. *Swann* and *Neale* opposed the motion.

The case was dismissed at a prior term of the court, for want of an appeal bond. There had been but one appeal prior to the present, which was entered in 1833. The counsel for the appellants were now prepared to proceed with the argument. It is not admitted, that a previous irregular appeal prevents another, unless the five years allowed by law for an appeal have expired. The record of the former appeal was not filed in the time required by the rules of the court; and after it was dismissed, the appellants went into the circuit court of the county of Alexandria, and prayed for this appeal, which was granted; and now all the requisites of the law and of the rules of court have been fully complied with. While it is admitted, that after an appeal, the appellees, on the omission of the appellants to do so, may file the record, have it opened, and pray to have
*124] *it dismissed, and thus finally disposed of, and preclude a second appeal; yet this has not been done, and the action of the court in the case, when formerly before it, has not such effect.

The Court refused the motion.—A party may, after an appeal has been dismissed for informality, if within five years, bring up the case again.

The case came on afterwards for argument: *Swann* and *Neale*, for the appellants; and *Coxe*, for the appellees. The court gave no opinion on the questions of law submitted in the argument, but dismissed the case for informality in the institution of the suit. The arguments of counsel are, therefore, omitted.

Marshall, Ch. J., delivered the opinion of the court.—The plaintiffs, with several other persons, had, previous to the year 1804, associated with each other, under the name of the Marine Insurance Association of Alexandria, for the purpose of making insurances on vessels and cargoes, against sea risks. On the 26th day of June 1804, James Wilson obtained an insur-

ance on the Governor Strong, on a voyage from Norfolk to Liverpool, to the amount of $10,000. The policy is inserted on the record. It is not a joint contract made by the association as a company, but by each for himself. Each subscribes the sum for which he becomes responsible. James Wilson had purchased the Governor Strong from Alexander Henderson & Co., and appears to have indorsed their notes in the Bank of the United States. After his death, his representatives, in September or October 1805, made a transfer of the vessel to the bank, for the security of that debt.

Some time after the vessel had sailed, intelligence was received of injury sustained by the Governor Strong, and Wilson claimed from the insurers a considerable sum on that account, informing them, at the same time, that the money belonged to the bank. Although the insurers were not satisfied of their liability, they agreed to advance their several notes, dated the 25th May 1805, to the said Wilson, payable sixty days after date, at the office of discount and deposit, Washington. The *bill charges, that these notes were advanced, on condition that the money should be returned [*125 to them by the bank, should it afterwards appear that they were not liable for the partial loss sustained by the Governor Strong, and that this agreement was communicated to the bank. These notes were passed to the bank, and paid by the several makers, when due.

In a suit afterwards brought on the policy, for the benefit of the bank, it was determined, that the underwriters were not liable for the loss sustained by the Governor Strong; after which, application was made for the return of the money paid on the notes given to Wilson, which the bank refused, alleging, that the money had been paid absolutely on account of the debts due from Alexander Henderson & Co. The charter of the bank having expired, and its affairs being committed to trustees, the makers of the several notes which have been stated, united in this suit against the trustees. As they were non-residents of the district, their property was attached in the hands of the debtors of the bank, who were also made defendants.

James Davidson afterwards undertook to perform the decree of the court, and the attachment was discharged. At a subsequent term, Davidson was, by consent, made a defendant, and his answer was received as an answer for the trustees. He says, that in January 1806, the bank received promissory notes from James Wilson, executed to the plaintiffs severally, amounting to $2124.04, to be placed, when paid, to the credit of Alexander Henderson & Co., on account of a loss by the underwriters. Should the underwriters not be liable, the notes were to be returned, if unpaid; if paid, the money was to be refunded. These notes, not being paid, were returned. He admits, that the notes mentioned in the bill, were deposited, on the 30th of May 1805, to go, when paid, to the credit of Alexander Henderson & Co., but has no recollection of any condition respecting their return. An amended bill was filed, in which the said Davidson was again required to answer more precisely respecting the transaction; to say, whether he was not, at the time, cashier of the office at Washington; to state in what way the notes were deposited in bank, on the 30th of May 1805; were they sent in a letter? if so, the defendant was *required to produce it, or a copy of it, and [*126 the entry made on the books of the bank in relation to the said notes.

The answer of Davidson refers to his former answer respecting the notes deposited on the 30th of May 1805, and says, that he has no other

information than is here given. He does not recollect in what manner the notes were transmitted, nor whether they were accompanied by any letter. "No such letter is now in his possession. No entry was made in the books of the bank in relation to said notes, except that they were to go, when paid, to the credit of Alexander Henderson & Co., to whose credit such of them as were paid were carried." The entry on the bank-books is made an exhibit, and is as stated in the answer of Davidson.

A correspondence which took place on this subject, with the then president of the office of the bank at Washington, is contained in the record, and some testimony was taken by the plaintiffs. The letters and the depositions furnish strong presumptive evidence, that if the bank supposed the notes to be paid absolutely on account of the debt due from Alexander Henderson & Co., the makers supposed them to be paid conditionally, and that the money was to be refunded, should they not be held responsible for the partial loss sustained by the Governor Strong. On a hearing, the bill was dismissed, with costs, and the plaintiffs appealed to this court.

Whatever might be the condition on which the plaintiffs delivered their notes to Wilson, the bank cannot be affected by it, unless it was communicated to the office. The testimony, that it was communicated, had great plausibility, but when it is recollected, that the deposit of January 1806, might be confounded with that of May 1805, we are not satisfied, that the testimony ought to countervail the answer of the cashier, and the entry on the books of the bank. We are, however, relieved from the difficulty of deciding on a doubtful fact, by an objection taken by the appellees, to the action.

The plaintiffs who unite in this suit, claim the return of money paid by them, severally, on distinct promissory notes. They are several contracts, having no connection with each other. These parties cannot, we think, join their claims in the same bill. *The appellants contend, that several *127] creditors may unite in a suit to attach the debts of an absent debtor. We do not think so. They may file their separate claims, and be allowed payment out of the same fund, but cannot unite in the same original bill. The decree of the circuit court is affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Alexandria, and was argued by counsel: On consideration whereof, it is ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*Bank of the United States, Appellants, *v.* John T. Ritchie, Jr., and others, Appellees.

Bill of review.—Suits against infants.—Sales of decedents' estates.

The Bank of the United States and others, under the authority of the act of the legislature of Maryland, passed in the year 1785, entitled an act for enlarging the powers of the "high court of chancery," under which the real estates of persons, descending to minors and persons *non compos mentis*, where authorized to be sold for the debts of the ancestor, proceeded against the real estate of A. R., for debts due by him; and in 1826, the estate was sold by a decree of the circuit court of the district of Columbia, exercising chancery jurisdiction; afterwards, in 1828, some of the infant heirs of A. R., by their next friend, filed a bill of review against the administrator of A. R., the purchaser of his real estate, and others, stating various errors in the original suit and in the decree of the court, and prayed that the same should be reversed: *Held*, that a bill of review could be sustained in the case.

From the language of the fifth section of the act, some doubt was entertained, whether the act conferred a personal power on the chancellor, or was to be construed as an extension of the jurisdiction of the court; if the former, it was supposed, that a bill of review would not lie to a decree made in execution of the power. On inquiry, however, the court are satisfied, that in Maryland, the act has been construed as an enlargement of jurisdiction, and that decrees for selling the lands of minors and lunatics, in the cases prescribed by it, have been treated, by the court of appeals of that state, as the exercise of other equity powers.

In all suits brought against infants, whom the law supposes to be incapable of understanding and managing their own affairs, the duty of watching over their interests, devolves, in a considerable degree, upon the court; they defend by guardian to be appointed by the court, who is usually the nearest relation, not concerned, in point of interest, in the matter in question. It is not error, but it is calculated to awaken attention, that, in this case, though the infants, as the record shows, had parents living, a person not appearing, from his name, or shown on the record, to be connected with them, was appointed their guardian *ad litem*.

The answer of the infant defendants, in the original proceeding, was signed by their guardian, but not sworn to; it consented to the decree for which the bill prayed; and without any other evidence, the court proceeded to decree a sale of their lands. This is entirely erroneous; the statute under which the court acted authorizes a sale of the real estate, only where the personal estate shall be insufficient for the payment of debts, when the justice of the claims shall be fully established, and when, upon consideration of all circumstances, it shall appear to the chancellor to be just and proper, that such debts should be paid by a sale of the real estate; independent of these special requisitions of the act, it would be obviously the duty of the court, particularly in the case of infants, to be satisfied on these points.

The insufficiency of the personal estate of A. R. to pay his debts, was stated in the answer of his administrator, but was not proved; and was admitted in that of the guardian of the infants, but his answer was not on oath; and if it was, the court ought to have been otherwise satisfied of the fact. [*129

The justice of the claims made by the complainants in the original proceeding, was not established otherwise than by the acknowledgment of the infant defendants, in their answer, that, "according to the belief and knowledge of their guardian, they are, as alleged in said bill, respectively due." The court ought not to have acted on this admission; the infants were incapable of making it, and the acknowledgment of the guardian, not on oath, was totally insufficient; the court ought to have required satisfactory proof of the justice of the claims, and to have established such as were just, before proceeding to sell the real estate.

There was error in the original proceedings in ordering the sale of the real estate of A. R. for the payment of his debts, before the amount of the debts was judicially ascertained by the report of an auditor.

The eighth section of the law which authorizes the sale of real estate descending to minors, enacts, "that all sales made by the authority of the chancellor, under this act, shall be notified to and confirmed by the chancellor, before any conveyance of the property shall be made." This provision was totally disregarded; the sale was never confirmed by the court; yet the conveyance was made. It is a fatal error in the decree, that it directs the conveyance to be made on the payment of the purchase-money, without directing that the sale shall first "be notified to, and approved by," the court.

The conveyances of the real estate, made under the original proceeding, were properly set aside by the decree of the court below; the relief would be very imperfect, if, on the reversal of a decree, the party could, under no circumstances, be restored to the property which had been improperly and irregularly taken from him.

Appeal from the Circuit Court of the District of Columbia, and county of Washington.

The appellees filed their bill of complaint in the circuit court, in the nature of a bill of review, against the appellants, in which they set forth, that in the year 1825, the appellants filed their bill against the complainants and others, as heirs-at-law of Abner Ritchie, deceased, under the act of assembly of Maryland of 1785, ch. 72, § 5, alleging themselves to be the creditors of said Abner Ritchie in the several sums of money mentioned in said bill; that John T. Ritchie, son of said Abner, and one of said defendants, had obtained letters of administration upon the estate of said Abner; that complainants had frequently applied to him for the payment of their debts, which he refused; saying, that he had not assets of the said estate to pay them, or any part thereof, and that said *Abner had died without leaving personal estate to discharge the debts due by him; that said Abner died possessed of real estate described in an exhibit filed therewith, and that the defendants were the heirs-at-law of the said Abner, and prayed process, &c., against them. The bill of review proceeded to aver, that said process did accordingly issue, and that before said these complainants appeared to the same, an order was obtained by the solicitor for the then complainants, appointing Thomas Turner guardian, to appear and answer for them; that this order was obtained without their knowledge or approbation, and without it having been made to appear, that the said parties were infants, and without it appearing by the terms of the said order, that Turner was appointed guardian for these parties; that said Turner did, however, appear for them as their guardian, and filed an answer for these complainants, admitting the truth of all the allegations in the bill; that said bill was not on the oath of said pretended guardian, as was usual. They further stated, that John T. Ritchie, sen., filed his answer to said bill, and alleging, that he himself was a large creditor of deceased, suggested a reference of the various claims to an auditor. That in the year 1826, B. L. Lear, solicitor for said complainants, and T. Swann, also solicitor of said court, misled by some person or persons, entered into an agreement to set the cause for hearing, and did consent that a decree should pass, and which was passed by said court, decreeing that said real estate should be sold, and that trustees should convey the same, and that these parties, on their arrival at age, should release to the purchasers all their title to the same. That said sale was accordingly made, and said T. Ritchie, sen., became the purchaser, and had received a conveyance. The parties averred, that Mr. Swann had no authority to appear for them, or to enter into any consent or agreement on their behalf, or that any decree should be entered against them; and that said proceedings were had without their knowledge or assent, and had never been acquiesced in; that their friends and natural guardians were overlooked and unconsulted. That they were aggrieved by said decree, and ought not to be bound thereby; that they ought not to convey their estate as by the decree is directed; that said decree was erroneous, and ought to be reversed; and assigned several errors:

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*1. There was no allegation in the bill or evidence filed in the case, that Abner Ritchie died without leaving personal estate sufficient to pay his debts. 2. That there was no allegation or evidence that his real estate descended to a minor. 3. That said decree was made without any legal or sufficient answer by the complainants, and without the several matters contained in the bill being taken *pro confesso* against them. 4. That there was neither allegation nor proof, that either of said defendants was a minor, and incapable of answering without a guardian. 5. That the court appointed a guardian *ad litem*, without naming the infant defendants, or causing them to be brought into court to have a guardian appointed, and without any averment or proof that either of them was a minor. 6. That the order appointing a guardian was vague, uncertain and void. 7. That the answer of Turner, professing to be a guardian, &c., not being under oath, was insufficient and void. 8. That said decree purported to be by consent, whereas, it appeared, that the complainants never appeared to said suit, in person or by guardian, and therefore, never could have assented, and could not, as minors, be bound by the consent of an attorney. 9. That there was not sufficient matter alleged in the bill to sustain the decree, if the parties had been competent to assent, and had assented. 10. Because the decree, contrary to right and equity, and the uniform rule and practice of the court, directed the trustee to convey, without a ratification of his sale. 11. Because the decree was an absolute one, without giving complainants a day after they should arrive at age, to show cause against the decree. The bill then averred the death of Henry Carbery, one of the complainants in the first bill, about three years before the filing of said bill, and prayed a review and reversal, &c.

Several of the defendants appeared, and disclaiming any interest, &c., assented to the review and reversal. John T. Ritchie answered, averring the correctness of the proceeding, and prayed a confirmation of what had been done. *The Bank of the United States, and Union Bank of [*132
Georgetown, answering, admitted that the original bill was filed as stated, and required proof of the further allegation of the complainants; they averred the sufficiency and correctness of the former proceedings, and denied that there was any sufficient cause for a review, &c.

The circuit court decreed a reversal of the original decree, and annulled all the proceedings had under it, declaring the parties to be restored to their original rights. The proceedings in the former case constituted the only evidence in the case of the review.

For the appellants, it was contended: 1. That no decree could be set aside or reversed on a bill of review, for any reason not appearing on the face of the decree itself, whereas, most of the objections here urged, were *dehors* the decree. 2. Because such of the reasons as were alleged to appear on the face of the decree itself, were wholly insufficient. 3. Because a bill of review will lie only where the original decree, of which complaint is made, has been fully executed by the party complainant; whereas, the contrary is apparent on the face of the bill of review. 4. Because the decree of reversal transcended the power of the court, and extended further than the court had jurisdiction to decree. 5. Because it was in other respects inequitable and illegal.

The case was argued by *Coxe*, for the appellants ; and by *Marbury*, for the appellees.

Coxe, for the appellants.—The appellees filed their bill of review in the circuit court, for the purpose of reversing a decree of that court, passed several years since. Various grounds of reversal are assigned, as well in the proceedings, as in the decree ; and many allegations are introduced, which are wholly irrelevant in a bill of review, and which are unsupported by any testimony. They would, in an English court of chancery, be deemed
*133] scandalous and impertinent. *The circuit court reversed they former decree, and from this judgement the parties aggrieved have entered this appeal. It will be contended:—

That among all the grounds assigned for the reversal of the original decree, none are to be regarded, excepting those which point out error on the face of the decree itself. Error in the proceedings, in the want of conformity of the decree to the evidence, ought to be taken advantage of, either by petition for a rehearing, or by appeal ; and where the original proceedings are infected with fraud, an original bill lies to vacate them on that ground. But the peculiar and appropriate object of a bill of review is, to obtain a reversal for some defect, apparent on the face of the decree, or for some cause arising or discovered since the date of the decree.

It is urged, however, that the chancery practice of Maryland varies essentially from that of England ; it not being customary here to introduce into the decree, the matters upon which it is based. Certainly, a somewhat looser practice has prevailed, than is known in the English courts ; but the legal result contended for, cannot flow from it. The character of the bill of review is still the same ; and there is no precedent or *dictum* by any Maryland chancellor sustaining the ground relied upon.

The party aggrieved is not without remedy ; he has his appeal, he may have a rehearing ; but it is no legitimate conclusion, from the fact that we have introduced a looser practice, that the whole nature, object and design of the bill of review, shall, therefore, be changed. The case 1 Har. & Gill 393, 424, shows, that in Maryland, the English rule still prevails. This view of the character of this proceeding, dispenses with the necessity for examining in detail, the reasons assigned for a reversal of the original decree, or for showing upon what slender foundation, either of fact or law, they rest.

The last four are all that purport to come within the legitimate scope of a bill or review. 8. The decree purports to be by consent ; whereas, it appears that these complaints never appeared to the suit. Here again, we are required to examine the previous prodeedings, to determine the validity of the objection. The proceedings show that Mr. Turner, a highly
*134] respectable *gentleman, acted as guardian ; that Mr. Swann acted as counsel. In this summary way, the validity of their authority and acts cannot be questioned. 9. That there is not sufficient matter alleged in the bill to sustain the decree. Here again, we are driven to the previous proceedings, which cannot be done on a bill of review. 10. Because the decree directs the trustee to convey, without a previous ratification of his proceedings. This may be unusual ; but it is neither contrary to equity or justice ; it is a matter clearly within the discretion of the court. 12 Johns.

521, 528. The act of 1785, ch. 72, § 8, is merely directory to the chancellor, and may be waived by consent. 11. Because the decree does not, on its face, give complainants a day in court. In general, it may be admitted, that this should constitute part of the decree ; but that rule never has prevailed, when the decree directs a sale. *Booth* v. *Rich*, 1 Vern. 295. If there be any error in this, it is one of mere surplusage, directing the infant to convey, when he comes of age, which may be erased from the decree, as superfluous. Even according to the strictest rules of the English chancery, this being a decree for a sale, it was not necessary to give the infants a day in court. This, however, is a statutory proceeding under the laws of Maryland. The act of 1785, ch. 72, § 8, confers the general authority, but gives no day in court to infants. The act of 1799, ch. 78, § 4, gives a day to infants, against whom such decree may be had, if they are non-residents.

This decree having been obtained by consent, cannot be made the subject of a review. 12 Johns. 521 ; Ambl. 229, 534, 535 ; 1 Harr. Ch. 142, 143. The facts must be admitted, as stated in the decree.

Marbury, for the appellees.—The object of this appeal is, to reverse a decree of the circuit court, on a bill of review, filed by the appellees, to annul a preceding decree of that court, directing the sale of the real estate of Abner Ritchie, the father of the appellees, who are minors, on an alleged deficiency of his personal assets—a proceeding authorized by an act of assembly of Maryland, passed *in the year 1785, ch. 72, and now in force in this district. The bill embodies the exceptions to the original decree, [*135 some of which appear on its face ; others are *dehors* the decree, and can be detected only by reference to the pleadings in the original cause.

It has been objected by the counsel for the appellants, that on a bill of review, filed for error in the decree, nothing but the decree can be read, and no objection can be taken, unless the error appear in the body of the decree ; that it is not allowable to look into the pleadings or the evidence, except so far as the decree may recite them. There can be no doubt, that such is the rule in the English court of chancery, founded upon an early ordinance, established with reference to the mode of preparing the decree in that country. If, however, the rule be rigidly applied to the practice of the courts in the United States, it will amount to an abolition, in those courts, of the mode of relief by bill of review, except in cases where there has been newly-discovered evidence. In the English courts, the substance of the pleadings, and such facts as the court allows to have been proved, are recited in the decree, as the basis of the court's judgment ; but in our courts, the decree contains no such recital ; it is a simple declaration of the court's judgment or order in the case, referring to the proceedings—it is only by reference to those proceedings, that any error, which may exist in the decree, can be detected and exposed.

The new practice, which is believed to be universal in this country, in framing the decree, requires a corresponding change in the rule relating to bills of review, by which the plaintiff should be permitted to look into the proceedings, and not be confined to the face of the decree ; and it is believed, that it was with reference to this diversity, that the court of appeals of Maryland, in delivering their opinion in the case of *Hollingsworth* v. *Mc-*

Donald, 2 Har. & Johns. 237, which was on a bill of review, say, "nothing appears on the face of the proceeding, to show error in the decree." There are several English cases to justify the adoption of such new rule; viz., that the plaintiff, in a bill of review, should not be concluded by the omission of
*136] the officer, whose duty it *was to prepare the decree, to make the proper recitals. 1 Vern. 214–16; 2 Cas. Chan. 161.

A doubt has been suggested, whether a bill of review can be maintained when the plaintiff has the right of appeal, and the period within which such appeal should be taken, has been limited by law. This suggestion is founded upon the idea, that the law limiting the appeal, is a virtual repeal of the remedy by bill of review. This remedy, by review in the court where the error was made, has its origin in an ancient ordinance or rule of practice—has become the law of the court and of the land, to which suitors may, of right, resort; and ought not to be put aside, or repealed by implication; but if consistent with subsequent enactments, should be allowed to remain. Hitherto, it has been considered as existing, notwithstanding the limitation of the period of appeal in Maryland. 2 Har. & Johns. 237; 1 Gill & Johns. 398; 10 Wheat. 149. The rule which requires the performance of the decree by the plaintiff, before filing his bill of review, will always effectually prevent a resort to this remedy, merely for delay.

There would seem to be nothing in the objection, that as the statute which confers on the court jurisdiction in the original case, is silent as to this remedy, that, therefore, there can be no review by the court of its decree; the statute places the subject within the control of the court, to be dealt with according to its usages and practice; not so with the bankrupt laws, which have been referred to; they prescribe the mode of proceeding, and exclude the idea of the application of the ordinary practice of the chancery court in their administration.

There is one other preliminary objection. It is said, that as the original decree was made by consent of the appellees, and so indorsed by their attorney, that they are estopped thereby; and cannot object, even if errors be apparent on the face of the decree. The defendants in the original cause, the appellees in this, were minors—as such, they could not appear and defend the cause by an attorney. An infant can appear by guardian only, who is appointed by the court. Coop. Eq. Pl. 109. The answer of an infant by his guardian, and the admissions contained in it, are not binding on him. Coop. Eq. Pl. 324. Lord HARDWICKE held, that an infant could admit
*137] nothing. 2 *Atk. 377. The court will not conclude an infant, or make an absolute decree against him, though by his own consent, or the consent of his parents, except in some special cases. 7 Johns. 581, 593; Cur. Canc. 466; 1 Desauss. 158.

If it were admitted, that an unexceptionable decree, whether made on proof in the cause, or by consent of parties, being the act of a competent tribunal, would be binding as well on an infant as an adult; it would not then follow, that an erroneous decree would bind an infant, though made by the consent of an attorney appearing on the record for him. It must be conceded, that an erroneous decree, made on the proof in a cause, may be reversed for error appearing on its face; as, where an absolute decree is made against an infant defendant. So, such erroneous decree, taken by

consent of the infant, his guardian or attorney, is reversible in like manner; for an infant is not within the maxim, "*consensus tollit errorum.*"

Again, it is objected, that the original decree in this cause has not been performed, and that a bill of review will not lie, until the decree has been performed. The rule is admitted ; but there is an exception, which embraces the case of the appellees. By the original degree, they are required to do nothing, except "to convey, as they severally come to the age of twenty-one years, their interest and estate in the property, decreed to be sold, to the purchasers at the trustee's sale." When the act required to be done by a decree, will, if performed, extinguish the party's rights at common law, as making an assurance, releasing or cancelling a bond ; performance is not required, but such party may proceed with his bill of review, and leave the decree unperformed. Coop. Eq. Pl. 90.[1]

These preliminary objections being answered, the several errors assigned in the bill of review are to be considered. The fifth section of the act of 1785, ch. 72, authorizes the chancellor to decree the sale of real estate, which descends, or is devised, to a minor, if the intestate or devisor should not leave personal estate sufficient to pay his debts, after such minor has been summoned, and hath appeared. The first and second objections refer to the bill, in which there is no allegation that the intestate died without leaving personal estate to pay his debts, or that his land descended to a minor. The declaration of the administrator, mentioned in the bill, is not the *averment of the complainants, and the want of such averment is not [*138 helped by the subsequent interrogatories. Coop. Eq. Pl. 12, 13.

The 3d, 4th, 5th, 6th and 7th assignments of error, also refer to the proceedings, and being taken together, amount to this : 1st. That there was an illegal appointment of a guardian. 2d. That the infant's answer by the guardian, if duly appointed, was void. The appointment of a guardian in the case was illegal, because the infants were not before the court ; they had not been summoned as the law required. The appearance of an attorney, in their names, was illegal and void. Minors should be brought before the court, to have a guardian assigned ; or a commission should issue to some fit person, to assign a guardian for them. Coop. Eq. Pl. 109 ; 1 Harr. Ch. 474. The guardian's answer was void, because not sworn to by him. 1 Harr. Ch. 474, 477 ; 7 Johns. 581.

The 8th, 10th and 11th assignments of error refer to matter appearing on the face of the decree itself.

8. That the decree was taken by consent of an attorney ; whereas, the act of assembly, giving jurisdiction in the case, requires, "that the justice of the creditor's claim should be fully established ;" "that the court should inquire into all the circumstances," "so that it should appear to the chancellor, to be just and proper to decree a sale of the land," descended or devised to the minor. This was omitted ; the decree was made without reference or inquiry, to know whether it would be just and proper, and for the benefit of the infants, that such decree should be made. 3 Johns. Ch. 361.

10. The eighth section of the act of 1785 requires, "that all sales, made by authority of the chancellor, under this act, shall be notified to, and confirmed by the chancellor, before any conveyance of the property shall be

[1] And see Livingston *v.* Hubbs, 3 Johns. Ch. 124.

made." The decree directs the trustee to convey the property to the purchaser, on the payment of the purchase-money, without waiting for the ratification of the court; and thus violates the provisions of the statute, for which it may be reversed on a bill of review. Cur. Canc. 384; Coop. Eq. Pl. 90.

11. The decree requires the infant defendants, as they severally come to the age of twenty-one years, to convey *the property decreed to be *139] sold, to the purchasers at the trustee's sale, and there is no saving clause in their favor. If there be an absolute decree against a minor, and no day given him, it is reversible on a bill of review. 3 Johns. Ch. 368; 2 Madd. Ch. Pl. 538. It has been insisted, that the omission in the decree, to give a day to the minor, is, in this case, no error, because it is a decree for the sale of land for the payment of debts: to which it is answered, that when the infant is decreed to join in the conveyance, even in a sale under a mortgage, he is entitled to a day. The court will not direct an infant to part with his inheritance, without a day being reserved to him in the decree. 3 Johns. Ch. 361; 1 Ball & Beat. 551; 3 Pow. on Mort. 985, note *z*.

The circuit court, in their decree on the bill of review, not only reverse the original decree, but vacate the sale made under it, and the deed from the trustee to the purchaser, and from such purchaser to others, who are all parties in the original cause, and in this case. This has been objected to, but is according to the authorities. The court may proceed to restore the plaintiffs to the situation in which they would have been, had the decree never passed. 2 Madd. Ch. Pl. 542; 1 Hen. & Munf. 350.

Coxe, in reply, contended, that the cases cited from Vernon's reports, and the chancery cases referred to by the counsel for the appellees, did not warrant the conclusion, that there had been a change of the practice in framing the decrees of a court of chancery. The case cited from Mason's reports, did not call for a decision as to the mode of framing the decree. The general rules upon the matter are fully recognised, in relation to bills of review, in those cases. The appellees might have presented a petition for a rehearing of the case; but having adopted a bill of review, they must submit to the established rules of practice, in reference to such a proceeding. 1 Har. & Gill 423. The English rule has been fully adopted in the courts of Maryland. A bill of review is not a favorite in courts of equity: and the original proceeding in this case being on a statute; and no *bill *140] of review having been given by the statute, no right to such a practice is to be derived by implication.

The statute, in conferring a new right and remedy, must be strictly pursued. It takes away the rights of infants. To allow infants a day in court, after coming of age, would be defeating the whole object of the act. Its object was, to enforce the payment of debts out of the lands of the debtors; necessarily affecting the rights of infants.

The court, in reversing the original decree, has exceeded its powers, by reinstating the parties in their original rights. This may be the general rule, and proper in some cases; but such a rule cannot apply in such a case as this. John T. Ritchie, the elder, had conveyed the property to a purchaser, at a sale made by trustees; and subsequent purchasers cannot be ousted of their titles. The parties to be reinstated, must be those only,

who were the parties to the original bill. The reversal must be restricted to the mere reversal of the original decree; and whatever had been done, under that decree, so far as strangers to the proceeding had derived rights under the sale as *bonâ fide* purchasers, must remain.

MARSHALL, Ch. J., delivered the opinion of the court.—This is an appeal from a decree pronounced by the United States court for the district of Columbia, sitting in chancery, for the county of Washington.

The Bank of the United States and others, alleging themselves to be creditors of Abner Ritchie, deceased, instituted this suit in chancery against John T. Ritchie, administrator, and one of the heirs of the said Abner, and against John T. Ritchie, jun., and others, who were the infant heirs of the said Abner, praying that his real estate may be subjected to the payment of the debts due to them, and that so much of the said estate might be sold as would satisfy their claims. The bill charges, that Abner Ritchie died, possessed of a considerable estate, not having left personal estate sufficient to pay his debts.

The *subpœna* was returned, executed on John T. Ritchie, the other defendants not found. On being called, they appeared by attorney, whereupon, on motion of the plaintiffs, *Thomas Turner was appointed guardian to appear and answer for the infant defendants. The infant [*141 defendants answer, that, according to the belief and knowledge of their guardian, the said claims are, as alleged in said bill of complaint, due and owing to the several complainants; and that Abner Ritchie did die, leaving personal property insufficient for the payment of his debts, having, as is alleged, real property, &c.; and that they have no objection to the sale of a part thereof, sufficient to pay his debts. The answer is not sworn to by the guardian.

The answer of John T. Ritchie, administrator, and one of the heirs of Abner Ritchie, admits that his intestate died considerably indebted; suggests that the claims of the complainants should be referred to an auditor, alleges that he is himself a creditor, and that the personal assets of his testator are insufficient for the payment of his debts. He is willing that the real estate should be sold, and the proceeds applied to the payment of debts.

The cause came on to be heard by consent, and on the 21st day of June 1826, the court, also by consent of parties, decreed that the real estate of Abner Ritchie, deceased, or such part thereof as may be necessary for the purpose, be sold for the payment of the debts due to the complainants, and of such other creditors as should come in, &c., within the time prescribed in the decree. A trustee was appointed to make the sale, who, after giving bond with surety, and advertising the real property left by the said Abner, or so much thereof as might be deemed sufficient to satisfy his debts, at least three weeks, should proceed to sell the same to the highest bidder; one-fourth of the purchase-money to be paid in cash, and the residue in four equal instalments, at six, twelve, eighteen and twenty-four months; for which the trustee is to take the notes of the purchaser, the property to stand as security for the payment of the purchase-money. And upon payment of said notes and interest, the said trustee, and the heirs of Abner Ritchie, as they respectively attain the age of twenty-one years, shall convey in fee.

The trustee was directed to report his proceedings to the court, at the succeeding term, and to pay into court the net proceeds of the first payment, and on payment of the balance, was to convey. The court appointed
*142] Joseph Forrest to report on such claims on the estate of Abner *Ritchie, as should be proved to him before the first Monday in the succeeding November, and the administrator of Abner Ritchie was directed to exhibit to him the settlement of his administration account with the orphans' court.

On the 28th of March 1828, the trustee reported, that after giving bond, and advertising as required by the decree, he had, on the 17th day of July 1826, sold the property at public sale, to John T. Ritchie, the highest bidder, for the sum of $2715. That Mr. Ritchie, having produced satisfactory evidence of his having paid all the debts, and becoming the only creditor to an amount exceeding the amount of sales, he had made to him a deed conveying the property. On the 10th of June 1828, the auditor made his report, in which he disallows several claims to a large amount, made by John T. Ritchie, against the estate of Abner Ritchie.

In 1828, some of the infant heirs of Abner Ritchie, by their next friend, filed their bill of review against the complainants in the original suit, and against John T. Ritchie, the administrator of Abner Ritchie, and the purchaser of his real estate, and against such of the other defendants as do not become plaintiffs; in which they state the proceedings in the original suit, and assign various errors in the decree; for which, and for other errors therein, they pray that the same may be reviewed and reversed, that the deed made by the trustee to the defendant John T. Ritchie, and all deeds made by him to the other defendants, may be declared void, and that the sales made by the trustee may be set aside. The infant defendants answer by their guardian, and admit the allegations of the bill. The other defendants also answer, and insist on the original decree.

The cause came on to be heard, in May term 1830, by consent, when the court, being of opinion, that there was manifest error in the original proceedings, and on the face of the decree, did adjudge, order and decree, that the same should be reversed and annulled, and that all proceedings of the trustee therein named, and all sales and deeds made by him by virtue thereof, to the defendant John T. Ritchie, or any other person, and all deeds made by the said John T. Ritchie of the said real estate, to either of the
*143] other defendants, or for their use, *so far as respects the interest of any of the heirs of Abner Ritchie, except the said John T. Ritchie, senior, should be utterly null and void, and that the complainants be restored to their original estates. From this decree, the defendants appealed to this court.

A doubt has been suggested, whether a bill of review could be sustained in this case. The parties proceeded under an act of the legislature of Maryland, passed in the year 1785, ch. 72, entitled, "an act for enlarging the power of the high court of chancery." The fifth section enacts, "that if any person hath died, or shall hereafter die, without leaving personal estate sufficient to discharge the debts by him or her due, and shall leave real estate, which descends to a minor, or person being idiot, lunatic or *non compos mentis*, or shall devise real estate to a minor, or person being idiot, lunatic or *non compos mentis*, or who shall afterwards become *non compos*

mentis, the chancellor shall have full power and authority, upon application of any creditor of any deceased person, after summoning such minor, and his appearance by guardian, to be appointed as aforesaid, and hearing as aforesaid, or after summoning the person being idiot, lunatic or *non compos mentis*, and his appearance by trustee, trustees or committee, to be appointed as aforesaid, and hearing as aforesaid, and the justice of the claim of such creditor is fully established; if, upon consideration of all circumstances, it shall appear to the chancellor to be just and proper that such debts should be paid by a sale of such real estate, to order the whole, or part, of the real estate so descending or devised, to be sold, for the payment of the debts due by the deceased."

From the language of this section, some doubt was entertained, whether the act conferred a personal power on the chancellor, or was to be construed as an extension of the jurisdiction of the court. If the former, it was supposed, that a bill of review would not lie to a decree made in execution of the power. On inquiry, however, we are satisfied, that in Maryland, the act has been construed as an enlargement of jurisdiction, and that decrees for selling the lands of minors and lunatics, in the cases prescribed by it, have been treated, by the court of appeals of that state, as the exercise of other equity powers.

*We proceed then to examine the original decree, and the errors assigned in it. In all suits brought against infants, whom the law supposes to be incapable of understanding and managing their own affairs, the duty of watching over their interests devolves, in a considerable degree, upon the court. 4 Har. & Johns. 126, 270, 548; 5 Ibid. 459; 5 Har. & Gill 504; Coop. Eq. Pl. 28. They defend by guardian, to be appointed by the court, who is usually the nearest relation, not concerned, in point of interest, in the matter in question. (Coop. Eq. Pl. 29.) It is not error, but it is calculated to awaken attention that, in this case, though the infants, as the record shows, had parents living; a person not appearing from his name, or shown on the record to be connected with them, was appointed their guardian *ad litem*. He was appointed, on the motion of the counsel for the plaintiffs, without bringing the minors into court, or issuing a commission for the purpose of making the appointment. This is contrary to the most approved usage (Coop. Eq. Pl. 109), and is certainly a mark of inexcusable inattention. The adversary counsel is not the person to name the guardian to defend the infants. [*144

The answer of the infant defendants is signed by their guardian, but not sworn to. It consents to the decree for which the bill prays, and, without any other evidence, the court proceeds to decree a sale of their lands. This is, we think, entirely erroneous. The statute under which the court acted, authorizes a sale of the real estate, only where the personal estate shall be insufficient for the payment of debts, when the justice of the claims shall be fully established, and when, upon consideration of all circumstances, it shall appear to the chancellor, to be just and proper that such debts should be paid, by a sale of the real estate. Independent of these special requisitions of the act, it would be obviously the duty of the court, particularly in the case of infants, to be satisfied on these points. The sufficiency of the personal estate of Abner Ritchie to pay his debts, is stated in the answer of his administrator; but is not proved, and is admitted in that of the guardian

of the *infants, but his answer is not on oath ; and if it was, the court ought to have been otherwise satisfied of the fact.

The justice of the claims made by the complainants, is not established otherwise, than by the acknowledgment of the infant defendants in their answer, that, "according to the belief and knowledge of their guardian, they are, as alleged in said bill, respectively due." The court ought not to have acted on this admission. The infants were incapable of making it, and the acknowledgment of the guardian, not on oath, was totally insufficient. The court ought to have required satisfactory proof of the justice of the claims, and to have established such as were just, before proceeding to sell the real estate. Without knowing judicially that any debts existed, or the amount really due, or the value of the real estate, the court directed, "that the real estate of the said Ritchie, or such part thereof as may be necessary for the purpose, be sold, for the payment of debts of said Ritchie to complainants, and to such other creditors of said Ritchie, as shall come in and bear their proper proportions of the costs and expenses of this suit, and shall exhibit their claims, with the proper proof thereof, to the auditor hereinafter appointed, &c." The decree does not postpone the sale until the claims should be exhibited to the auditor ; and, consequently, so far as other creditors were concerned, leaves the trustee without information as to the quantity of property it would be his duty to sell. He accordingly sold the whole estate.

The eighth section of the law, which authorizes the sale of real estate descending to minors, enacts, "that all sales made by the authority of the chancellor, under this act, shall be notified to, and confirmed by the chancellor, before any conveyance of the property shall be made." This provision is totally disregarded. The sale was never confirmed by the court ; yet the conveyance has been made. It is a fatal error in the decree, that it directs the conveyance to be made on the payment of the purchase-money, without directing that the sale shall first "be notified to, and approved by," the court.

These are radical errors, apparent on the face of the decree, which show that the interests of the infants have not been protected as is required by
*146] law and usage ; and that great *injustice may have been done them. The decree, therefore, ought to have been reversed.

The appellants contend, that, even admitting the propriety of reversing the original decree, the circuit court ought to have stopped at that point, and not to have set aside the conveyance which were made under its authority. All the persons affected by the decree now under consideration, were parties when it was made. The bill of review prays for the relief which the court granted, and states all the facts which entitled them to that relief. The power of the court was, we think, competent to grant it, if it was required by the principles of equity and justice. The relief might be very imperfect, if, on the reversal of a decree, the party could, under no circumstances, be restored to the property which had been improperly and irregularly taken from him. Cooper, in his Equity Pleading, page 95, says, "the bill may pray, simply that the decree may be reviewed and altered, or reversed in the point complained of, if it has not been carried into execution ; but if the decree has been carried into execution, the bill should also pray the further decree of the court, to put the party complaining of the former decree into

the situation in which he would have been, if that decree had not been executed." "A supplemental bill may likewise be added, if any event has happened which requires it." In addition to these general principles which sustain the rule laid down by Cooper, circumstances exist, which require, in an eminent degree, its application to this particular case. The decree itself was disregarded by the trustee, in executing the conveyance. It directed him to receive one-fourth of the purchase-money in cash, and the residue in four equal instalments. The first payment is to be brought into court, and he is to make the conveyance, on receiving the last. He is not authorized to pay the money to the creditors. The court has not intrusted to him the right of deciding on the debts, and disposing of the purchase-money. He is only to receive it before he conveys; and, consequently, should hold it subject to the order of the court. It does not appear, that he has ever received a cent. He undertakes to settle the account of Mr. Ritchie, the purchaser, and to convey the property to him, in violation of the decree; *on being satisfied by him that he had paid all the debts, and was himself [*147
a creditor to an amount exceeding the purchase-money. He had no right to be satisfied of these facts. The court had not empowered him to inquire into or decide on them. He has transcended his powers; and with the knowledge of the purchaser, and in combination with him, has executed to him a deed which the law did not authorize. The whole proceeding was irregular, and ought to be set aside. The plaintiffs in the original suit will then be at liberty to prosecute their claims according to law. The court is of opinion, that there is no error in the decree of the circuit court, and that it be affirmed with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*Thomas Jackson *et al.*, Appellants, *v.* William E. Ashton. [*148

Averment of citizenship.

The caption of the bill was in the following terms, "Thomas Jackson, a citizen of the state of Virginia, William Goodwin Jackson and Maria Congreve Jackson, citizens of Virginia, infants, by their father and next friend, the said Thomas Jackson *v.* The Reverend William E. Ashton, a citizen of the state of Pennsylvania: In equity." In the body of the bill, it was stated that "the defendant is of Philadelphia."

The title or caption of the bill is no part of the bill, and does not remove the objection to the defects in the pleadings; the bill and proceedings should state the citizenship of the parties, to give the court jurisdiction of the case.

The only difficulty which could arise to the dismissal of the bill, presents itself upon the statement, "that the defendant is of Philadelphia;" if this were a new question, the court might decide otherwise; but the decisions of the court, in cases which have heretofore been before it, have been express upon the point.

Appeal from the Circuit Court for the Eastern District of Pennsylvania.

After the argument was commenced by Mr. *Key*, for the appellant, the court stated, that an objection to the jurisdiction of this case, arose from the omission to state the citizenship of the defendant, William E. Ashton, in the bill, as filed in the circuit court, and appearing upon the printed copy of the record. The caption of the bill was in the following terms.

"Thomas Jackson, a citizen of the state of Virginia, William Goodwin Jackson and Maria Congreve Jackson, citizens of Virginia, infants, by their father and next friend, the said Thomas Jackson *v.* The Reverend William E. Ashton, a citizen of the state of Pennsylvania: In equity."

The bill proceeded to state that the complainants and the appellants were citizens of the state of Virginia. The only description of the defendant was, "William E. Ashton, of the city of Philadelphia," which was in the body of the bill.

Peters, for the appellee, stated, that although aware of the objection to the jurisdiction, in consequence of there being an omission to state the citizenship of the appellee, yet he was *not disposed to urge the exception. If the court could take jurisdiction of the case, the appellee was entirely willing; indeed, he was anxious that the court should hear and determine the cause. He wished it to be understood, that the appellee made no objection to the court's proceeding in the case.

*149]

Key contended, that the caption of the bill was part of it, and that taken with the bill, the citizenship of the defendant was sufficiently shown. The disposition of this court has been manifested in many cases, to get rid of technical difficulties of this kind.

Marshall, Ch. J., delivered the opinion of the court.—The title or caption of the bill is no part of the bill, and does not remove the objection to the defects in the pleadings. The bill and proceedings should state the citizenship of the parties, to give the court jurisdiction of the case. The only difficulty which could arise to the dismissal of the bill, presents itself upon the statement, "that the defendant is of Philadelphia." This, it might be answered, shows that he is a citizen of Pennsylvania. If this were a new question, the court might decide otherwise; but the decision of the court, in cases which have heretofore been before it, has been express upon the point; and the bill must be dismissed for want of jurisdiction.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States, for the eastern district of Pennsylvania, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the said circuit court could not entertain jurisdiction of this cause, and that, consequently, this court has not jurisdiction in this cause, but for the purpose of reversing the decree of the said circuit court, entertaining said jurisdiction: whereupon, it is ordered, adjudged and decreed by this court, that the decree of the said circuit court be and the same is hereby reversed, and that this appeal be and the same is hereby dismissed. All of which is hereby ordered to be certified to the said circuit court, under the seal of this court.

*United States, Plaintiffs in error, *v.* Tench Ringgold.

Special allocatur.—Marshal's poundage.—Liability of the United States for costs.

On the opening of the record for the argument of this case, it was found, that the sum in controversy was less than the amount which, according to the act of congress, authorizes a writ of error, except on a special *allocatur*, from the circuit court of the district of Columbia to this court. The provisions of the law permit writs of error to be sued out without such *allocatur*, when the sum in controversy amounts to $1000 and upwards.

On the application of the counsel, stating the questions in the case were of great public importance, and were required to be determined, in order to the final settlement of other accounts in which the same principles were involved, the court gave the special *allocatur*.

The marshal of the district of Columbia, upon the settlement of his accounts at the treasury, claimed an allowance and credit by the United States, for the sum of $1111.02, being the amount of his poundage fees on a *capias ad satisfaciendum*, against John Gates, at the suit of the United States, and upon which Gates was arrested by the defendant, as marshal, and committed to jail, and afterwards discharged by order of the United States.

Admitting the defendant in an execution to be liable for poundage, if the plaintiff releases or discharges him, and thereby deprives the marshal of all recourse to the defendant, there can be no doubt, that the plaintiff would thereby make himself responsible for the poundage.

By the statutes of Maryland, relative to poundage fees, in force in the county of Washington, in the district of Columbia, the marshal is entitled to poundage on an execution executed, and the fix the rate of allowance: those statutes do not designate which of the parties shall pay the poundage.

It is undoubtedly a general rule, that no court can give a direct judgment against the United States for costs, in a suit to which they are a party, either on behalf of any suitor, or any officer of the government; but it by no means follows, from this, that they are not liable for their own costs. No direct suit can be maintained against the United States; but when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them for costs; it would be a very rigid principle, to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to congress, except for the purpose of remedy; and no such necessity can exist, when this right can properly be set up by way of defence, to a suit by the United States.[1]

The discharge, in this case, is absolute and unconditional; and the marshal had no authority to hold the defendant in custody afterwards; admitting Gates to have been liable for these poundage fees, the marshal's power or right to compel payment from him, was taken away by authority of the United States, the plaintiff in the suit; and the right of the marshal to claim his poundage fees from them, is thereby clearly established.

*Error to the Circuit Court of the district of Columbia and county of Washington. [*151

This was an action of *assumpsit*, instituted by the United States, in the circuit court, to recover the sum of $345, money of the plaintiffs, alleged to have been received by the defendant, as marshal of the district of Columbia. The defendant pleaded *non assumpsit*, and issue was joined thereon. The

[1] United States *v.* Mann, 2 Brock. 9. In the case of The Siren, 7 Wall. 154, the court say, that "although direct suits cannot be maintained against the United States, or against their property, yet, when the United States institute a suit, they waive their exemption, so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made, or property claimed; and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libelled. They then stand, in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs, and from affirmative relief against them, beyond the demand or property in controversy."

counsel for the plaintiffs and defendant, submitted the following statement, subject to the opinion of the court on the law and facts:

This is an action of *assumpsit*, brought to recover the sum of $345, money of the plaintiffs, which came to the hands of the defendant, as marshal of the district of Columbia. Upon the settlement of the defendant's accounts as marshal, with the treasury, he claimed an allowance and credit for the sum of $1111.02 (see account marked A), being the amount of his poundage fees on a *capias ad satisfaciendum* against John Gates, at the suit of the United States, and upon which Gates was arrested by the defendant as marshal, and committed to jail, and afterwards discharged by order of the president of the United States. (See statement marked B.) It is agreed, that this claim was presented to the accounting officers of the treasury, before the institution of this suit, and disallowed.

Account A.

United States, Dr. June term, 1819.

To *cepi ca. sa.* v. John Gates; released from jail by order of the president of the United States	50
Writ and return	14
Poundage fees on first $26.67, at 7½ per cent.	2.00
Ditto. on residue, $36,946 at 3 per cent.	1108.38
	$1111.02

T. Ringgold, M. D. C.

Statement B.

District of Columbia, County of Washington, Circuit Court, December term 1818. United States v. John Gates, Jun., January 5, 1819. Judg-
*152] ment for sixty-five thousand dollars, *current money, damages, to be released on payment of sixty-three thousand five hundred and ninety-seven dollars and seventy-three cents, or such other sum as may hereafter be certified by the accounting officers of the treasury—costs eleven dollars and eighty-two cents. Upon which judgment execution (*ca. sa.*) was issued, to June term, 1819, and returned by the marshal with the following indorsements thereon:

Certificate of Second Auditor of amount due.

Treasury department, second auditor's office, 27 March 1819. I certify, that on settlement of the account of John Gates, Jun., late paymaster of the United States light artillery, on the 29th Octobor 1818, a balance of thirty-six thousand nine hundred and sixty dollars was found due by him to the United States, which said balance is now standing against him on the books at this office. William Lee, 2d Auditor.

Return of Marshal.

Cepi: Released by order of the president of the United States, herewith returned. T. Ringgold.

President's order of discharge.

To the Marshal of the District of Columbia. Whereas, John Gates, Junior, of the county of Albany, in the district of New York, is confined

and held in custody in the prison aforesaid, in pursuance of a certain judgment and execution obtained at the suit of the United States; and whereas, it appears to my satisfaction, that the said John Gates, Junior, is unable to pay the said debt for which he is imprisoned: Now, therefore, by virtue of the power and authority invested in the president of the United States, by an act of congress, passed the 3d of March 1817, entitled "an act supplementary to an act for the relief of persons imprisoned for debts due the United States," I, James Monroe, president of the United States, do hereby authorize you to discharge from your custody, out of the prison aforesaid, the body of the said John Gates, Junior.

Given under my hand, in the city of Washington, this fifth day of March, one thousand eight hundred and nineteen, and forty-third year of the independence of the United States. JAMES MONROE.

*The circuit court gave judgment in favor of the defendant; and the United States prosecuted this writ of error. [*153

The case was argued by *Butler*, Attorney-General, for the United States; and by *Coxe*, for the defendant.

On the opening of the record, it was found, that the sum in controversy was less than the amount which, according to the act of congress, authorizes a writ of error, except on a special *allocatur*, from the circuit court of the district of Columbia to this court. The provisions of the law permit writs of error to be sued out without such *allocatur*, when the sum in controversy amounts to $1000, and upwards.

The attorney-general and Mr. Coxe requested the court to give a special *allocatur*, *nunc pro tunc*, as the questions in the case were of great public importance, and were required to be determined, in order to the final settlement of other accounts in which the same principles were involved. The court, on these representations, gave the special *allocatur*.

The *Attorney-General*, for the plaintiffs in error, contended, that the judgment of the circuit court was erroneous, for the following reasons. 1. By the laws of Maryland (to which the acts of congress refer), the defendant, and not the plaintiff, is liable to the sheriff or marshal for his poundage on the service of a *ca. sa.* 2. Whatever may be the rule in respect to individuals, the United States, under the general terms employed in the acts of congress and of the state of Maryland, are not liable to the officer.

1. The marshal of the district of Columbia is not entitled to poundage fees, under the acts of congress of 1801 and 1803. By those acts, the same fees are given to that officer, as are allowed for similar services by the laws of Maryland. No poundage fees are allowed in a case of this kind, by the Maryland law. It has been gravely questioned, whether the law of England, which gave poundage fees, was ever in force in Maryland; the best opinions are, that it never was in force in that state, and therefore, no right to such fees can exist. No case in which such fees have been allowed, is to be found. The sheriff (and *by this same rule, the marshal of this district) is not entitled, in Maryland, to any fees, as poundage, unless by the special provisions of some statute. [*154

The statutes of Maryland, in reference to the fees of the sheriff, are those

of 1753 and 1759. Upon those statutes, there have been contradictory decisions in the courts of Maryland. In 1805, it was decided, that the defendant, and not the plaintiff, was liable for the poundage fees of the sheriff; and under the authority of this decision, the circuit court of this district decided differently from their decision in this case. Afterwards, in the case of *Mason* v. *Muncaster*, decided in 1829, the circuit court of the district of Columbia adjudged that the plaintiff was liable to the marshal for such fees.(*a*)

(*a*) The reporter has great satisfaction in annexing to the report of this case, the opinion of Mr. Justice CRANCH, in the case of Mason *v.* Muncaster, delivered March 12th, 1829.[1]

This case comes before the court on a motion to quash two writs of *fieri facias*, levied on certain lands of the defendant, the sale of which was postponed by agreement of the parties, in order that the opinion of the court might be had, whether the marshal is entitled to poundage fees, on levying an execution upon lands which are not sold.

By the act of congress of 27th February 1801, § 9, the marshal was entitled to receive the same fees, perquisites and emoluments, as the marshal of the United States for the district of Maryland. By the act of 3d March 1807, the marshal, for services not enumerated in that or some other act of congress, is entitled to such fees as were, on the first Monday of December 1800, allowed, by the laws of Maryland, to a sheriff, for like services. The poundage fee is not expressly given or regulated by any act of congress. By the stat. Westm. I., c. 26, no officer shall take any reward to do his office, but of the king. And by the 29 Eliz., c. 4, no sheriff shall "receive or take of any person, for serving an execution on the body, lands, goods or chattels of any person, more or other consideration or recompense, than twelve pence of and for every twenty shillings that he shall levy or extend, and deliver in execution, or take the body in execution for, by virtue and force of any such extent or execution." This act does not contain the word poundage. The 3 Geo. I., c. 15, § 14, uses the word "poundage," allowed by that act; and (§ 16) "for ascertaining the fees for executing of writs of *elegit*, so far as the same relate to the extending of real estates and for executing writs of *hab. fac. poss. aut seisinam*," it is enacted, "that it shall not be lawful for any sheriff, by reason or color of office, or by reason or color of executing any writ or writs of *hab. fac. poss. aut seisinam*, to ask, demand or receive any other or greater consideration, fee, gratuity or reward, than twelve pence of every twenty shillings of the yearly value." By § 17, reciting that "it often happens, that small sums only remain due upon judgments, but upon executing writs of *ca. sa.*, the sheriff takes for his fees poundage for the whole money for which such judgments are ntered," it is enacted, that "poundage shall in no case be demanded or taken upon executing any writ of *ca. sa.* or upon charging any person in execution by virtue of such writ, for any greater sum than the real debt *bonâ fide* due and claimed by the plaintiff," under the penalty of treble damages to the party aggrieved; but the statute does not say, whether the party aggrieved be the plaintiff or defendant, nor which of them is bound to pay the poundage. The 8 Geo. I., c. 25, § 3, recites, that "by the 23 Hen. VIII., there was due to his majesty a fee of one halfpenny in the pound upon every recognisance, to be paid on sealing the first process, which is very heavy on every prosecutor on every such recognisance; and that the fees taken by sheriffs in getting an extent or execution on such recognisances are very expensive, and enacts, that the prosecutor shall mark the sum to be extended or levied, which sum the officer shall insert in the writ to be only extended or levied, and no more, and on which the poundage of one halfpenny shall be paid. And by the fifth section, the sheriff upon

[1] 3 Cr. C. C. 403.

United States v. Ringgold.

*If there is no decision of the courts of Maryland on the question, this court will examine the law of that state, and will *decide what it is. They will there find no warrant for the claim of the defendant. [*56

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such recognisances shall take only the same fees as are appointed by the 3 Geo. I. By the act of Maryland of 12th October 1753, c. 22, it is enacted, "that no officer, by reason or color of his office, shall have, receive or take of any person, any other or greater fees than by this act are allowed; to the sheriff serving an attachment or execution, seven pounds of tobacco; and if any execution be for above one hundred, and under five hundred pounds of tobacco, then thirty-seven pounds of tobacco; if it exceed five hundred pounds, then fifty-seven pounds, and so on; and if any execution be for money, the sheriff to have at the rate of seven per centum for the first five pounds, and three per centum for the residue, in the same specie the execution is issued for. The act of 1779, c. 25, gives "to the sheriff the same fees on a *fieri facias* or replevin, as upon attachments;" "for all goods and chattels which he shall attach and take into his possession, or wherewith he shall be chargeable, the same fees as on execution." And by § 5, "on the service of any execution for money or tobacco, the sheriff, for the service of the same, shall charge and receive on the same, at the rate of ten per centum for the first five pounds, &c., and five per centum for the residue; and no sheriff shall be chargeable in any action of escape, for more than the sum of money really due or indorsed to be received on the execution in discharge thereof. By the act of 1790, c. 59, § 2, "instead of the poundage fees to the sheriff by the first-mentioned act (1779, c. 25), he be allowed only at the rate of seven and a half per centum for the first ten pounds, and at the rate of three per centum for the residue; and where execution or attachment shall be made on lands held for years or a greater estate, only half of the poundage fees; but if the estate be not chargeable by appraisement and delivered to the plaintiff, or by sale of the sheriff, one quarter part of the poundage fees only shall be chargeable."

If the defendant be taken on a *ca. sa.*, who is, in the first place, liable to the marshal for his poundage—the plaintiff or the defendant? Les Viscount de London *v.* Mitchell, 1 Roll. 404 (1616), was debt by the sheriff against the plaintiff in the execution, for his poundage fees upon a *ca. sa.* Lord Coke said, "if he has not an action of debt, he has no remedy; and therefore, forasmuch as the words are, that he shall have, receive and take, this makes it a duty in him, and so the action lies: *quod fuit concessum per curiam.*" Welden *v.* Vesey, Poph. 173, debt by the sheriff against the creditor, for seven pounds and six pence, for poundage on one hundred and eighty-one pounds, for which the debtor was taken on a *ca. sa.* It was decided, that the sheriff should have five per centum on the first one hundred pounds, and two and a-half on the residue: and Whitelocke, J., was of opinion, that the sheriff may refuse to do execution, until the levying money be paid to him: but that point was not decided. The sheriff recovered his poundage against the plaintiff in the following cases. Brockwell *v.* Lock, 5 Mod. 97; Peacock *v.* Harris, 1 Salk. 331; Jayson *v.* Rash, Ibid. 209; Lyster *v.* Bromley, Cro. Car. 286; Earl *v.* Plummer, 12 Mod. 124; Tyson *v.* Paske, 1 Salk. 333; Pope *v.* Hayman, Holt 317; Suliard *v.* Stampe, Moore 468; Gurney and Somes' Case, Cro. Eliz. 336. In all these cases, the action was against the original plaintiff in the execution; and there is no case in which the marshal or sheriff brought his action for poundage against the original debtor, in the execution. In Earl *v.* Plummer, the action was brought by the sheriff, for his poundage on executing an erroneous writ, and the court said, "that if the party himself will take out such an erroneous writ, he shall not, under pretence thereof, cheat the sheriff of his fees." Woodgate *v.* Knatchbull, 2 T. R. 148, was an action on the case, under the 29 Eliz. c. 4, by the defendant in a *fi. fa.*, against the sheriff, for damages, for taking more than his poundage, for levying the *fi. fa.*; verdict for the plaintiff, for fifty-four pounds and fourteen shillings; rule to show cause why the verdict should not be set aside. The

*2. But whatever may be the law as to individuals, the government is not liable, unless specially declared to be so by statute. *The acts of congress do not profess to give the marshal fees of this description. They are entirely silent in reference to them; and

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counsel, in arguing in support of the rule, said, "the mischief intended to be remedied by the act of Eliz., was the negligence of sheriffs in executing process; persons who have recovered judgments, being obliged to pay money to sheriffs, to induce them to do their duty properly, in levying the sums recovered. This was to be remedied, by allowing the sheriff so much in the pound, for the sum levied, as a stimulus to him; but to prevent him from charging the plaintiff in the original suits, with more than was allowed, the act gave the two remedies therein specified. They, therefore, were the only persons intended to be benefited by such pecuniary compensations, and not the defendants." BULLER, J., says, "if the plaintiff choose to have an auction, he must defray the expenses out of his own debt to be levied; for there is no color to charge the defendant with it. The sheriff can only levy on the defendant, that sum which is given by the judgment of the court." The judgment was for two hundred pounds; but the *fi. fa.* was indorsed to levy one hundred and sixteen pounds, besides the costs of levying and sheriff's fees. He said further, "then the only remaining question is, whether, in this case, it appears, that the plaintiff is the party grieved? The first execution was what struck me as a ground for this doubt. The judgment there was for two hundred pounds. The sheriff was at liberty, by the judgment of this court, to raise two hundred pounds, but no more; and the expenses of levying must have been paid out of the debt. For, in actions on simple contract, and judgment for a debt certain, the expenses of levying must be paid by the plaintiff, and not by the defendant; so that, if the sheriff overcharge, the plaintiff is the sufferer. But if the judgment be for a penalty, the plaintiff has a right to receive the whole of his debt, independent of the expenses of the execution, and in those cases, the defendant is the party injured by the sheriff's taking more than he ought." GROSE, J., said, "at common law, no fee whatever was allowed to the sheriff; then, if he be entitled to receive any, it must be by act of parliament. Now, by looking into the act, it appears clearly to have been the intention of the legislature, that the sheriff should be paid in proportion to the sum levied, out of the sum levied, and that the sheriff should only levy what was really due." In Bonafous *v.* Walker, 2 T. R. 126, which was debt against the sheriff for an escape, the court decided, that the plaintiff was entitled to recover against the sheriff all that he had a right to receive from the debtor who had escaped, including the poundage; and BULLER, J., said, "for poundage is part of the debt, and the prisoner could not have been discharged out of the execution, without paying the poundage, and therefore, if the plaintiff was entitled to recover at all, he was entitled to recover the poundage as well as the debt." Lake *v.* Turner, 4 Burr. 1981, was debt by the sheriff for poundage on a *ca. sa.* in favor of defendant against Gibbs, who was arrested by plaintiff. The only ground of defence was, that the *ca. sa.*, was prosecuted at the instance and for the benefit of the king, who, not being named in the stat. 29 Eliz. c. 4, is not bound by it, and not liable for poundage. But this defence was, upon demurrer, adjudged bad, and the plaintiff had judgment. In Alchin *v.* Wells, 5 T. R. 470, it is held, that if the sheriff levy under a *fi. fa.* he is entitled to poundage, though the parties compromise before he sells any of the defendant's goods; and if the sheriff, notwithstanding the compromise, satisfy himself for the poundage on the debt, the court will not rule him to return the writ. Fisher *v.* Beatty, 3 Har. & McHen. 148, was an action of replevin for goods taken by the defendant, as sheriff, to satisfy his poundage and other fees due on a writ of *fi. fa.* and a *venditioni exponas*, which last writ was countermanded before execution, and so returned by the sheriff, before he took the goods in execution for his poundage. The general court decided, that the sheriff could not execute, in that case, for his poundage, and that the defendant in an execution is not liable to the sheriff for his pound-

therefore, no right to them exists. They cannot then be set off in an account with the United States. The government is not included in any general statute, but there must be an express provision in a statute, to make it operate upon the United States. *The Antelope*, 12 Wheat. 550. No costs can be awarded against the United States. *United States* v. *Hooe*, 3 Cranch 73. Also, 1 Salk. 331 ; 4 Burr. 1981. The defendant should have applied to the legislature for relief. If the services were such as to entitle him to compensation, and this is not denied, they would have been allowed to him by congress. This was done on the application of the marshal of the district of Maine, in a similar case.

Coxe, for the defendant, contended, that the law of Maryland was, that poundage should be paid to the sheriff, in case of the discharge of the defendant ; and that the adjudged cases upon this point, were conclusive. He referred to the opinion of the circuit court, in the case of *Mason* v. *Muncaster*, *for the authorities on the point, both in Maryland and in England. [*159

On the second point presented by the attorney-general, he argued, that the construction of the acts of congress contended for in behalf of the defendant, was of equal importance to all the officers of the courts of the United States. No costs could be allowed to the clerks, if none were to be allowed to the marshal. The exception in favor of the United States, as to

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age. In Maddox *v.* Cranch, 4 Har. & McHen. 343, the general court decided, that the plaintiff in an attachment was liable for poundage. In Stewart *v.* Dorsey, 3 Har. & McHen. 401, the defendant had been taken in execution by the plaintiff (the sheriff), at the suit of the state, who agreed to release the defendant, on his paying all legal costs, and the defendant promised to pay the poundage to the sheriff, who thereupon discharged him. The court gave judgment for the sheriff, in an action against the defendant upon that promise. A manuscript report of the case of Howard *v.* Justices of the Levy Court of Ann Arundel, in 1805, was cited in this court, in April 1821, in the case of Ringgold *v.* Nicholls; in which, the general court, after full argument, decided, that the defendant, and not the plaintiff, is liable to the sheriff for poundage. And upon that decision, this court (Morsell, J., absent, and the other jndges doubting), decided the case of Ringgold *v.* Nicholls. Letters were read by the counsel in that cause, from Mr. Harris and Mr. Taney, stating that the question was still open in Maryland, and from Mr. Williams, that the court of appeals had decided that the plaintiff is not liable to the sheriff when the defendant is discharged under the insolvent law.

By the consideration of all these cases, we are led to the conclusion : 1. That the plaintiff in a *ca. sa.* is liable to the marshal for his poundage, as soon as he has taken the body of the defendant in execution upon that writ. 2. That the plaintiff in a *fi. fa.* is also liable to the marshal for his whole poundage on the debt, if he levy goods to the value of the debt, whether they be sold or not. If sold, and they produce less than the debt, he can claim poundage only on the amount made. 3. The original defendant is not liable, in any form of action, to the marshal, nor to the original plaintiff, for the poundage, nor is he, or his property, liable for poundage, unless the judgment be for a sum larger than the debt due from the defendant, to be released on payment of the amount really due, with costs, for the marshal cannot, on a *fi. fa.*, make more than the amount of the judgment, nor can he detain the debtor, upon a *ca. sa.*, for more than that amount. 4. In the present case, the marshal, not having returned the *fi. fa.* may proceed to execute it for his poundage; and in this way only has the marshal a legal claim on the defendant in this cause, for the poundage; unless he shall have promised to pay it, upon a good consideration.

costs, is, that they are not liable to pay the defendant's costs. This is a hardship; but it is admitted to be the law. The claim in this case is not affected by that rule. By the provisions of the acts of congress, the costs of the marshal are required to be taxed by the circuit court, before they are submitted to the treasury. The court is, by the law, the judge of the legality of the allowances; and not the officers of the treasury, as has been asserted in the present case. It is denied, that such a right exists in the officers of the treasury; and the court has now to determine the question. During forty years, the marshals of the United States have been allowed fees for services rendered to the United States; and it is now attempted to distinguish the process for which poundage is claimed, from those which have hitherto been always allowed on the certificate of the court.

It is admitted, that the marshal must have a compensation for his services on the execution. The responsibilities are great, and they entitle him to fees. From whom was he to obtain them? Not from the defendant; he was discharged by the president, by an order for his discharge directed to the marshal. Could the marshal have detained the defendant for his fees, after this order? If, after this order, that right ceased, the United States stands in the same relation to the officer, as does any plaintiff.

An application was made to congress, by the marshal of Maine, for poundage fees, in a case similar to this now before the court, and the same were allowed by law, the law of Maine giving those fees to the sheriff. This shows the views of the legislature upon the matter.

*160] *THOMPSON, Justice, delivered the opinion of the court.—The United States brought a suit against the defendant, in the circuit court for the county of Washington, in the district of Columbia; and upon the trial of the cause, the following statement of facts was, by the agreement of the parties, submitted to the court for its opinion of the law thereupon.

"This is an action of *assumpsit*, brought to recover the sum of $345, money of the plaintiffs, which came to the hands of the defendant, as marshal of the district of Columbia. Upon the settlement of the defendant's accounts, as marshal, with the treasury, he claimed an allowance and credit for the sum of $1111.02, being the amount of his poundage fees on a *capias ad satisfaciendum*, against John Gates, at the suit of the United States, and upon which Gates was arrested by the defendant, as marshal, and committed to the jail, and afterwards discharged by order of the United States. It is agreed, that this claim was presented to the accounting officers of the treasury, before the institution of this suit, and disallowed." Upon this statement of facts, the circuit court gave judgment for the defendant.

The matter in dispute, in this case, being under the value of $1000, a writ of error has been specially allowed, according to the provisions of the act of congress of April 2d, 1816 (3 U. S. Stat. 261), and the cause comes here for revision.

Upon the argument here, it has been contended by the attorney-general, on the part of the United States: 1. That by the laws of the state of Maryland, to which the acts of congress refer, the defendant, and not the plaintiff, is liable to the sheriff or marshal, for his poundage, on the service of a

capias ad satisfaciendum. 2. That whatever may by the rule in respect to individuals, the United States, under the general terms employed in the acts of congress and of the state of Maryland, are not liable to the officer.

That the defendant is legally entitled to the fees claimed by him as poundage, upon the execution served upon Gates, cannot be denied. By the act of congress of the 27th of February 1801, § 9 *(2 U. S. Stat. 106), it is declared, that the marshal shall be entitled to receive, for his services, [*161 the same fees, perquisites and emoluments, which are by law allowed to the marshal of the United States for the district of Maryland. And by the act of congress of the 3d of March 1807 (2 U. S. Stat. 430), provision is made for certain specified services by the marshal, not, however, including poundage fees, but containing this general provision, "that for such services as are not enumerated in this or some other act of congress, the marshal shall receive, for for services performed in the county of Washington, the like fees and compensation as, by the laws of Maryland in force on the first Monday in December 1800, were allowed to a sheriff of a county of Maryland for the like services."

By the Maryland law of 1799, ch. 25, § 5, the sheriff, on the service of any execution for money or tobacco, shall charge and receive on the same at the rate of ten per centum for the first five pounds, and at the rate of five per centum for the residue; and no sheriff shall be chargeable for any action of escape for more than the sum of money really due, or indorsed to be received on the execution in discharge thereof. If any doubt could exist whether an execution against the body was included, or intended to be included, under the general term "*any* execution for money or tobacco;" that doubt is removed, by the provision in relation to escapes, which can apply only to cases where the party was held under an execution against the body. This provision as to poundage, is modified by a subsequent act of 1790, ch. 59, § 2, which declares, that instead of the poundage fees to the sheriff, by the act of 1779, he be allowed only at the rate of seven and a half per centum for the first ten pounds, and at the rate of three per centum for the residue; and this is the rate at which the marshal has charged his poundage in the present case.

Although the right of the marshal to poundage on a *capias ad satisfaciendum*, is clearly established by these laws; yet they are silent with respect to the party who is liable to him for the payment thereof. In the case of *Fisher* v. *Beatty*, 3 Har. & McHen. 148, in the court of appeals of Maryland, the question was made, whether, on an execution, the defendant is liable to the sheriff *for his fees; and the court decided, that he was [*162 not; the grounds upon which that decision rested are not stated. And in two other cases in the same court, *Stewart* v. *Dorsey*, 3 Har. & McHen. 401; and *Maddox* v. *Cranch*, 4 Ibid. 343, the same question arose, but accompanied with circumstances that did not call for a direct decision upon the point, though, in the latter case, the court say, the fees must be paid by the person who issues the attachment. From these cases, it would seem reasonable to conclude, that, in the courts in Maryland, it is held, that the plaintiff in the execution, and not the defendant, is liable to the sheriff for his poundage.

If there is no statute making the defendant responsible for such poundage, it follows, as matter of course, that it must be paid by the plaintiff;

and if the defendant is liable, and cannot pay, the plaintiff will be responsible. By the common law, costs are not recoverable against the opposite party; and he who requires the service to be performed, must pay all legal charges for such service. It may not, however, be amiss to observe, that, although, from the cases referred to in the court of appeals in Maryland, it is fairly to be inferred, that, according to the construction there given to the statutes of that state on this subject, the plaintiff, and not the defendant, is liable to the sheriff for the poundage fees on a *capias ad satisfaciendum;* yet a contrary conclusion may well be drawn, if not necessarily implied, in the provision contained in the 4th section of the act of 1779, ch. 25, which declares, that where any writ of *capias ad satisfaciendum* shall issue, poundage shall in no case be demanded or taken, upon execution of such writ, or upon charging any person in execution by virtue of such writ, for any greater sum than the real debt *bonâ fide* due and claimed by the plaintiff, amounts to; which sum the clerk, or the plaintiff, his agent or attorney, shall and are hereby obliged to make and specify, on the back of such writ, and no sheriff shall be obliged to execute such writ, before such indorsement; and that the defendant in the execution is liable for such poundage, is strongly fortified by the recital in this section: "whereas, it often happens that small sums only remain due upon judgments given for great sums and penalties, and, nevertheless, in these cases, upon executing of writs of *capias ad satisfaciendum*, the sheriff demands and takes for his fee poundage for *163] *the whole money for which such judgments are entered; for remedy whereof, be it enacted, &c."

But it is not necessary, in the present case, to decide whether in any, and in what cases, the defendant in the execution would be liable to the marshal for his poundage fees. For, admitting the defendant to be liable; if the plaintiff releases or discharges him, and thereby deprives the marshal of all recourse to the defendant, there can be no doubt, that the plaintiff would thereby make himself responsible for the poundage.

2. The next inquiry is, whether the United States, in this respect, stands upon a different footing than private parties. It is said, the United States are not included in any general statute; but that express provision must be made, or the statute cannot apply to them. But a sufficient answer to this is, that the statutes of Maryland do not, in terms, apply to individuals or private parties, or designate which of the parties is liable for the marshal's poundage. They only settle, that the marshal is entitled to poundage; and fix the rate of allowance. It is, undoubtedly, a general rule, that no court can give a direct judgment against the United States for costs, in a suit to which they are a party, either on behalf of any suitor, or any officer of the government. 12 Wheat. 550. But it by no means follows from this, that they are liable for their own costs. No direct suit can be maintained against the United States; but when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them, it would be a very rigid principle, to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to congress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of defence, to a suit by the United States.

This rule is fully recognised by this court in the case of the *United States* v. *Macdaniel*, 7 Pet. 16. That was, like this, an action brought to recover a balance, certified at the treasury, against the defendant, and he set up, by way of defence, a claim which had been rejected at the treasury, for services as agent for the payment of the navy pension fund; and to which claim this *court thought him equitably entitled. It is there [*164 said by the court, that this action is for a sum of money which happens to be in the hands of the defendant, and the question is, whether he shall be required to surrender it to the government, and then petition congress on the subject. The government seeks to recover money from the defendant, to which he is equitably entitled for services rendered. This court cannot see any right, either legal or equitable, in the government, to the money, for the recovery of which this action is brought.

If anything more could be wanted to show how entirely unsupported the present suit is, it will be found in the discharge given by the president of the United States, of Gates, who was held in custody by the marshal, under the execution upon which the poundage is now claimed. This discharge, directed to the marshal, after reciting that Gates had complied with the requisites of the act of the 3d of March 1817, authorized him to discharge the said Gates from his custody, and out of the prison. This law (3 U. S. Stat. 399) gives to the president full power to order such discharge, upon such terms and conditions as he may think proper, and the party shall not be imprisoned again for the same debt. The discharge in this case is absolute and unconditional, and the marshal had no authority to hold him in custody afterwards. So that, admitting Gates to have been liable for these poundage fees, the marshal's power or right to compel payment from him, was taken away by authority of the United States, the plaintiff in the suit. And the right of the marshal to claim his poundage fees from them, is thereby clearly established. The judgment of the circuit court is accordingly affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed.

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*John Lutz, Plaintiff in error, *v.* Otho M. Linthicum. [*165

Award.—Responsibility of agent.—Presumption.

In the circuit court of the county of Washington, Linthicum instituted an action of covenant, on articles of agreement, by which Lutz covenanted that Linthicum should have peaceable possession of a certain house in Georgetown, and retain and keep the same for five years; Linthicum was evicted by Lutz, before the time expired. The articles were spread upon record, by which it appeared, that they were made "by and between John Lutz, of, &c., and agent for John McPherson, of Fredericktown, in the state of Maryland, of the one part, and Otho M. Linthicum, of Georgetown, &c., of the other part;" and it is witnessed, "that the said John Lutz, agent as aforesaid, has rented and leased," &c., the premises to Linthicum; and on the other hand, Linthicum covenants to pay the rent, &c., as stated in the declaration; there was no covenant in the lease, by Lutz, for quiet enjoyment, as stated in the declaration; but the latter was founded upon the covenant implied by law, in case of demises. The articles concluded with

these words: "In witness whereof, we, the said John Lutz and O. M. Linthicum, have hereunto interchangeably set our hands and seals, day and date above. John Lutz, agent for John McPherson [L. S.], O. M. Linthicum. [L. S.]" The defendant Lutz pleaded performance, without praying *oyer*, and issue was joined. Afterwards, the parties, by consent, agreed to refer the cause: and accordingly, by a rule of court, it was ordered, "that William S. Nicholls and Francis Dodge be appointed referees between the parties aforesaid, with liberty to choose a third person; and that they, or any two of them, when the whole matter concerning the premises, between the parties aforesaid in variance, being fairly adjusted, have their award in writing under their hands, and return the same to the court here; and judgment of the court to be rendered according to such award, and be final between the said parties." The referees so named, on the 28th of January 1833, chose John Kurtz the third referee; and afterwards, on the same day, made their award in the following words: "We, the subscribers, appointed arbitrators to settle a dispute between Otho M. Linthicum and John Lutz, in which the executors of the late John McPherson of Frederick are interested, do award the sum of $1129.93, to be paid to the said Linthicum, in full for all expenses and damages sustained by him, in consequence of not leaving him in quiet possession of the house, at the corner of Bridge and High streets, in Georgetown; (the demised premises), for the full term of the lease for five years; any arrear of rent due from Linthicum, to be paid by him:" signed by all the referees. Judgment was given by the circuit court, for the full amount of the award so made, and costs.

The articles purport to be made by Lutz, and to be sealed by him; and not to be made and sealed by his principal; the description of himself, as agent, does not, under such circumstances, exclude his personal responsibility.[1] But this very liability was necessarily submitted to the referees, and came within the scope of their award.

*166] *It was objected to the award, that it was uncertain, not mutual and final; that it did not state whether the money is to be paid by Lutz, or the executors of McPherson; that it did not find the arrears of rent due, and to whom due; that it did not appear to be an award in the cause; that the award and the proceedings thereon where not according to the laws of Maryland; that the appointment of the third referee ought not to have been made, until after the other two referees had met and heard the cause, and disagreed thereon.[2] The court held all these objections invalid.

Without question, due notice should be given to the parties, of the time and place for hearing the cause, by the referees; and if the award was made, without such notice, it ought, upon the plainest principles of justice, to be set aside; but it is by no means necessary, that it should appear upon the face of the award, such notice was given; there is no statute of Maryland, whose laws govern in this part of the district, which requires such facts to be set forth in the award. If no notice is in fact given, and no due hearing had, the proper mode is to bring such facts, not appearing on the face of the award, before the court, upon affidavit and motion to set aside the award; but *primâ facie*, the award is to be taken to having been regularly made where there is nothing on its face to impeach it.

The statute of Maryland requires that notice of an award shall be given to the party against whom it is made, by service of a copy, three days before judgment is moved; and judgment is not to be entered, but on motion, and direction of the court; it was alleged, that a copy of the award was not delivered. How that may have been, we have no means of knowing, for nothing appears upon the record respecting it, and there is no ground to say, that it ought to constitute any part of the record, or that it is properly assignable as error; it is a matter purely collateral, and *in pais*. If no such copy had been delivered, the proper remedy would have been, to take the objection in the court below, upon the motion for judgment, or to set aside the judgment for irregularity, if there had been no waiver, or no opportunity to make the objections before judgment. But in the present case, sufficient does appear upon the record, to show that the party had full opportunity to avail himself of all his legal rights in the court below: the cause was referred at November term 1832; pending the term, to wit, on the 18th of January 1833, the award was filed in court; the cause was then continued until the next term, viz., the fourth Monday in March 1833; at which time, the parties appeared by their attorneys, and upon motion, and after argument of counsel, judgment was entered. We are bound to presume, in the absence of all evidence to the contrary, that all things were rightfully and regularly done by the court, and that the parties were fully heard upon all the matters properly in judgment.

[1] See note to Clarke *v.* Courtney, 5 Pet. 320.

[2] Alexandria Canal Co. *v.* Swann, 5 How. 83, 90. And see Smith *v.* Morse, 7 Wall. 57.

Lutz v. Linthicum.

ERROR to the Circuit Court of the district of Columbia, and county of Washington.

In the circuit court, Otho M. Linthicum, the defendant in error, instituted an action of covenant, on a certain lease, or article of agreement, by which the defendant, John Lutz, demised to him a certain brick house in Georgetown, for a term of five years, at a rent specified in the same. Under this lease, *the plaintiff, Linthicum, held possession of the premises, [*167 according to the covenants in the said lease, and made certain repairs. The declaration averred, that before the end of the term for which the premises were so leased to the said Linthicum, the defendant, John Lutz, evicted and dispossessed him from the premises, whereby he lost the benefit of the repairs done to the same, and claimed damaged for the breach of the covenants in the lease and for eviction, amounting to $2000. The lease, upon which the action was instituted, was in the following terms:

"Articles of agreement, made and concluded this 22d day of October, in the year of our Lord 1828, by and between John Lutz, of Georgetown, in the district of Columbia, and agent for John McPherson, of Fredericktown, in the state of Maryland, of the one part, and Otho M. Linthicum, of Georgetown and district aforesaid, of the other part, witnesseth, that the said John Lutz, agent as aforesaid, has rented or leased to the said O. M. Linthicum, all that brick house, with the appurtenances thereto belonging, situated on the corner of High and Bridge streets, in Georgetown aforesaid, with the alley thereto attached, of thirteen feet six inches, fronting on Bridge street, and running parallel with said house, now in possession and occupied by Jacob Carter, Jun., as a dry-goods store: to have and to hold said house, and receive peaceable possession on the 3d day of May next ensuing, and continue for the space of five years from said time, which will terminate on the 3d day of May 1834. And the said O. M. Linthicum, on his part, doth hereby covenant and agree, for himself, his heirs and assigns, to pay to the said John Lutz, agent as aforesaid, or his successor, the just and full sum of two hundred and fifty dollars, for each and every year, for the aforesaid term of five years, the rent to be paid half yearly, as the same may become due; and all repairs that may be done by the said O. M. Linthicum, for his own convenience, to be at his own expense, and any repairs done by him to be left on the premises, as relates to the house; but in case he should erect a warehouse on the vacant ground, shall have the privilege to remove the same, at his will and pleasure, within said time, and to leave the house in as good condition, at the end of said term, as when he gets possession, the usual wear and tear excepted. *In witness whereof, we, the said John Lutz and O. M. Linthicum, have [*168 hereunto interchangeably set our hands and sale, day and date above.

JOHN LUTZ, Agent for J. MCPHERSON. [L. S.]
O. M. LINTHICUM. [L. S.]

"Signed, sealed and delivered in presence of
JAMES GETTYS, JOHN WHITE."

The defendant, John Lutz, pleaded performance, and afterwards, the following agreement of reference was entered into, by the counsel for the parties in the case. The record contained the following entries, relative to the further proceedings in the case.

"Whereupon, it is ruled by the court here, that the said William S. Nicholls and Francis Dodge, gentlemen, be appointed referees between the parties aforesaid, with liberty to choose a third person; and that they, or any two of them, when the whole matter concerning the premises between the parties aforesaid in variance, being fairly adjusted, have their award in writing, under their hands, and return the same to the court here, and judgment on the court to be rendered according to such award, and be final between the said parties. And afterwards, to wit, on the 28th day of January 1833, the said William S. Nicholls and Francis Dodge file in court here, the following certificate, appointing John Kurtz, with themselves, the referees in the premises, to wit:

"We certify, that, pursuant to the terms of reference, in the case of Otho M. Linthicum *v.* John Lutz, and before proceeding to act therein, or make any award, we, the referees, did nominate and appoint John Kurtz, whose name is subscribed to the within award, the third referee, to act, together with ourselves, in deciding the controversy between the parties, and submitted to us. W. S. Nicholls. Francis Dodge."

"And on the same day, the referees file in court here their award, in manner and form following, to wit: We, the subscribers, appointed arbitrators to settle a dispute between Otho M. Linthicum and John Lutz, in which the executors of the late John McPherson, of Frederick, are interested, do award the sum of eleven hundred and twenty-nine dollars and ninety-three cents to be paid to the said Linthicum, in full for all expenses and damages sustained by him, in *consequence of not leaving him in quiet possession of the house, at the corner of Bridge and High streets, Georgetown, for the full term of the lease for five years—any arrear of rent due from Linthicum to be paid by him. W. S. Nicholls. J. Kurtz. Francis Dodge."

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The circuit court gave judgment for the plaintiff on the award, and the defendant prosecuted this writ of error.

The case was argued by *Key*, for the plaintiff in error; and by *Marbury* and *Coxe*, for the defendant.

For the plaintiff in error, the following points were relied upon. 1. That the award is void for uncertainty, in not stating who is to pay the money awarded, the defendant or the executors of McPherson; and in not finding whether there was any arrear of rent due, or how much, nor to whom. 2. That the award is void, not being mutual nor final, in leaving the rent unascertained, and its payment unenforced. 3. The award is void, not appearing to be made in the cause—there being, in fact, another submission at the same time, to the same referees, of the same matters of controversy, by bond between the appellee, and the executors of McPherson, in reference to which the referees made the award. 4. The judgment of the court is erroneous; the submission, appointment of the third referee, award, and proceedings thereon, not being according to the act of assembly and the order of the court: 1st. The arbitrators ought not to have appointed a third person, until it was seen that they disagreed. 2d. When they appointed a third person, the defendant ought to have had notice of the person so chosen. The appointment and the award were made and filed the same day. 3d. No notice appears to have been given to the defendant, either of the

appointment of the third person, or of the making, or of the return of the award.

Key contended, that the award was defective in form. The reference was under an act of the assembly of Maryland, which directs the mode of proceeding in such cases. The *lease on which the action was [*170 founded, was executed by the plaintiff in error, as an agent of McPherson; and yet the award is given against him, as if he had acted as the principal in the agreement. The award was made against him, imposing upon him a personal liability, when the declaration states, that in the contract he acted as agent, and the claim stated in it is a claim on him as the agent of McPherson. Thus, the award is not in conformity with the submission; for the submission must be considered as having reference to the pleadings; and in the declaration, as well as in the articles of agreement, the plaintiff in error is stated to be the agent of McPherson. Yet the award finds against the plaintiff in error individually; and judgment is entered against him, not as agent, but individually.

The award is void for uncertainty. It does not say, who shall pay the amount found due, whether it shall be paid by John Lutz, or by the executors of McPherson. If it is a debt due by him as agent, he should, by the award, have been directed to pay it as agent, and his claim to repayment by the executors, would thus be clearly established. The award is not declared to be made in the suit in which the agreement to refer was entered. It does not say, that the money is to be paid in that suit, nor is it applicable to it; nor does it appear, that there was not another suit between the parties. The suit was brought for damages under a contract, and for the loss of the use and repairs of a certain house; and the award gives the amount to the plaintiff below for expenses, but nothing is said in the agreement about expenses. There could be no claim for expenses, for not having been allowed to hold the premises under the lease.

The award is also defective, in not finding the exact amount to be deducted for arrearages of rent. "Any arrear of rent due from Linthicum to be paid by him." The referees do not say, what those arrears are; and thus the whole amount found by the referees must be paid by Lutz, and he may afterwards recover the arrears when he can. *Lyle* v. *Rodgers*, 5 Wheat. 395, 405; 2 Gallis. 61; 14 Johns. 308. When a suit such as this is referred to arbitrators, they *must dispose of it—they must say what is to be [*171 done finally with it. This is not done; nothing is said about the costs.

The law of Maryland, ch. 8, § 75, directs that a notice of the award, and a copy of the same, shall be given to the party. Nothing of this is shown by the record to have been done; and the court had, therefore, no authority to give judgment on the award.

Marbury and *Coxe*, for the defendant.—Formerly, it seems to have been the policy of courts, in construing awards, to vacate them, if possible. A more reasonable construction now prevails; courts will intend everything to support awards, and give them effect. Most of the objections in this case must be sustained, if at all, by matter beyond the award.

A very material inquiry is contained in the proposition, to consider, that the submission was limited to the parties in the cause, and the matters in dif-

ference between them in that cause. Other parties, and other matters, different from those connected with the particular action referred to, may be introduced into the order of reference, if it be the pleasure of the parties and the order of reference embrace them. But who are connected with the reference, and what is referred, must depend on the terms of the order of reference. The agreement of the parties, and the order of reference, both show that the submission was limited to the parties in the suit. The record exhibits no evidence of a reference of the same, or any other controversy, between other parties. There is no ground for the introduction of the executors of Mr. McPherson; they certainly were not parties to the reference by order of court; and are strangers to the record and proceedings in this cause.

What was the matter referred? Was it general, of all matters in controversy between the parties; or special, of the matters in difference between them in this suit? There have been some nice discriminations respecting the effect of certain terms of referenee, which have how become familiar to the profession. When the reference is in these terms, "all
*172] matters in *difference between the parties in the cause," it has been held, to constitute a general reference; and then the arbitrators are not confined to the special matter in dispute in the cause referred, but may award on any subject or matter in difference between the parties, whether pleaded or not. But when the reference is, "of all matters in difference in the cause between the parties, the reference is special, and the arbitrators are confined to the matters in dispute in the cause referred. Watson on Arb. 3; 2 T. R. 645. The reference in this cause was special: the language of the agreement and of the order of reference limited it not only to the parties on the record, but to the matter in dispute between them in that cause. The language is, "the arbitrament of a majority in the premises, to be final between the parties," "when the whole matter concerning the premises, between the parties aforesaid in variance, being fairly adjusted," &c. By *premises*, meaning the cause referred. It is, in effect, if not in terms, a reference of "all matters in the cause in variance between the parties." The arbitrators were thus limited, and were not authorized to inquire or award concerning matters not pending in the cause referred to them.

What was then in dispute in the cause? It is shown by the pleadings. The action was brought to recover damages for the breach of a covenant for quiet enjoyment, contained in a lease signed by the plaintiff in error. The defendant pleaded performance. The reference then embraced nothing more than the question of eviction, and the consequent damage; and the referees had no authority to inquire into any other matter. It is insisted, that the award is uncertain in this: "that it does not find whether there was any arrear of rent due, nor how much, nor to whom." This matter concerning the rent was not a matter in controversy in the cause, and was not within the submission. It could not have been introduced into the cause but by a plea of set-off against the damages claimed by the plaintiff. No such plea was filed, in fact; nor would such a plea have been admissible. A plea of set-off can only be when there are mutual debts; not when the demand, on either side, is for unliquidated damages.

*If there be uncertainty in what the arbitrators have said concern-
*173] ing the rent, it will not vitiate the award; for "if an award be good

in part, and bad in part, and that part in which it is bad be not within the submission, it shall not invalidate that which is good within the submission." Watson on Arb. 135, 136 ; Kyd on Awards 244.

Again, on this part of the award. It does not appear by the finding of the arbitrators, in their award, that any rent was in arrear and due: they say, "any arrear of rent due from Linthicum, to be paid by him ;" not that there is rent in arrear, but if there be any. If the plaintiff in error would avail himself of any uncertainty connected with this part of the award, he should have made a motion to set it aside, and made it appear to the court, by affidavits, that there was rent in arrear. In the absence of such proof, it is not to be presumed, that there was rent due, the payment of which the arbitrators should have awarded, with sufficient certainty. For courts will not intend an award to be uncertain ; the uncertainty must appear on the face of the award, or by averment. Watson on Arb. 103–4, 119–20 ; Kyd on Awards 26.

With regard to all that was within the submission, the award is sufficiently certain, final and mutual. The submission embraced nothing more than "whether there had been a breach of the covenant ; and if so, the plaintiff's claim to damages for the eviction." If the arbitrators had done nothing more than award the payment of a sum of money, it would have been sufficient, without finding the act of eviction. But the arbitrators not only award the money to be paid, but they state that it is to be paid in consideration of the breach of covenant, complained of in the plaintiff's declaration. Watson 131, 145.

It is objected, however, to this part of the award, that it is uncertain, "in not stating who is to pay the money awarded." Absolute certainty is not required ; yet nothing short of absolute certainty, could make it more certain than it appears in this case, that Lutz is to pay the money awarded to Linthicum. There are but two parties to this suit, and two only to the reference. *Linthicum is the plaintiff, seeking damages for breach of a specific covenant. Lutz is the defendant, charged [*174 with the breach. The arbitrators award, that Linthicum shall receive $1129.93, for his loss and damage, in consequence of the breach of covenant of which he complained against Lutz. Who then is to pay? Certainly, Lutz, the defendant, and only other party in the suit. The executors of McPherson had nothing to do with it. Are the terms in which the verdict of a jury is rendered more certain ? Not at all ; the usual form is, "we find for the plaintiff, and assess his damages at so much ;" it is never added, to be paid by the defendant.

This award is said to be void, not being mutual. In the case of *Lyle* v. *Rodgers*, 5 Wheat. 400, it is said, "that if that part of the award which is void, be so connected with the rest as to affect the justice of the case between the parties, the whole is void." In that case, the release of certain lands by Bond and Lyle, was the recompense, in consideration of which Mrs. Dennison was to pay a sum of money ; but inasmuch as Mrs. Dennison could not have advantage of what was intended for her, the whole was declared void. The payment of the rent, in this case, forms not part consideration for the payment of the $1129.93 to Linthicum, and is no way connected with it ; the suit was solely for the damages.

It is objected, that the arbitrators ought not to have appointed a third

person, until they had disagreed. To this it is answered, that the third person to be chosen by the arbitrators, was, by the terms of the order of reference, to be a referee, and not an umpire; but if an umpire, it was not improper to make the appointment before a difference.

It is objected, that the appointment and award were made and filed the same day. It is answered, that the record does not show this to be the fact; it shows, that the arbitrators filed the certificate of the appointment of the third referee, and their award, on the same day, to wit, the 28th day of January. If, however, the fact was shown, it is no evidence of misconduct; it is consistent with perfect fairness. If there be unfairness *or mis- *175] conduct in the arbitrators, it should be averred and shown, on affidavit, on a motion to set aside the award.

As to no notice of the appointment of a third referee, or of the making or of the return of the award. This objection is for matter *dehors* the award. That notice was given, need not be stated in the award. 6 Har. & Johns. 407. To impeach the award for want of notice, a motion, supported by affidavit, to set it aside, must be made; it cannot be by exception, which must be for matter on the face of the award. Act of Maryland of 1778, ch. 21, §§ 8–10. The award shall remain seven days in the general, and four in the county court during their sitting, before judgment shall be entered up. Then judgment shall be entered, and execution granted, in the same manner as may be on verdict, confession or nonsuit.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Columbia, for the county of Washington. The original suit was an action of covenant, brought by Linthicum against Lutz, upon certain articles of agreement, made between Lutz on the one part, and Linthicum on the other part, on the 22d of October 1828. The declaration, after reciting that Lutz, by these articles, leased certain premises in Georgetown to Linthicum, for five years, from the 3d day of May then next ensuing, and a covenant on the part of Linthicum to pay therefor an annual rent $250, the rent to be paid half-yearly, averred, that, by the articles of agreement, Lutz bound himself to Linthicum, that the latter should have peaceable possession of the premises and retain and keep the same for the said five years; that Linthicum entered into possession of the premises, and held the same until the 3d day of November 1832, when Lutz evicted and dispossessed him, &c. The articles are spread upon the record, by which it appears, that they were made "by and between John Lutz of, &c., and agent for John McPherson, of Fredericktown, in the state of Maryland, of the one part, and Otho M. Linthicum, of Georgetown, &c., of the other part." And it is witnessed, "that the said *176] John Lutz, agent as aforesaid, *has rented and leased," &c., the premises, to Linthicum; and on the other hand, Linthicum covenants to pay the rent, &c., as stated in the declaration. But there is no covenant in the lease by Lutz for quiet enjoyment, as stated in the declaration; but the latter is founded upon the covenant implied by law, in cases of demises. The articles conclude with these words: "In witness whereof, we, the said John Lutz and O. M. Linthicum, have hereunto interchangeably set our hands and seals, day and date above. John Lutz, agent for John McPherson. [L. S.] O. M. Linthicum. [L. S.]"

The defendant, Lutz, without praying *oyer* of the articles (without which they could not constitute a part of the declaration), pleaded general performance of the covenants; upon which an issue was joined to the country. Afterwards, the parties, by consent, agreed to refer the cause; and accordingly, by a rule of court, it was ordered, "that William S. Nicholls and Francis Dodge he appointed referees between the parties aforesaid, with liberty to choose a third person; and that they, or any two of them, when the whole matter concerning the premises, between the parties aforesaid in variance, being fairly adjusted, have their award in writing, under their hands, and return the same to the court here; and judgment of the court to be rendered according to such award, and be final between the said parties." The referees so named, on the 28th of January 1833, chose John Kurtz the third referee; and afterwards, on the same day, made their award in the following words: "We, the subscribers, appointed arbitrators to settle a dispute between Otho M. Linthicum and John Lutz, in which the executors of the late John McPherson, of Frederick, are interested, do award the sum of eleven hundred and twenty-nine dollars and ninety-three cents, to be paid to the said Linthicum, in full for all expenses and damages sustained by him, in consequence of not leaving him in quiet possession of the house, at the corner of Bridge and High streets, in Georgetown (the demised premises), for the full term of the lease for five years. Any arrear of rent due from Linthicum, to be paid by him." Signed by all the referees. Judgment was given by the circuit court, for the full amount of the award so made, and costs; and the present writ of error is brought to revise that judgment.

*The question, whether the articles of agreement personally bound Lutz, is not presented by the pleadings in such a manner as that there might not be difficulty in deciding it, if it constituted the only point in judgment. But if this difficulty were surmounted, and the articles are to be deemed properly before us, we do not see, how they can well be construed not to import a personal liability on the part of Lutz, for the want of any other obligations contained in them. The articles purport to be made by Lutz, and to be sealed by him; and not to be made and sealed by his principal. The description of himself, as agent, does not, under such circumstances, exclude his personal responsibility. But this very liability was necessarily submitted to the referees, and came within the scope of their award. [*177

Several objections have been taken to the award. In the first place, it is said, that the award is uncertain, and not mutual and final; that it does not state by whom the money awarded is to be paid, whether by Lutz, or by the executors of McPherson; and that it does not find the arrears of the rent due, and to whom due; and that it does not appear to be an award made in this cause. We are of opinion, that these objections are ill founded. The award is sufficiently shown to be an award in this cause; for no other cause directly appears to have been pending, or in dispute between the parties; and the subject-matter of this very suit is directly within the terms of the award. The award being made in this suit, and applicable in its terms to it, it is sufficiently certain, that the money is to be paid by Lutz, for there is no other person on the record by whom it can be judicially awarded to be paid. The award is also mutual and final, as to all the matters referred. It is not a general arbitration, at the common law, of all

matters in dispute between the parties; but a specific reference of the matters in dispute, in the cause pending in court, under a rule of court. Now, those matters were the damages and losses claimed by Linthicum, for the breach of the covenant; and the sum awarded is expressly declared to be "in full for all expenses and damages" so sustained. As to the arrears of the rent due from Linthicum, they constituted no part of the matters submitted; they were not in controversy in the suit. And the statement in the award, as to any arrears of rent, was *merely an exclusion of a *178] conclusion, which might possibly have been drawn, that the referees had deducted such arrears in making their award. It is, therefore, very properly stated, that any arrears of rent due by Linthicum are, notwithstanding the award, to be paid by him.

Another objection is, that the submission, the appointment of the third referee, the award itself, and the proceedings thereon, have not been according to the acts of assembly of Maryland, and to the order of the court. It is said, that the appointment of the third referee ought not to have been made, until after the two other referees had met and heard the cause, and disagreed thereon; but we are of a different opinion. The submission under the rule of court did not contemplate the third referee to be a mere umpire in the case, upon a difference of opinion of the other two; but an original referee, to be chosen by the other two, and when chosen, to constitute a part of the board authorized to hear and decide the cause. How otherwise are we to understand the language of the rule? "They (that is the three), or any two of them, are to have their award in writing," &c., which words plainly contemplate the case of a hearing by all of them; and if the case were one in which an umpire was to be chosen, there is no impropriety, and on the contrary, it has been thought, that there is great propriety, in selecting the umpire, before the other arbitrators have disagreed. This doctrine has been repeatedly held in England, (*a*) and it was affirmed in the court of appeals of Maryland, in *Rigden* v. *Martin*, 6 Har. & Johns. 403. It is so reasonable in itself, that if the point were new, it would be difficult to displace it. Then, again, it is said, that no notice appears to be have been given to Lutz of the appointment of the third referee, or of the making or returning the award, and that these acts appear all to have been done on the same day. There is certainly no objection to these acts being done on the same day, if the parties had due notice and a due hearing before the referees, and the award was made upon due deliberation. Without question, due notice should be given to the parties, of *the time and place for hearing the cause; and if *179] the award was made, without such notice, it ought, upon the plainest principles of justice, to be set aside. But it is by no means necessary, that it should appear upon the face of the award, that such notice was given. There is no statute of Maryland (whose laws govern in this part of the district) which requires such facts to be set forth in the award. The act of 1779, ch. 21, § 8, merely authorizes submissions, by a rule of court, of causes pending in the court; and the act of 1785, ch. 80, § 11, provides only for cases, where either of the parties dies pending the submission, and before the award. If no notice is in fact given, and no due hearing had, the

(*a*) See Watson on Awards, ch. 4, § 2, p. 56–8; Kyd on Awards 82–8, 2d edition; Roe *v.* Doe, 2 T. R. 644; Harding *v.* Watts, 15 East 556.

proper mode is to bring such facts (not appearing on the face of the award) before the court, upon affidavit, and motion to set aside the award. But, *primâ facie*, the award is to be taken to have been regularly made, where there is nothing on its face to impeach it. This very objection was made and overruled in *Rigden* v. *Martin*, 6 Har. & Johns. 403.

Another objection is, that the same act of Maryland of 1785, ch. 80, § 11, requires, that in all cases of awards made under a rule of court, the party in whose favor the award is made shall cause a copy thereof to be delivered to the adverse party or his attorney, at least three days before judgment is moved for upon the award; and the clerk of the court is not to enter judgment upon any award, without a motion to, and direction from, the court; and the court shall always have satisfactory proof that a copy of the award hath been so delivered, before judgment shall be so directed to be entered; and it is said, that there has not been a compliance with this requisite by a delivery of the copy. How that may have been, we have no means of knowing, for nothing appears upon the record respecting it, and there is no ground to say, that it ought to constitute any part of the record, or that it is properly assignable as error. It is matter purely collateral and *in pais*. If no such copy had been delivered, the proper remedy would have been, to take the objection in the court below, upon the motion for judgment, or to set aside the judgment for irregularity, if there had been no waiver, or no opportunity to make the objections, before judgment. But in the present case, sufficient does appear upon the record, to show, that the party had full opportunity *to avail himself of all his legal rights in the court below. [*180
The cause was referred at November term 1832; pending the term, to wit, on the 18th of January 1833, the award was filed in court; the cause was then continued until the next term, viz., the fourth Monday in March 1833; at which time, the parties appeared by their attorneys, and upon motion, and after argument of counsel, judgment was entered. We are bound to presume, in the absence of all evidence to the contrary, that all things were rightfully and regularly done by the court, and that the parties were fully heard upon all the matters properly in judgment.

Upon the whole, our opinion is, that the judgment of the circuit court ought to be affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

*William Robinson, Jr., Plaintiff in error, *v.* William Noble's Administrators.

Damages.

N. stipulated in certain articles of agreement, to transport and deliver, by the steamboat Paragon, to R., a certain quantity of subsistence stores, supposed to amount to $3700 barrels, for the use of the United States; in consideration whereof, R. agreed to pay to N., on the delivery of the stores at St. Louis, at a certain rate per barrel, one-half in specie funds, or their equivalent, and the other half to be paid in Cincinnati, in the paper of banks current there, at the period of the delivery of the stores at St. Louis. Under the agreement was the following memorandum: "It is understood, that the payment to be made in Cincinnati, is to be in the paper of the Miami Exporting Company or its equivalent."

The court erred in refusing to instruct the jury, that the plaintiffs could only recover the stipulated price for the freight actually transported, and that they were entitled to no more than the specie value of the notes of the Miami Exporting Company Bank, at the time the payment should have been made at Cincinnati; the specie value of the notes, at the time they should have been paid, is the rule by which such damages are to be estimated.[1]

The plaintiff, the owner of the steamboat, was not entitled under the contract to recover in damages more than the stipulated price for the freight actually transported; if R. had bound himself to deliver a certain number of barrels, and had failed to do so, N. would have been entitled to damages for such failure; but a fair construction of the contract imposed no such obligation on R.

There is no pretence, that R. did not deliver the whole amount of freight in his possession, at the places designated in the contract; in this respect, as well as in every other, in regard to the contract, he seems to have acted in good faith; and he was unable to deliver the number of barrels supposed, either through the loss stated, or an erroneous estimate of the quantity. But to exonerate R. from damages on this ground, it is enough to know, that he did not bind himself to deliver any specific amount of freight; the probable amount is stated or supposed, in the agreement, but there is no undertaking as to the quantity.

Error to the District Court for the Western District of Pennsylvania. In the district court, the administrators of William Noble, the defendants in error, instituted an action of covenant against the plaintiff in error, upon certain articles of agreement in the following terms:

"Article of agreement entered into this 24th day of February, between
*182] William Noble, of the city of Cincinnati, of the *one part, and William Robinson, Jun., of the city of Pittsburgh, of the other part, witnesseth: That the said Noble hereby agrees, stipulates and binds himself, to and with the said Robinson, to transport and deliver to said Robinson, in the steamboat Paragon, a certain quantity of subsistence stores, for the use of the United States army, supposed to amount to three thousand seven hundred barrels, estimating one-half of the quantity of stores as flour barrels, and the other half as whiskey or pork barrels; the said Robinson delivering the one-half of the same between the 1st and 10th March, to said Noble, at Cincinnati, and the other half by the 30th of March, at the usual place of deposit, near the mouth of the Ohio; the delivery of which stores is to be made and completed in the order in which they are received in the town of St. Louis aforesaid, on or before the 15th day of April next ensuing. In consideration whereof, the said Robinson hereby agrees and binds himself to pay to the said Noble, one dollar and fifty cents per barrel, one-half

[1] A promise made, during the rebellion, to pay in confederate notes, in consideration of the receipt of such notes, and of drafts payable by them, was held not to be an illegal contract. Planters' Bank *v.* Union Bank, 16 Wall. 483. And see Atlanta, Tennessee and Ohio Railroad Co. *v.* Bank of Columbia, 19 Id. 548.

whereof is to be paid on the delivery of said stores in St. Louis, in specie funds or their equivalent, and the other half, in Cincinnati, in the paper of banks current therein, at the period of the delivery of the said stores at St. Louis."

The declaration averred, that in the month of March 1821, he, the said Noble, received on board the steamboat Paragon, all the stores and lading which were offered by Robinson, both at the city of Cincinnati, and the usual place of deposit near the mouth of the Ohio river, and conveyed all the stores delivered on board the said boat, according to the stipulations in the articles of agreement, to the town of St. Louis, and delivered those to Robinson in person; and also averred performance of all the agreements, covenants and stipulations in the articles of agreement. The declaration then proceeded to assign as breaches of the articles of agreement, that Robinson did not deliver one-half of the said amount of 3700 barrels of army subsistence stores, or any other equivalent freight, to Noble, or on board the said steamboat Paragon, at Cincinnati, between the 1st and 10th of March, in the year 1821, although Noble and the boat were, during that time, ready and waiting to receive the same; and Robinson did not, on or before the 30th day of March, in the year last aforesaid, nor afterwards, deliver to Noble, at the usual place of deposit, *near the mouth of the Ohio river, the other half of the said 3700 barrels of army subsistence [*183 stores, or on board of said boat, at said last-mentioned place, although the boat was there, ready and waiting to receive the same, after the said 30th of March, in the year last aforesaid; and although Noble had frequently, before and after that time, requested the said Robinson to furnish the stores and freight stipulated for as aforesaid; and further, that Robinson had not paid to the said Noble, nor to his use, the said sum of one dollar and fifty cents per barrel on the delivery of such amount of said stores as were actually carried in said steamboat and delivered, in all respects, in accordance with the tenor of the articles of agreement, at St. Louis, in specie or otherwise; nor had Robinson paid to Noble, in any money, by the barrel, according to the price stipulated as aforesaid, or otherwise, for such amount of said army subsistence stores as Robinson was, by the tenor of said articles of agreement, bound to furnish for freights to St. Louis, as above recited, but on the contrary, had wholly refused to pay the amount stipulated by him to be paid as aforesaid, in the manner or at the times above mentioned, or at any other times, or in any other manner. And Robinson had further neglected and omitted to perform, in manner by him agreed as above mentioned, the stipulations and covenants made as aforesaid, but the same had broken and not kept, contrary to the tenor and spirit of said articles of agreement; whereby the said Noble not only was deprived of the amount agreed to be paid by Robinson in manner aforesaid, but also of other great gains and profit which might and would otherwise have arisen and accrued to him, during the time of detention of steamboat, caused by the non-performance, by Robinson, of his agreements aforesaid.

On the trial of the cause, the counsel for the defendant prayed the court to charge the jury:

1. That it is an inflexible rule in the construction of contracts, so to interpret them as to effectuate the intention of the parties. That it is within the province of the jury to determine what the intention was, at the time of

the execution of the instrument, according to the rules of construction the court may advise.

*184] 2. That the contract upon which the present action is *instituted, is not a contract of affreightment by charter-party. There is no hiring of the ship; it is a contract for the conveyance of merchandise in a general ship. That the plaintiff cannot recover damages according to the number of tons the ship was capable of containing; but that his damages must be limited, according to the terms of the contract, to the actual freight earned upon the cargo delivered.

3. That the words, the spirit and the meaning of the contract preclude the plaintiff from recovering from the defendant more than the actual value of the Miami Exporting Company paper, at the time it became due, according to the scale of depreciation.

4. That under this contract, there was no legal obligation upon the defendant to tender to plaintiff the amount due him, in the depreciated currency of the Miami Exporting Company, in order to save himself from the payment of the numerical value of the notes, inasmuch as the defendant reserved to himself the right either to pay in the depreciated currency, or in its equivalent.

5. That the plaintiff cannot recover, in the present action at law, the freight for goods actually transported, and damages for the breach of the contract for non-delivery of all the stores defendant contracted to deliver for transportation.

The court charged the jury upon these points:

1. It is certainly true, that the intention of the parties to a contract must govern its construction, provided that no violence is done to the rules of law, in seeking to effectuate such intention, and it is the province of the jury, to judge, from the language of the contract, what that intention is, subject to the opinion of the court as to its legal effect.

2. The contract which is the subject of the present suit, is not a contract of affreightment by charter-party; and, in strictness, the plaintiff cannot recover damages according to the number of tons the boat was capable of containing. The rule of law, in cases where there has been a failure to furnish the stipulated freight, and there exists no charter-party, is, for the jury to take all circumstances into consideration, and to make an allowance for any freight which the master had it in his power to transport, in addition to that which was furnished. If the lading should not be complete, without *185] the default of the *master, the rule is to estimate the freight by means of an average, so as to take neither the greatest possible freight, nor the least, and such average is the proper measure of damages.

3 and 4. The actual specie value of the paper of the Miami Exporting Company, at the time it became due by the contract, is not the true measure of damages. It was made, and to be executed in the state of Ohio, and the laws of that state must, therefore, govern this case. The defendant having failed to tender to the plaintiff the paper of the Miami Exporting Company, or its equivalent, at the time mentioned in the contract, and the plaintiff having performed all he had covenanted to perform, is, by the laws of Ohio, entitled, to recover the numerical value of the paper of the Miami Exporting Company, in specie, with interest.

5. In answer to the last point, the court said, that the plaintiffs claim,

not only for the freight actually transported and delivered, but damages for failing to furnish as much freight as the article stipulates for; if the testimony supports their claim, they may, in the present action, recover damages for such failure.

Whereupon, the counsel for the defendant excepted to the opinion of the court upon the several points aforesaid, and requested the court to seal a bill of exceptions, which was accordingly done. The jury rendered their verdict, finding in favor of the plaintiff the sum of $3391.14; upon which verdict the court entered judgment; and the defendant prosecuted this writ of error.

The case was submitted to the court, on printed arguments, by *Watts*, for the plaintiff in error; and by *Fetterman* and *Colwell*, for the defendants.

Watts, for the plaintiffs in error.—Noble's administrators were plaintiffs in the inferior court, in an action of covenant, upon a certain agreement, under the seals of the parties. From the face of this paper, as well as from evidence extrinsic, *it appears, that Robinson was a contractor with the United States, for the supply of subsistence stores for their troops [*186 stationed at a north-west post on the Mississippi river; and that Noble was a freighter, who navigated the rivers Ohio and Mississippi in steam and flat boats. As one-half of the stores were to be delivered by Robinson for transportation at Cincinnati, and the other half at the mouth of the Ohio—St. Louis being the destination; there appears to be two subjects of contemplation presented to the mind of said Robinson, at the time he executed the agreement: 1. The usage prevailing between contractors of the United States and the government; the latter reserving the right to restrict the quantity of supplies, by giving to the contractors a reasonable notice of the same. 2. The loss arising from the perils of the river, in navigating it, at that early day, either in steam or keel boats. Hence, the caution observed by said Robinson in the introduction of the terms of his agreement. The stipulation is, on the part of Noble, to carry subsistence stores, *supposed* to amount to *about* 3700 barrels, leaving the covenant, on the part of Robinson, implied, rather than clearly expressed, to deliver any number of barrels for shipment; and that number entirely contingent upon his interests, controlled, as they were liable to be, by the United States, and the dangers of the river.

The testimony of Richard Miller proves, that one-half of the stores was delivered at Cincinnati, and the reason why the other half (two-thirds or three-fourths being delivered) was not ready at the mouth of the Ohio, was the loss of a flat-boat laden with them, and under the direction of said Noble. Notwithstanding the misfortune of Robinson, it is seriously contended by the learned counsel of Noble, that, under the terms of his agreement, Robinson will be obliged to pay for the freight of goods that were sunk on their passage to the place of delivery, and never carried by Noble. But the learned judge, in his charge to the jury, stretched the point further and wider than the conscience of the counsel would allow them to go. For, although he admits there was no "charter-party," still he asserts the irreconcilable doctrine, that *the rule of damages, where there has been [*187 an infraction of the agreement, would be to find an average number between what was actually furnished and what the boat was capable of

containing ; so that, if the capacity of the "Paragon" exceeded 6000 barrels, the average number, according to the charge of the court, and which governed the jury, would be far beyond even the 3700 barrels. By referring to the account of Robinson, the court will see how far a blind chance has carried her votaries beyond the limits of justice.

The second reason assigned for the reversal of the judgment arises out of the misconstruction of the court of that part of the agreement relating to the payment of money. It is proved, by the deposition of Spencer, that the current value of the bills of the Miami Exporting Company paper, on the 1st April 1821, was 66⅔ cents in specie. Cincinnati is about 800 miles from St. Louis, and the mouth of the Ohio not more than one-fourth the distance ; hence the stipulation, on the part of Robinson, to pay one dollar and fifty cents per barrel for transportation from Cincinnati, and the equivalent of one dollar and fifty cents, in the depreciated currency, being one dollar, from the mouth of the Ohio to St. Louis. This intention of the parties is the more apparent, by compairing the different clauses of the agreement. In the first, Robinson contracts to pay in "specie funds ;" and in the second, "in the paper of banks current at Cincinnati, at the period of delivery of said stores at St. Louis ;" and, to put the intention beyond controversy, it is further added, "it is understood, that the payment to be made in Cincinnati is to be in the paper of the Miami Exporting Company, or its equivalent." The term "equivalent" (being compounded of *æquus* and *valeo*), both in its original and ordinary signification, means what this depreciated currency was worth, equal in value ; and cannot be restrained to what it is contended it is, to bank-notes, of numercial value. In the general derangement of currency of 1821, Mr. Robinson clearly reserved
*188] the right to pay either in the paper of the *Miami Exporting Company, in other depreciated paper, or the value of said Miami Exporting Company's paper, in April 1821, in specie.

The case relied upon by the learned judge who ruled this cause will be found in *Morris* v. *Edwards*, 1 Ohio 189. And although dissenting from the opinion of Judge Hitchcock, and yielding to that of Judge Burnet, it is considered, that the opinion of Judge Hitchcock is irreconcilable with that of the district judge in the present cause. It is based upon the principle, that the amount of the indebtedness of the maker of the note was liquidated and fixed at $2000 ; and that, if it had been intended as a promise to pay numerically, or the value of the currency, it ought so to have been expressed ; and the judge infers, from the absence of the expression, that it was not so intended. In the case of *Morris* v. *Edwards*, the evidence of depreciation was excluded from the jury ; in this case, it was admitted without objection.

Differing as that case does essentially from the present, the attention of the court is particularly invited to a review of it. To sustain the position that depreciated bills are not money, not a legal tender, and not negotiable, but a mere commodity, the attention of the court is requested to the cases of *McCormick* v. *Trotter*, 10 S. & R. 94 ; 8 Mass. 260 ; 9 Johns. 120 ; 3 Kent's Com. 76 ; 1 Dall. 124 ; 2 Ibid. 123, 173 ; 1 Bibb 461. It is certainly clear, that when a man agrees to pay an ascertained sum of money, in commodities, as in the case in 1 W. C. C. 376, where there was an agreement to pay 7820 livres, in sugar ; or the bureau case in 2 P. & W. 63, and fails to

tender the commodities, on the day they become due, that the debtor can recover the amount in money, as in the first case, and the price of the bureaus, as in the second. But this does not disturb the inviolable principle. When there is a contract to pay in specific articles, the rule of construction is, to estimate the damages according to the value of the articles, at the time of the infraction of the agreement. See 2 Mason 89 ; 3 Wheat. 200 ; *6 Ibid. 109 ; Pet. C. C. 85 ; 3 Cranch 298 ; 11 S. & R. 445. But by the [*189 positive stipulation of the parties to the present case, the paper of the Miami Exporting Company was rendered a commodity, and Robinson agreed to pay in money, and Noble to receive in money, what it was worth, at a certain date ; and all the circumstances of the transaction, the words and spirit of the covenant, conduce to this construction.

The learned judge, therefore, has erred in his charge to the jury, upon the several points presented ; and injustice has been done to the plaintiff in error.

Fetterman and *Colwell*, for the defendant in error, contended :—By the terms of the contract, Robinson was bound to furnish Noble, the owner and master of the steamboat Paragon, with about 3700 barrels of freight, to be transported to St. Louis ; one-half to be furnished at Cincinnati, and the other half at the mouth of the Ohio, for the transportation of which was to be paid the sum of one dollar and fifty cents per barrel, freight. It appeared in evidence, that he furnished for the long voyage, the full half of 3700 barrels, and prevented Noble from taking other freight ; but that for the short and profitable voyage, he furnished not quite two-thirds of a load. And in the declaration, it is averred, as a breach of the agreement on the part of Robinson, that he did not furnish the stipulated number of barrels, freight. In consequence of which, Noble sought to recover damages.

It is urged, that, by the true effect of the agreement, Robinson is not so discharged, and that he was bound to furnish the 3700 barrels, subject only to such deduction as may be reasonable, under the qualification of the terms connected with the number 3700, keeping in view the circumstances of the case. It is plain, that the owner of a boat, entering into such a contract, would be governed in his arrangements, and in fixing his terms, by the quantity of freight he has to carry. The testimony shows, that the amount agreed for, would make *about two loads for the Paragon. The [*190 voyage was specially undertaken for Robinson ; and doubtless, the rate of the freight was regulated by its length, the time it would occupy and the amount to be furnished. The boat might make money by carrying two full loads at one dollar and fifty cents per barrel, and lose money by carrying a load and a half at the same price. When Robinson agreed to furnish "stores, supposed to amount to about 3700 barrels," how was he understood by Noble? Did either of them suppose, that this stipulation would be fulfilled by a delivery of 3100? Surely, these qualifying terms have some reasonable limitation. When we say, about 3700, we surely mean more than 3000, else why descend to hundreds? Some degree of certainty in hundreds, above three thousand, is clearly intended. Does not the common and plain intent of the language show, that the parties meant some number between 3600, and 3800? As hundreds is the lowest denomination to which the parties have descended, the range of the qualification must be

kept within one hundred of the number named. Here, then, is the case of a plain agreement to furnish at least 3600 barrels of freight, and to pay for the same as further agreed. It matters not, in the view of the defendant in error, whether this is a case of a charter-party, or the case of goods carried in a general ship ; the construction of the agreement must be the same, either way. In relation to this point, our claim arises in the failure of Robinson to furnish the freight agreed upon, and is, therefore, a claim upon dead freight. The agreement, when understood, constitutes the law of this case, and there can be no rule in relation to charter-parties or freight in general ships, affecting its construction, or the rights of the injured party, in reference to the question before the court.

It is objected, that the judged erred in laying down the rule of damages on this point to the jury. It is believed, that no fairer, nor more honest, rule can be found, than the one adopted by him, nor does it militate with any decision. The owner of the Paragon is prevented taking more freight, *by the conduct of Robinson, for the long voyage and the short voy-
*191] age ; the owner of the Paragon performed his part of the contract. He transports a full load the long voyage ; he gets but half a load the short one, and that, to him, the voyage intended to be profitable. The judge is correct in saying, that Robinson, when there had been a failure on his part to furnish the amount of freight stipulated, should pay for any freight that might have been transported, and which was not transported, owing to his interference or default. Can there be a fairer rule on this subject, than the average one as laid down by the judge ?

It is believed, that the rule recognised in Story's Abbott, last edition, pages 197–200, and the cases there referred to, fully establish the rule laid down by the learned judge to be the law. See also *Penoyer* v. *Hallett*, 15 Johns. 332. It is also presumed, that the same answer may be given to the fourth assignment of error, which is nothing more than a consequence from the first. Abbot on Shipping 278, where the very rule of the court below is laid down distinctly ; Holt on Shipping 350 ; 3 Chit. Com. Law 399, 407–8 ; Beawes 190 ; Lawes on Chart. Part. 117 ; *Klaine* v. *Catara*, 2 Gallis. 73 ; *Edwin* v. *East India Co.*, 2 Vern. 212.

2. It is assigned for error, that the court were wrong in charging the jury, that Robinson having failed to tender to the plaintiff the paper of the Miami Exporting Company, or its equivalent, at the time it was due, is obliged to pay the numerical value of the paper with interest. It appears from the evidence, that at the time Robinson was to have paid in paper of the Miami Exporting Company, or its equivalent, such paper was considerably under par, and that Noble was an indorser on, and liable for a considerable amount to the Miami Exporting Company. It would then have suited him as well as cash. Robinson, however, does not pay, when the agreed time arrived, and never has paid, even until this day. And now, after this great delay, he comes forward, and asks to be released from a breach of his contract. This is the case of a contract made in the state of Ohio, as the money is to be paid at Cincinnati. *The contract, then,
*192] between these parties, must be governed by the law of the state of Ohio on the subject. *Van Reimsdyke* v. *Kane*, 1 Gallis. 271 ; *Camfranque* v. *Burnell*, 1 W. C. C. 340 ; *Golden* v. *Prince*, 3 Ibid. 313 ; *Green* v *Sarmi-*

ento, Pet. C. C. 74; 3 Wheat. 101, 146; *Cox* v. *United States*, 6 Pet. 172; *Boyle* v. *Zacharie*, 6 Ibid. 635; which cases settle the point.

It is apprehended, then, that in Ohio, the question has been decided, both at law and equity. The case of *Edwards* v. *Morris*, 1 Ohio 524, was a bill in chancery, filed by the complainant, alleging, that at the time he contracted to pay for certain land in current bank-notes of the city of Cincinnati, his agreement was, as he supposed, only to pay in paper of the Miami Exporting Company, which was thirty-three per cent. under par, and praying for relief, &c., and that he only may be compelled to pay the real value of that paper. And the case appears, by the report, to have been fully argued, and the opinion delivered by Judge HITCHCOCK, who says: The prayer of the bill, in this case, is, to enjoin a judgment at law, rendered at the last term of this court, and also to procure a rescission of a contract. Two reasons are assigned why the court should interfere. 1st. A mistake in the terms of the note upon which the judgment was rendered. 2d. A doubt as to the title to the land conveyed by the defendant to the complainant, which land was the consideration of the note. The facts set forth in the bill are admitted by the demurrer, and the question to be determined is, whether there is sufficient matter to justify the interference of a court of chancery. It is the peculiar province of chancery, to relieve against fraud, mistake or accident. But how far parol testimony can be admitted, to prove mistake in a written instrument, has been matter of such altercation and doubt. Mistakes in matter of fact, it seems, may be rectified; and the opinion of the court, in the case of *Hunt* v. *Rousmanier's Administrators*, 8 Wheat. 174, goes far to establish the doctrine, that where parties, *through a mistake and ignorance of the law, execute a writing which does not carry into [*193 effect their contract and intention, the true contract and intention may be enforced in chancery. In the case before the court, the alleged mistake consists in this; the purchase-money, which was the consideration for which the note was given, was to have been paid in the notes of the Miami Exporting Company. The note was to have been made thus payable, whereas, in fact, it was made payable in "current bank-notes of the city of Cincinnati." The complainant understood, that he was to pay in the numerical value of the notes. If, in consequence of this mistake, the complainant has sustained an injury, he ought to be relieved. It is an invariable rule in chancery, that he who seeks equity, must do equity. Suppose, the notes referred to had been made payable in the notes of the Miami Exporting Company, and there had been no mistake, what must the complainant have done, to have defended himself at law, and to have secured to himself the privilege of paying in the notes of that bank? He must have tendered the notes on the day; and ought to have them in court. The mistake however happened, which rendered it proper that he should come into a court of chancery: what ought he to do here? The contract was, that he was to pay, on a particular day, the sum named in the obligation, in a particular description of bank-notes. He ought then to show, that he tendered these notes, at the time specified, and he ought to bring them into court, that the opposite party may receive them. The notes, however, are not brought into court, nor is there any pretence that they have been tendered. The complainant, then, does not appear to be ready to do that equity which he requires of the defendant, and on this ground, is not entitled to the relief prayed for. The circum-

stance that the defendant, some time before the promissory note fell due, stated, that he would not receive those bank-notes in payment, cannot excuse the complainant in not making the tender. It is claimed, that an *194] account should be taken of those *notes, and that the complainant should only be made liable for their specie value. This cannot be done. Bank-notes are considered as money—the holder has a right to look to the banks which issue them, for their numerical value in specie, and cannot be compelled to take for them a value fixed by shavers and brokers. The ability or inability of the bank to pay, ought not to be taken into consideration. The demurrer is, therefore, sustained, the injunction dissolved, and the bill dismissed, with costs.

In the same book, page 178, in the case of *Smith* v. *Goddard*, it is ruled at law, that a contract to pay in current bank-notes, is a contract to pay in money, if the bank-notes are not tendered at the day. And also, in the before-cited case of *Morris* v. *Edwards*, 1 Ohio 189 on the law side of the court, the question is fully discussed, both by the bar and the bench; and the question seems conclusively settled. To that case, and to the reasoning of the judges who delivered the opinion of the majority of the court, the attention of this court is respectfully requested.

It is thought, that the principle of the Ohio cases, is sanctioned by a decision of Judge WASHINGTON in the case of *Courtois* v. *Carpentier*, 1 W. C. C. 376. This was an action on a note, given by defendant to plaintiff, at Guadaloupe, both parties being French subjects, for the payment of 7812 livres, in sugars, at money value; it was proved, that notes of this description formed a species of circulating medium at Guadaloupe. That according to the custom of the place, when payment is demanded, or suit brought, three persons are appointed to value the sugar, and determine what quantity should be delivered in payment of the note. That notes of this kind are always in a state of depreciation, from twenty-five to forty per cent. below cash. That when this note was given, it would have been easier to pay $3000 in sugar, than one in cash. That they carried interest only from the time judgment was rendered, or the note registered before a notary. Held, that the law of the place where the contract was made must govern; but *195] since our courts, to which the parties have *appealed, cannot give a judgment for sugar, the value in money must be given, which, in effect, is the precise sum mentioned in the note, but that no interest is to be allowed up to the time of the judgment.

As to the term "about," in the agreement, it is obvious, that it means between 3600 and 3800 barrels—without straining, it cannot be made, in this case, to mean less. It appears, that the half of 3700 was a fair load for the boat, and it is obvious, that the contract was made in special reference thereto. It is believed, that the cases to which the court are referred, will justify the district judge fully in his instruction on all the points to the jury.

MCLEAN, Justice, delivered the opinion of the court.—This case was brought into this court, by a writ of error to the district court (which exercises the powers of a circuit court) for the western district of Pennsylvania. The plaintiffs in the district court commenced an action of covenant on the following instrument.

Robinson v. Noble.

"Article of agreement, entered into this 24th day of February, between William Noble of the city of Cincinnati, of the one part, and William Robinson, Jun., of the city of Pittsburgh, of the other part, witnesseth, that the said Noble hereby agrees, stipulates and binds himself, to and with the said Robinson, to transport and deliver to said Robinson, in the steamboat Paragon, a certain quantity of subsistence stores, for the use of the United States army, supposed to amount to about thirty-seven hundred barrels, estimating one-half of the quantity of stores as flour barrels, and the other half as whiskey or pork barrels, the said Robinson delivering one-half of the same, between the 1st and 10th of March, to said Noble, at Cincinnati, and the other half by the 30th of March, at the usual place of deposit, near the mouth of the Ohio; the delivery of which stores is to be made and completed in the order in which they are received, at the town of St. Louis aforesaid, on or before the 15th day of April next ensuing. In consideration whereof, the said Robinson hereby agrees and binds himself to pay to *the said Noble, one dollar and fifty cents per barrel, one-half whereof is to be paid on the delivery of said stores at St. Louis, [*196 in specie funds or their equivalent, and the other half, in Cincinnati, in the paper of banks current therein, at the period of the delivery of said stores at St. Louis. In testimony whereof, the parties signed and sealed the instrument, the 24th of February 1821." Under the agreement, was the following memorandum. "It is understood, that the payment to be made in Cincinnati, is to be in the paper of the Miami Exporting Company, or its equivalent." (Signed) William Robinson, Jun.

This covenant being before the jury, the defendant's counsel prayed the court to instruct them, that the plaintiffs could only recover the stipulated price for the freight actually transported, and that they were entitled to no more than the specie value of the notes of the Miami Exporting Company Bank, at the time the payment should have been made at Cincinnati. But the court refused so to instruct the jury, and directed them, that they were authorized to take "all the circumstances into consideration, and to make an allowance for any freight which the master had it in his power to transport, in addition to that which was furnished. That if the lading should not be complete, without the default of the master, the rule is to estimate the freight by means of an average, so as to take neither the greatest possible freight, nor the least, and that such average is the proper measure of damages. And the judge further instructed the jury, that "the defendant having failed to tender to the plaintiff the paper of the Miami Exporting Company, or its equivalent, at the time mentioned in the contract, and the plaintiff having performed all he covenanted to perform, is, by the laws of Ohio, entitled to recover the numerical value of the paper of the Miami Exporting Company in specie, with interest." And the jury, under these instructions found for the plaintiff $2377.36 in damages.

On this statement of the case, the question arises, whether the court erred in refusing to give the instructions prayed for by the defendant? And first, whether the plaintiffs were entitled *to recover in damages more [*197 than the stipulated price for the freight actually transported.

By the article, Noble agreed with Robinson to transport "in the steamboat Paragon, a certain quantity of subsistence stores, &c., supposed to amount to about 3700 barrels," &c.; "in consideration whereof, Robinson

binds himself to pay one dollar and fifty cents per barrel." Under this argeement, only 3105 barrels were delivered for transportation. The plaintiff's counsel insist, that Robinson was bound by his agreement to deliver the number of barrels specified, subject only to a reasonable qualification of the words "supposed to amount to 3700 barrels;" and that by this rule, the number could not be reduced below 3600 barrels.

It is clear, from the agreement, that the amount of freight was not ascertained, and that Robinson did not convenant to deliver any specific number of barrels. It was conjectured, there were 3700, and the payment for the transportation was to be at the rate of one dollar and fifty cents per barrel. The master of the steamboat Paragon proved on the trial, that on the second trip which the boat made under this contract, she had not more than two-thirds or three-fourths of a cargo. And it also appeared, that the reason assigned why a greater number of barrels were not delivered to the master of the steamboat was, that one or two flat-boats, laden with flour, designed as a part of the second cargo of the Paragon, were sunk above Cincinnati. If Robinson had bound himself to deliver a certain number of barrels, and had failed to do so, Noble would have been entitled to damages for such failure; but a fair construction of the contract imposed no such obligation on Robinson, and consequently, the breach assigned in the declaration is not within the covenant.

It is unnecessary to determine, whether, under a certain state of facts, and with proper averments in the declaration, damages might not be recovered, beyond the price per barrel for the cargo transported, as such a case is not before the court.

*198] *There is no pretence, that Robinson did not deliver the whole amount of freight in his possession, at the places designated in the contract. In this respect, as well as in every other, in regard to the contract, he seems to have acted in good faith. And he was unable to deliver the number of barrels supposed, either through the loss stated, or an erroneous estimate of the quantity. But to exonerate Robinson from damages on this ground, it is enough to know, that he did not bind himself to deliver any specific amount of freight. The probable amount is stated or supposed, in the agreement; but there is no undertaking as to the quanity. When the circumstances under which this contract was made are considered; the contingencies on which the delivery of the freight, in some degree, depended: the reason is seen, why cautious and indefinite language was used, in regard to the number of barrels, in the contract. And the result proved that this caution was judicious; as, if the contract had stipulated for a specific amount of freight, Robinson would have been bound to pay the full price of transportation, notwithstanding the loss he sustained. The court think that there was no breach of the covenant, in this respect, on the part of Robinson, and that the district court erred in not giving the instruction, as prayed for by the defendant.

The second instruction asked by the defendant's counsel in the court below was, that the plaintiffs were not entitled to recover more than the specie value of the notes, in which the payment was to have been made, at Cincinnati. It was proved, on the trial, that the notes of the Miami Exporting Company, in which, by the contract, the payment was to be made, or other notes of equal value, were not worth more in specie, than 66⅔ per cent. The

express provisions of the contract show, that the payment at Cincinnati was not to have been made in specie, or what was equivalent to specie. The notes of the Miami Exporting Company were substituted by the parties, as the standard of value, which should discharge this part of the contract, and the payment of those notes, or any others of equal value, was all that Noble had a right to demand. But it is contended, *that as the payment [*199
was not made at the day, it must needs be made in specie, and to the full amount of the sum agreed to be paid in depreciated paper. In what does this covenant to pay differ from an agreement to deliver a certain quantity of flour, or any other commodity on a given day. The notes of the Miami Exporting Company purported to be money, and may, to some extent at the time, have circulated as such in business transactions: but it is manifest, they were not considered as money by the parties to this contract; but as a commodity, the value of which was to be ascertained by the amount of specie it would bring in the market. And if it should not be convenient for Robinson to make the payment in these notes, he was permitted to make it, by the contract, in any other depreciated notes of equal value.

Robinson failed to make the payment at the time, and is he now bound to pay the nominal amount of these notes in specie? What damage has Noble sustained by the non-payment? Certainly, not more than the value of the notes, if they had been paid. Had these notes been equal to specie, on the day of payment, Robinson was bound to pay them, or what was of equal value. If they had depreciated to fifty cents in the dollar, Noble was bound to receive them, in discharge of the covenant. Each party incurred a risk in the fluctuations of the value of the notes specified; and nothing could be more unjust, or more opposed to the spirit and letter of the contract, than to require Robinson to pay in specie, the nominal value of these notes. The law affixes no such penalty for default of payment. Robinson can only be held liable to make good the damages sustained through his default; and the specie value of the notes, at the time they should have been paid, is the rule by which such damages are to be estimated.

In this view, it appears that the district court erred in refusing to give the second instruction prayed for by the defendant's counsel; on this ground, therefore, as well as the one first noticed, the judgment of that court must be reversed, and the cause remanded for further proceedings, in conformity with this decision.

*This cause came on to be heard, on the transcript of the record [*200
from the district court of the United States, for the western district of Pennsylvania, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court, with directions that further proceeding be had therein, according to law and justice, and in conformity with the opinion of this court.

*Amos Binney, Appellant, *v.* The Chesapeake and Ohio Canal Company.

Construction of charter.

A bill was fi'ed in the circuit court of the district of Columbia, against the Chesapeake and Ohio Canal Company, claiming, as riparian proprietor, from the company, a right to use, for manufacturing purposes, the water of the Potomac, introduced through the land of the appellant, when the quantity of water so introduced should exceed that required for navigation; the bill charged, that the land of the appellant was susceptible of being improved, and was intended so to be, for the purposes of manufacturing, by employing the water of the Potomac, prior to 1784, in which year, the Potomac Company was chartered. All the chartered rights of that company, and all their obligations were, in 1825, transferred to the Chesapeake and Ohio Canal Company; by the improvements made by the Potomac Company, much surplus water was introduced and wasted on the land of the appellant; the Chesapeake and Ohio Canal Company had deepened the canal; had made other improvements on the land of the appellant; thus introducing a large quantity of water for navigation and manufacturing. The appellant claimed, that under the charter of the Potomac Company, held by the Chesapeake and Ohio Canal Company, he was entitled to use this surplus water for manufacturing purposes; if the water was insufficient for this purpose, he claimed to be allowed to have the works enlarged, to obtain a sufficient supply. The court *held*, that under the provisions of the charter, the purposes for which lands were to be condemned and taken were for navigation only; limiting the quantity taken to such as was necessary for public purposes. By the 13th section of the charter of the Potomac Canal Company of 1784, the company were authorized, but not compelled, to enter into agreements for the use of the surplus water; the owner of the adjacent lands required no such special permission by law; this was a right incident to the ownership of land; the authority, on both sides, was left upon to the mutual agreements of the parties; but neither could be compelled to enter into an agreement relative to the surplus water.

Appeal from the Circuit Court of the district of Columbia, and county of Washington.

The appellant, on the 5th day of December 1831, filed a bill in the circuit court of the county of Washington, against the appellees, by which he charged, that he and those under whom he claimed, held title to, and were in possession of, three adjacent tracts of land on the shore of the river Potomac, and where the said river was innavigable, prior to the year 1784. That these lands being situate on that part of the river called the Little Falls, were susceptible of being improved, by *applying the water of
*202] the river for manufacturing purposes; and were, prior to the year 1784, intended by the proprietors to be so improved. That when the charter of the Potomac Company was granted, in 1784, by Maryland and Virginia, it was known, that such improvement was intended—and the charter expressly secured the rights of such proprietors, by the 13th section of the act of incorporation, which was in these words:

§ 13. And whereas, some of the places through which it may be necessary to conduct the said canals may be convenient for erecting mills, forges or other water-works, and the persons, possessors of such situation, may design to improve the same, and it is the intention of this act not to interfere with private property, but for the purpose of improving and perfecting the said navigation: Be it enacted, that the water, or any part thereof, conveyed through any canal or cut, made by the said company, shall not be used for any purpose but navigation, unless the consent of the proprietors of the land through which the same shall be led, be first had; and the said president and directors, or a majority of them, are hereby empowered

and directed, if it can be conveniently done, to answer both the purposes of navigation and water-works aforesaid, to enter into reasonable agreements with the proprietors of such situation, concerning the just proportion of the expenses of making large canals or cuts, capable of carrying such quantities of water as may be sufficient for the purposes of navigation, and also for any such water-works as aforesaid.

That in the year 1825, the Chesapeake and Ohio Canal Company obtained a charter, and by this charter and the proceedings under it, this company had obtained a surrender from the Potomac Company of all its chartered rights and privileges and property, and now held the same, "in the same manner and to the same effect," as they were before held by the Potomac Company. The bill charged, that in the year 1793, the Potomac Company made a condemnation, under its charter, of a portion of these lands, for a canal, which was exhibited; and made a canal through the same, which was so constructed as to admit more water than was necessary for navigation; which surplus water was wasted on the lands of complainant, at four sluice-gates, *and three waste-dams, and continued to be so wasted at such places, during the continuance of the works of said company. The [*203
complainant further charged, that, since their incorporation, and the surrender of the charter of the Potomac Company, the Chesapeake and Ohio Canal Company had taken possession of the canal of the former company, and of the land so condemned, and had also entered upon other parts of his said land, not condemned, and had greatly enlarged and deepened the said canal, and constructed a part of it as a feeder for their main canal, and erected a permanent stone dam across the river, and introduced therein a large quantity of water, for the purpose, as appeared, in their own reports, memorials and proceedings, of obtaining "a large volume of surplus water to sell for manufacturing purposes, and to be applied to other canals to be hereafter authorized." The bill further charged, that these works might, if necessary, in order to introduce more water into the canal, be enlarged; and though the complainant averred, that the quantity of water now admitted, was abundant both for navigation and for manufacturing purposes, yet he declared, that he had always been, and yet was willing, to make an equitable arrangement to pay a fair proportion of the expense of such enlargement if the same should be adjudged necessary. The complainant further charged, that by these works of the said two companies, it had been made, if not impracticable, yet very expensive and difficult for him to apply the water of the river to works upon his lands, without taking the same out of the said canal and feeder. He contended, that, under these charters, he was entitled to be allowed the use of the surplus water out of the canal and feeder, and complained, that the defendants had wholly refused to admit him, on any terms, to use the said surplus water, or to make any equitable agreement for the enlargement of the works, if they should contend that such enlargement was necessary; and that they avowed their determination to take the water through his said lands, without his being allowed in any manner, or upon any terms, the use of said water, and to dispose of the same, after passing through his lands, at such places as they were allowed by the present charter to waste the same, for their own benefit and profit, and also to sell the same wherever they might find it advantageous to do so, *if they could obtain an amendment of their charter to [*204

authorize them so to do, for which amendment they were then making application. The complainant prayed to be relieved against these wrongs, to be allowed to use the surplus water now admitted into the canal and feeder, which he averred was abundant both for navigation and manufacturing purposes, and if found insufficient, then to be allowed to have the works enlarged, upon equitable terms, to admit a sufficient supply of water for both purposes—and also prayed for general relief.

The answer denied the right of complainant to the relief sought, or to any relief; denied that he, or those under whom he claimed, had any right to use the water of the river on their lands, for manufacturing purposes, prior to the charter to the Potomac Company, in 1784; denied that such right, if he had it, had been affected by the works of either company; denied his right to any use of the water, under the charter of that company, and under the charter of the present company; admitted that they had enlarged the canal and feeder, so as to receive more water than was necessary for navigation; and "that a considerable quantity of surplus water might be used and expended on that part of the canal adjacent to the lands claimed by complainant, and through said lands, without injury to the navigation of said canal;" and claimed the said water "as their sole and exclusive property," and insisted, that "they possess the same right, in disposing of the same, to determine where it shall be vented from the canal, and in what quantities, and upon what terms it shall be enjoyed by others, as they have in exercising similar acts of ownership over any other description of property to which their title is absolute and unconditional."

It was agreed, that the complainant had title to the lands set forth in the bill; and the location of the said lands, and their susceptibility of improvement for manufacturing purposes, were admitted to be as set forth in the bill. The appellant made the following points.

1. That the complainant, and those under whom he claimed, had the right to apply the water of the river to manufacturing purposes on the said lands, prior to the act of 1784, incorporating the Potomac Company.

*205] *2. That this right was affirmed and secured by that act, and the terms and manner of exercising it provided for.

3. That the charter of the Chesapeake and Ohio Canal Company did not impair this right.

4. The lands owned by the complainant having the entire and sole command of the falls, and no proprietor of lands below him being able to get the water, without taking it through his land, the Chesapeake and Ohio Canal Company could not condemn his land, and construct their works so as to take the water through his land, and dispose of it on lands below him, without his consent.

5. The company had no right to take his land, or construct their works, so as to admit more water into their canal than was necessary for the purposes of navigation; and this, the evidence, and their own reports of proceedings, show they had done.

6. The Potomac Company having constructed their canal, and established sluices and waste-dams for the disharge of surplus water on the complainant's lands, for more than twenty-five years, which surplus water could have been applied to manufacturing purposes (as proved by the evidence of Payne, Pierce and Thompson), the present company were bound to allow

the complainant the use of an equal quantity of the surplus water on his said land.

7. The company, having purposely introduced more water than was necessary for navigation, with a view to dispose of it for their own benefit, could not take it through the complainant's land, and dispose of it, under their charter, even at places where it might be necessary to waste what was thus introduced.

8. That the said company had no right to enter upon, or condemn any lands of the complainant, not included in the condemnation of the Potomac Company; congress not having given any such power of entry or condemnation, and congress having no right, under the constitution, and acts of cession of Maryland and Virginia, to give such power.

The case was argued by *Key* and *Webster*, for the appellant; and by *Swann* and *Coxe*, for the appellees.

*The court gave no opinion upon any of the questions argued in the case, other than those arising out of the 13th section of the act [*206 incorporating the Chesapeake and Ohio Canal Company, as to the power and obligation of the company to enter into arrangements with the owners of the lands adjacent to the canal, respecting the use of the water introduced into the canal "for the purpose of carrying on water-works of various descriptions, when it could be done conveniently."

The counsel for the appellees denied, that under the charter of the company, they were compelled to make agreements for the use of the surplus water; or that the owners of land, through which the canal passed, claiming as riparian proprietors, could oblige the company to enlarge the canal, or to permit it to be enlarged, so as to introduce a surplus quantity of water to be used for the supply of manufacturing power.

Thompson, Justice, delivered the opinion of the court.—This case comes before the court from the circuit court of the district of Columbia, for the county of Washington, on appeal from a decree, dismissing a bill of the complainant in that court, who is the appellant here. The questions involved in this controversy, are highly important to the parties in a pecuniary point of view, and embrace, in some measure, public considerations, connected with the Chesapeake and Ohio Canal Company. These considerations have led to a range of argument at the bar, and the discussion of many questions, important and interesting in themselves, but which are not raised by the case now presented to the judgment of this court: and we shall confine ourselves to the questions properly arising out of the pleadings in the cause.

The bill filed in the court below charges, that prior to the year 1784, the appellant, and those under whom he claims, held title to, and were in possession of, certain tracts of land, on the shore of the river Potomac, where the said river was innavigable. That these lands, being situated on that part of the river, called the Little Falls, were susceptible of being improved, by applying the water of the said river to manufacturing purposes, and were, prior to the year 1784, intended by the proprietors to be so improved. *That when the charter of the Potomac Company was granted, it was known, that such improvement was intended. And that the char- [*207

ter expressly secured the rights of such proprietors, by the 13th section of the act incorporating that company in the year 1784.

The bill then charges, that in the year 1825, the Chesapeake and Ohio Canal Company obtained a charter, by which, and the proceedings under it, this company obtained a surrender from the Potomac Company, of all its chartered rights, privileges and property; and now holds the same, in the same manner, and to the same effect, as they were before held by the Potomac Company. The bill further charges, that in the year 1793, the Potomac Company made a condemnation, under its charter, of a portion of these lands for a canal, and made a canal through the same; which was so construed as to admit more water than was necessary for navigation. Which surplus water was wasted on the lands of the complainant, at four sluice-gates, and three waste-dams, and continued to be so wasted at such places, during the continuance of the works of the said company. That the Chesapeake and Ohio Canal Company, since their incorporation, and the surrender of the charter of the Potomac Company to them, have taken the possession of the canal of that company, and of the land so condemned; and have also entered upon other portions of said land, adjacent thereto, and have greatly enlarged and deepened the said canal, and constructed a part of it as a feeder for the main canal; and erected a permanent stone dam across the river, and introduced into the land a large quantity of water, for the purpose, as is alleged, of obtaining a large volume of surplus water, to sell for manufacturing purposes, and to be applied to other canals to be hereafter authorized. The bill further alleges, that these works may, if necessary, be still further enlarged, so as to admit a still further supply of water, which might be conveniently applied to the purposes, both of navigation and manufactories. And that although all the water now admitted, is abundantly sufficient, both for navigation and for manufacturing purposes, without enlargement; yet, that the complainant has always been, and yet is willing to make an equitable arrangement to pay a fair *proportion
*208] of the expense of such enlargement, if the same shall be adjudged necessary.

The bill further charges, that by these works of the two companies, it has been made, if not impracticable, yet very expensive and difficult, for him to apply the water of the river to works upon his lands, without taking the same out of the said canal and feeder; and he claims, that under these charters, he is entitled to be allowed the use of the surplus water out of the canal and feeder. But that the defendants have wholly refused to admit him, on any terms, to use the said surplus water; or to make any equitable agreement for the enlargement of the said works; if they shall contend that such enlargement is necessary. And the specific relief prayed is, that the complainant be allowed to use the surplus water, now admitted into the canal and feeder, which, he avers, is abundantly sufficient, both for navigation and manufacturing purposes. And, if found insufficient, then to be allowed to have the works enlarged, upon equitable terms, to admit a sufficient supply of water for both purposes.

The answer denies the right of the appellant to the specific relief prayed, or to any relief whatever; denies that he, or those under whom he claims, had any right to the use of the water of the river on their lands, for manufacturing purposes, prior to the charter to the Potomac Company, in the

year 1784; denies that such right, if he has it, has been affected by the works of either company; denies the complainant's right to any use of the water, under the charter to the Potomac Company, or under the charter to the Chesapeake and Ohio Canal Company. The defendants admit, that they have enlarged the canal and feeder, so as to receive more water than is necessary for the purpose of navigation, and that a considerable quantity of surplus water might be used on that part of the canal adjacent to the lands claimed by the appellant, and through which the canal runs, without injury to the navigation of the canal. But they claim said water as their own exclusive property, and insist they have the same right, in disposing of it, that they have over any other description of property, to which their right is absolute and unconditional.

It will be perceived, by this statement of the bill and answer, *that many of the questions which have been raised and argued at the bar, [*209 are not necessarily involved in the decision of the cause. The rights of the appellant, and of those under whom he claims, as riparian proprietors, antecedent to the charter of 1784 to the Potomac Company, are not drawn in question, under the allegations in the bill. The appellant does not set up any right, in hostility to the rights granted by those charters; but his claim rests upon an affirmance of those charters. His claim is, of right, to the use of the surplus water, now admitted into the canal and feeder; and if that is insufficient, both for navigation and manufacturing purposes, his prayer is, that the defendants may be compelled to allow the works to be enlarged, so as to admit a sufficient supply of water for both purposes. He seeks, therefore, to divert a still greater quantity of water from the river, and thereby further impairing riparian rights, if any exist which can be affected by diverting such a portion of the water from the river into the canal. Nor does the bill seek any relief, founded on an objection to the validity of the proceedings to obtain an condemnation of the land; nor is there any complaint, that the company entered upon other portions of the land (not included in the condemnation of 1793), without authority. No injunction is prayed to restrain the defendants from the use of such land; and this cannot be granted under the general prayer. No proper case is made for such relief; it does not come within the scope and object of the bill; and would be inconsistent with the specific relief prayed; which, instead of restraining the defendants from the use of such lands, seeks to compel them to enlarge the canal still more, if necessary, to accomplish the purposes for which the complainant wants the water. Nor is it matter of complaint to be made by the appellant, that the company avow a determination to dispose of the surplus water, after it passes through his land, for their own benefit and profit. This cannot, in any manner, prejudice the complainant. And the bill only charges, that such is the avowed purpose of the defendants, when it can be done, without injury to the navigation, and in case they can obtain an enlargement of their charter.

By the appellant's own allegations, therefore, the defendants disclaim any intention to waste the surplus water, unless it can *be done [*210 without prejudice to his navigation, nor without obtaining further permission for that purpose from the competent authority. The right of the appellant, therefore, to the relief sought, is narrowed down to the single inquiry; whether his claim can be sustained under the thirteenth

section of the charter of 1784, to the Potomac Company? That section is as follows:

"Whereas, some of the places through which it may be necessary to conduct the said canals, may be convenient for erecting mills, forges or other water-works; and the persons, possessors of such situations, may design to improve the same; and it is the intention of this act, not to interfere with private property, but for the purpose of improving and perfecting the said navigation: Be it enacted, that the water, or any part thereof, conveyed through any canal or cut, made by the said company, shall not be used for any purpose but navigation, unless the consent of the proprietors of the land, through which the same shall be led, be first had. And the said president and directors, or a majority of them, are hereby empowered and directed, if it can be conveniently done, to answer both the purposes of navigation and water-works aforesaid, to enter into reasonable agreements with the proprietors of such situation, concerning the just proportion of the expenses of making large canals or cuts, capable of carrying such quantities of water as may be sufficient for the purposes of navigation, and also for any such water-works as aforesaid."

We think, that the relief sought by the appellant, cannot be granted under this section of the charter. The whole structure of the act shows, that the great and leading purpose for which this company was incorporated, was for the extension of the navigation of the Potomac; every antecedent provision of the charter looks to that object. The president and directors are authorized to employ persons to cut such canals, and erect such locks, and perform such other works as they shall judge necessary, for opening, improving and extending the navigation of the river. The said river, and the works to be erected thereon, in virtue of this act, when completed, are declared for ever thereafter to be esteemed and taken to be navigable, as a public highway, subject to the payment of certain *tolls, &c. The act declares, that it is necessary for the making of said canal, locks and other works, that provision should be made for condemning a quantity of land for that purpose. And the proceedings thereupon are accordingly prescribed by the act, where no voluntary agreement can be made with the owners of the land, for taking a limited quantity, against the will of the owner, on payment of the damages, to be assessed by a jury. After these, and some other provisions are made, clearly indicating an intention, that the purpose for which the lands were to be taken was for navigation only, and limited to a quantity necessary for such public objects; then comes the clause in question, presenting other purposes, and providing for other objects, where circumstances will justify connecting private enterprises with the leading public purposes of navigation.

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But this clause in the act seems studiously to guard against blending these two objects by any compulsory measures; but to make it the result of mutual and voluntary arrangements between the company, and the owners of the land upon which the water-works are to be erected. It is declared, in explicit terms, that it is the intention of the act, not to interfere with private property, except for the purpose of improving and perfecting the said navigation; and that the water shall not be used for any purpose but navigation, unless the consent of the proprietors of the land, through

which the canal shall run, be first had. It would be a very rigid and forced construction of this act, to place the company at the will and pleasure of the adjacent lands, especially, if this should be considered a continual subsisting right, after the canal has been once completed. If the company are prohibited from using the water, except for navigation, without the consent of the owner of the adjacent land, and yet be obliged to yield to the wishes of such owner, to alter and enlarge the canal, there would be wanting that mutuality, which is essential to the just and reasonable regulation of all rights. All the legislative provision necessary, was to authorize the company to enter into such agreement with respect to the use of the water; the owner of the adjacent land required no such special permission; this is a right incident to his ownership of the land. The authority on both sides to *make such agreement being established, all was left open to the mutual arrangement of the parties, like all other contracts. But to [*212 compel one party to consent, and leave the other at liberty to consent or not, at his pleasure, would be a violation of of all sound principles of justice.

Much stress has been laid on the word *directed*, as used in the statute. "The company are hereby empowered and directed, &c." The word, if standing alone, might imply something mandatory to the company; but it must be taken with the context, and the general scope and object of the provision, in order to ascertain the intention of the legislature. There was an absolute prohibition to the company to give their assent to such private use of the water, and the obvious intention of the act was, to remove that prohibition, and place the company in a situation capable of entering into arrangements with the owners of the adjacent lands, respecting the use of the water, for the purpose of carrying on water-works of various descriptions, when it could be done conveniently. But the whole structure of the clause shows, it was to be a voluntary and mutual agreement of the parties. It cannot be supposed, that if any compulsory measures were contemplated the act would have been left so entirely silent, as to the mode and manner in which this was to be enforced upon the company. If, as we think, it clearly was the intention of the act, that their use of the water should be subject to the mutual agreement of the parties, no legislative provision was necessary. The parties having authority to make the agreement, they could make it, in any manner, or under such modifications as they might think proper.

It is not a well-founded objection to this construction of the act, that the most apt and appropriate phraseology to convey this meaning, has not been employed. The great object is, to ascertain the intention of the legislature; and there is certainly nothing in the language used, that is repugnant to the construction we have adopted.

If the right of the appellant to compel the company to make the agreement was clearly established, it might be within the province of a court of chancery, to enforce the consummation of such agreement, and carry it into effect. But the entire absence of any provision looking to compulsory measures, as to *the mode and manner in which the agreement is to be made or executed, is a very strong, if not conclusive, reason, to [*213 show that no such right exists; and leads irresistibly to the conclusion, that this is a matter left open for the voluntary arrangement of the parties. To

consider the company bound to enter into such agreements with the owners of the adjacent land, the whole extent of the canal, and liable to be called upon to alter and enlarge the same, at the pleasure of such owners; would be imposing an expense and limitation upon their chartered rights, which ought not to be adopted, without the most explicit and unequivocal provision in their charter. And which, we are very clearly of opinion, is not imposed upon the company in the present case. The decree of the court below is accordingly affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*214] *The Lessee of Amos Binney, Plaintiff in error, *v.* The Chesapeake and Ohio Canal Company.

Ejectment.

The declaration in ejectment was dated on the 22d day of May 1831, and the judgment was rendered on the 14th of January 1832; the plaintiff in ejectment counted on a demise made by Amos Binney, on the 1st day of January 1828; his title, as shown in the abstract, commenced on the 17th of May 1828, which was subsequent to the demise on which the plaintiff counted. Though the demise is a fiction, the plaintiff must count on one, which, if real, would support his action.

The counsel for the defendants insisted, that, if the cause could not be decided on its supposed real merits, it ought to be remanded to the circuit court, for the purpose of receiving such modifications as will bring before this court those questions of law on which the rights of the parties depend. Where error exists in the proceedings of the circuit court, which will justify a reversal of its judgment, this court may send back the cause, with such instructions as the justice of the case may require; but if, in point of law, the judgment ought to be affirmed, it is the duty of this court to affirm it; this court cannot, with propriety, reverse a decision which conforms to law, and remand a cause for futher proceedings.

Error to the Circuit Court of the district of Columbia, and county of Washington.

An action of ejectment was commenced in the circuit court, by agreement, on the 14th day of January 1832. The declaration counted on a demise from the lessor of the plaintiff, dated the 1st of January 1828, for the term of fifteen years. The declaration was afterwards amended, by adding, "a demise from John K. Smith, and a demise from the heirs of Amos Cloud (their names to be left in blank, or considered as properly instituted in the record), and another from John Way." The following agreement, signed by the counsel for the plaintiff, was also filed in the circuit court.

"The plaintiff's title depends on the title papers herewith shown to the court, the due authentication of which is admitted: viz., the patents for Amsterdam and White Haven, and the several mesne conveyances, decrees, &c., from the patentees down to the plaintiffs; and it is admitted, that the plaintiff's lessor, J. K. Smith, was in possession, in June 1812, when the condemnation hereinafter mentioned was made of the *land comprised
*215] within said condemnation, and that it is a part of the said two tracts

of land. It is admitted, that the Potomac Company, in the year 1793, condemned certain lands, as appears by their said inquisition and condemnation, and plat hereto annexed, for their canal and locks through the aforesaid tracts of land, and other adjacent tracts as noted on said plat. And it is admitted, that, on the 23d of June 1812, an inquisition was held, and condemnation had by said company, as appears by the papers hereto annexed; and it is admitted, that the location of the land, so last condemned, and the new locks erected thereon, and the old locks erected on the land condemned as aforesaid, in 1793, is truly shown by a plat thereof, made out by Thomas F. Percell and William Bussard, hereto annexed. And it is further admitted, that the Potomac Company, after said respective condemnations, entered upon the lands so condemned, and erected thereon the locks as shown in the said plat, and continued in possession, until transferred to the defendants, the Chesapeake and Ohio Canal Company, which latter company have continued in possession ever since. Upon which case agreed, it is submitted to the court to say: 1st. Whether the plaintiff has shown title? and 2d. Whether the condemnation of 1812 aforesaid, divested the plaintiff's title, and gave a valid title to the Potomac Company? It is agreed, that all the papers, plats, &c., mentioned and referred to in the foregoing case agreed, may be omitted in the record of this case, and may be used in the supreme court, as if contained in the record."

The circuit court gave judgment for the defendants, and the plaintiffs prosecuted this writ of error.

The case was argued by *Key* and *Jones*, for the plaintiff in error; and by *Coxe* and *Swann*, for the defendants.

The court gave no opinion upon the general questions discussed by the counsel in the cause; the only points decided were upon the demise in the declaration, and on the application of the counsel of the plaintiffs in error, if the cause could not be decided on its supposed real merits, to remand it to the circuit court, "that the pleadings should receive such *modifications, as will bring before the court those questions of law, on which the rights of the parties depend." [*216

Swann and *Coxe*, for the defendants in error.—The suit was brought in January 1832, and the demise is laid in the declaration, on the 1st of January 1828. The lessor of the plaintiff, Amos Binney, acquired his title in May 1828; the other lessors had no title; by the plaintiff's own showing, they had parted with their title, long before the demises in the declaration. The plaintiff must recover on his own title, and that title as shown in the declaration, and in the process. The title must have existed at the time the suit was commenced, and must exist at the time of the trial of the cause. Adams on Ejectment; 5 Har. & Johns. 173; 3 Ibid. 13.

Jones and *Key*, for the plaintiff in error.—The objection to the demise should have been made at some previous stage of the cause. Runnington on Ejectment 213; Adams 288; Laws of Maryland of 1785. The objection of the defendants in error to the demise, ought not to operate to produce an affirmance of the judgment of the circuit court. If the plaintiff in error has merits, the court, by remanding the case, so that the pleadings may be

modified, will afford to the parties an opportunity to have the real questions in the case fully adjudged.

MARSHALL, Ch. J., delivered the opinion of the court.—This was an action of ejectment, brought by the lessee of Amos Binney, in the court of the United States for the district of Columbia, sitting in the county of Washington. It was agreed by the parties, that the declaration should be amended, by adding a demise from J. K. Smith, one from the heirs of Amos Cloud, and one from John Way. This amended declaration, however, does not appear in the record, and was not filed in the circuit court. The following statement is made, as forming a case agreed :

The plaintiff's title depends on the title papers herewith shown to the
*217] court ; the due authentication of which is admitted, *viz., the patents for Amsterdam and White Haven, and the several mesne conveyances, decrees, &c., from the patentees down to the plaintiffs ; and it is admitted, that the plaintiff's lessor, J. K. Smith, was in possession in June 1812, when the condemnation hereinafter mentioned was made of the land comprised within said condemnation, and that it is a part of the said two tracts of land. It is admitted, that the Potomac Company, in the year 1793, condemned certain lands, as appears by their said inquisition and condemnation and plat hereto annexed, for their canal and locks through the aforesaid tracts of land, and other adjacent tracts, as noted on said plat. And it is admitted, that on the 23d of June 1812, an inquisition was held, and condemnation had by said company, as appears by the papers hereto annexed ; and it is admitted, that the location of the land so last condemned, and the new locks erected thereon, and the old locks erected on the land condemned, as aforesaid, in 1793, is truly shown by a plat thereof made out by Thomas F. Percell and William Bussard, hereto annexed. And it is further admitted, that the Potomac Company, after said respective condemnation, entered upon the lands so condemned, and erected thereon the locks as shown in the said plat, and continued in possession until transferred to these defendants, the Chesapeake and Ohio Canal Company ; which said company have continued in possession ever since. Upon which case agreed, it is submitted to the court to say, first, whether the plaintiff has shown title ? and second, whether the condemnation of 1812 aforesaid divested the plaintiff's title and gave a valid title to the Potomac Company ? It is agreed, that all the papers mentioned and referred to in the aforegoing case agreed, may be omitted in the record of this case, and may be used in the supreme court as if contained in the record.

The circuit court decided both points in favor of the defendants ; and the plaintiffs have brought the cause before this court by writ of error.

The abstract laid before the court by consent of parties, does not show a regular title in the plaintiff ; and the case does not, we think, find a pos-
*218] session of twenty years, anterior to the *inquisition, which would constitute a title in ejectment. It presents evidence from which a jury might be justified in finding possession ; evidence from which possession may be inferred, but the court cannot infer it.

The counsel for the plaintiffs in error contend, that the Chesapeake and Ohio Canal Company, who claim their title under the inquest, have admitted it, and are not now at liberty to controvert it. On the influence of the

inquest in this cause, some contrariety of opinion prevails among the judges; but the defendants in error have made a preliminary question, which, if decided in their favor, will terminate the present suit. The declaration in ejectment is dated on the 22d of May 1831, and the judgment was rendered on the 14th of January 1832. The plaintiff in ejectment counts on a demise made by Amos Binney, on the 1st day of January 1828; his title, as shown in the abstract, commenced on the 17th of May 1828, which is subsequent to the demise on which the plaintiff counts. Though the demise is a fiction, the plaintiff must count on one, which, if real, would support his action.

We find in the record an entry that the declaration is amended, by adding a demise from J. K. Smith, one from the heirs of Amos Cloud, and another from John Way. These counts, however, do not appear, and the court would feel great difficulty in framing them. If this difficulty could be overcome, the abstract shows that J. K. Smith conveyed all his title on the 17th of May 1828, before this action was commenced. It also shows that the title of Amos Cloud's heirs was conveyed from them by deeds bearing date in 1816 and 1819. Had these additional counts been filed, neither of the lessors possessed any title, when this ejectment was brought, or when it was tried. The case, therefore, could not have been aided by counts on demises from them.

The counsel for the defendants have insisted, that if the cause cannot be decided on its supposed real merits, it ought to be remanded to the circuit court, for the purpose of receiving such modifications as will bring before this court those *questions of law on which the rights of the parties depend. Where error exists in the proceedings of the circuit court, [*219 which will justify a reversal of its judgment, this court may send back the cause, with such instructions as the justice of the case may require. But if, in point of law, the judgment ought to be affirmed, it is the duty of this court to affirm it. (6 Cranch 268.) We cannot, with propriety, reverse a decision which conforms to law, and remand a cause for further proceedings. The judgment of the circuit court is affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court be and the same is hereby affirmed, with costs.

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*James McCutchen and others, Appellants, *v.* James Marshall and others. [*220

Slavery.

Patrick McCutchen, of Tennessee, died in 1810, having previously made his last will and testament; by which will, among other things, he bequeathed to his wife Hannah, during her natural life, all his slaves, and provided, that they, naming them, should, at the death of his wife, be liberated from slavery, and be for ever and entirely set free; except those that were not of age, or should not have arrived at the age of twenty-one years at the death of his wife; and those were to be subject to the control of his brother and brother-in-law, until they were of age, at which period they were to be set free; as to Rose, one of the slaves, the testator declared, that she and her children, after the death of his wife, should be liberated from slavery, and for

ever and entirely set free. Two of the slaves, Eliza and Cynthia, had children born after the death of the testator, and before the death of the wife; nothing was said in his will as to the children of Eliza and Cynthia. After the decease of the wife, the heirs of the testator claimed all the slaves, and their increase, as liable to be distributed to and among the next of kin of the testator; alleging, that by the laws of Tennessee, slaves cannot be set free by last will and testament, or by any direction therein; that if the law does authorize emancipation, they are still slaves until the period for emancipation; and that the increase, born after the death of the testator, and before their mothers were actually set free, were slaves, and as such were liable to be distributed. The laws of Tennessee fully authorize the emancipation of slaves, in the manner provided by the last will and testament of Patrick McCutchen.

As a general proposition, it would seem a little extraordinary, to contend, that the owner of property is not at liberty to renounce his right to it, either absolutely, or in any modified manner he may think proper; as between the owner and his slave, it would require the most explicit prohibition by law, to restrain this right. Considerations of policy, with respect to this species of property, may justify legislative regulation, as to the guards and checks under which such manumission shall take place; especially, so as to provide against the public's becoming chargeable for the maintenance of slaves so manumitted.

It is admitted to be a settled rule in the state of Tennessee, that the issue of a female slave follows the condition of the mother; if, therefore, Eliza and Cynthia were slaves, when their children were born, it will follow, as matter of course, that there children are slaves also. If this was an open question, it might be urged with some force, that the condition of Eliza and Cynthia, during the life of the widow, was not that of absolute slavery; but was, by the will, converted into a modified servitude, to end upon the death of the widow, or on their arrival at the age of twenty-one years, should she die before that time; if the mothers were not absolute slaves, but held in the condition just mentioned, it would seem to follow, that their children would stand in the same condition, and be entitled to their *freedom, on their arrival at twenty-one years of age. But the course of decisions in the state of Tennessee, and some other states where slavery is tolerated, goes very strongly, if not conclusively, to establish the principle, that females thus situated, are considered slaves; that it is only a conditional manumission, and until the contingency happens, upon which the freedom is to take effect, they remain, to all intents and purposes, absolute slaves. The court do not mean to disturb this principle; the children of Eliza and Cynthia must, therefore, be considered slaves.

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Appeal from the Circuit Court for the district of West Tennessee. In the circuit court, the appellants, James McCutchen and others, citizens of Missouri, Kentucky, Ohio and Mississippi, complainants, filed a bill against James Marshall and others, citizens of the state of Tennessee, defendants.

The bill stated, that some time in the year 1812, one Patrick McCutchen, at that time, and for many years before, a citizen of Williamson county, in the state of Tennessee, departed this life. Previous to his death, the said Patrick McCutchen made and published his last will and testament, which was, after his death, proved before the court of pleas and quarter sessions of said county, of Williamson, and established and admitted to record in said county, as his last will and testament. A copy of said last will and testament was annexed to the bill. The whole of the persons nominated in the will as executors and executrix, qualified as such, and took upon themselves the burden of executing the same. Of the said executors, Samuel McCutchen and Hannah McCutchen were dead, leaving James Marshall the sole surviving executor of the will. Patrick McCutchen, the testator, departed this life without issue; and Hannah McCutchen, the widow of the said Patrick, although she intermarried, after the death of the said Patrick, with one James Price, also died without issue. By the provisions of the will, said Hannah McCutchen, the widow of the said Patrick, only held under it a life-estate in such portion of the property of the said Patrick as was therein devised and bequeathed to her, which estate had, consequently,

terminated by her death. The bill charged, that they, together with the defendants to this bill, except the defendant James Marshall, were the legal heirs and distributees of the said Patrick McCutchen, deceased. The said Patrick also left as his distributees and heirs-at-law, the defendant, James McCutchen, brother of said Patrick, and *Alexander and William Buchanan, children of a deceased sister of Patrick, but who resided [*222 without the jurisdiction of the court, and were, therefore, not made parties to the bill.

The will of the said Patrick McCutchen, after giving certain legacies to his relatives, devised "to his wife Hannah, during her natural life, the tract of land on which the testator lived, together with all the residue of his personal property, of every kind, including the slaves, which shall remain after the payment of his debts, and the legacies afterwards, to be used as she may think proper; the slaves, nevertheless, to be subject to the arrangement to be made in a subsequent article of the testament." The sixth article of the will was in these terms.

"It is my will and desire, that my negro man slave named Jack, aged about twenty-four years; also my negro man slave named Ben, aged about nineteen years; also my negro woman slave named Rose, aged about twenty-six years, together with what children she may hereafter have, if any, before the death of my wife Hannah; also my negro girl slave named Eliza, aged about eleven years; also my negro girl slave named Cynthia, aged about seven years; also my negro boy slave named Thomas, aged about four years; also my negro girl slave named Harriet, aged about two years; also my negro girl slave named Maria, aged about two months; the four last-mentioned slaves being the children of the above-mentioned Rose, shall all and each, at the time of the death of my beloved wife Hannah, to whom they are given during her natural life, as mentioned in the third article, be liberated from slavery, and for ever and entirely set free; provided, those who are not now of age or shall not have arrived at the age of twenty-one years at the happening of the death of my beloved wife Hannah, shall be subject to the following disposition, viz.: Eliza shall be at the control and under the direction of my brother, Samuel McCutchen, until her arrival at the age of twenty-one years, and then be set free; Cynthia, Ben, Thomas, Harriet and Maria shall be at the control and under the direction of James Marshall, my wife's brother, until they shall each, respectively, arrive at the age of twenty-one years; at which time or times, they are to be each, respectively, liberated and for ever set free."

*The bill charged, that the slaves mentioned in the will, and owned [*223 by the testator, with their increase, were liable to be distributed to the complainants and the defendants, Marshall excepted, as his legal representatives; but that James Marshall refused to distribute them, or any of them, and denied that they were any part of the estate by him to be distributed, alleging that by the terms of the will they were to be set free at the times specified in the will. That the said James Marshall did present a petition to the county court of Williamson county, praying the court to set free a certain number of the said slaves, to wit, Jack, Ben, Thomas, Eliza and Cynthia; and the court, supposing they had power to do so, granted the prayer of the petition, and declared them free; which proceedings the bill charged were *coram non judice* and void, as the court had no power to

set the said negroes free, unless the testator had, in his lifetime, presented a petition for the purpose. The bill further charged, they were advised, that by the laws of the state of Tennessee, slaves could not be set free by last will and testament, or by any directions therein; and that, consequently, all the said slaves, with their increase, were liable to be distributed among the legal representatives of the testator. That if the law authorized a testator to direct his slaves to be set free, by a given period, or at their arriving at a particular age, yet they were still slaves until that period arrived; and that all their increase, born after the death of the testator, but before they were actually set free, were slaves, and as such were liable to distribution. The bill prayed for an account of the hire of the slaves, and for their distribution, and for an injunction, &c.

The defendant, James Marshall, executor of the last will and testament of Patrick McCutchen, demurred to the bill, and the circuit court sustained the demurrer, and ordered the bill to be dismissed. The complainants appealed to this court.

The case was submitted to the court, on printed arguments, by *Benton*, with whom were *Washington* and *Yerger*, for the appellants; and *White*, for the appellees.

The counsel for the *appellants* first referred the court to the following
*224] extract from the will: *"I give and bequeath to my beloved wife Hannah, during her natural life, the tract of land on which I now live, together with all its appurtenances, and the residue of the slaves—the slaves subject to an arrangement to be made in a subsequent article of this testament."

They said, that the slaves, in a subsequent part of the will, he directs to be set free, at the time of the death of his wife Hannah, to whom he had given them for life. In enumerating his slaves he says, that "Rose and such children as she shall have before his wife dies, shall be set free." In relation to the rest of his female slaves, he directs them to be set free, but says nothing of their children.

1. In the case of *Hope* v. *Johnson*, 2 Yerg. 123, it was decided by the supreme court of this state, that where a testator directs that his slaves shall be set free, his executors can have them set free, upon petition, in the same manner as the deceased could in his lifetime. If this case be the law, it is probable, that all the slaves who were directed to be set free at the death of Mrs. McCutchen, would be entitled to their freedom; but still a question arises, as to the children who were born before that period.

Mrs. McCutchen had but a life-estate; the slaves, after her death, belonged to the distributees of McCutchen, until they are set free. The will does not of itself operate as a gift of freedom; the assent of the state must be had, before they can be free; this may never be given. It is settled in this state, that the increase of slaves, born during the continuance of a particular life-estate, does not belong to the tenant for life. *Glasgow* v. *Flowers*, and *Timms* v. *Potter*, 1 Hayw. 234; *Preston* v. *McGaughey*, Cooke 113. It was the early doctrine of the courts, that a limitation of chattels for life, gave the absolute interest, but that notion is now exploded; and, consequently, where slaves are given for life, with remainder over, the first legatee takes only the specific interest given, and the right of absolute pro-

perty rests in the remainder-man. The cases above cited, and 2 Roper on Legacies 351. So, where there is a devise for life alone, the *property, after life-interest, vests in the distributees. *Reith* v. *Seymour*, [*225 4 Russ. 263. In this case, then, there was a devise for life, of the slaves, with a reversion or vested interest in the distributees of McCutchen—subject, however, to be divested by the court, upon petition, setting them free. That it is a vested interest, subject to be divested, is proved by the case of *Doe* v. *Martin*, 4 T. R. 39.

The next question is, what is the condition of children born after a time has been fixed for their mother to obtain her freedom, but before the time arrives, and before she is actually free? In this case, it would seem, that the testator only intended that his then slaves should be free, and not their issue, except Rose's, because he expressly says that Rose shall be free, at the death of his wife, and all her children born before that period. But in speaking of the other female slaves, he directs them to be set free, but says nothing of their issue. But independent of this, the law is clear, that the issue must follow the condition of the mother. In McCutchen's will, the slaves were not free; they had only a right to future freedom, and that depending upon a contingency, to wit, whether the county court would grant the petition. Until the period arrives when they are to become free, they remain slaves; if they die before that time, they die slaves; they are in fact slaves; but entitled to be set free in future.

Suppose, a man devises, that if A. is elected president, his female slave B. shall be free—she has a child born, and after its birth, A. is elected—is not the child a slave, although its mother, after that event has happened, is free? Was it not born, whilst the mother was a slave? Surely, it was. Most of our rules (except statutory provisions) are derived from the civil law. By the civil law, the issue of slaves entitled to future liberty, or entitled to it at a fixed time, or upon a contingency, if born before the period arrives or the contingency happens, are slaves. See authorities collected in Judge GREEN's opinion, 2 Rand. 241–2. In Virginia, the question in the case of *Maria* v. *Surbaugh*, the case above alluded to in 2 Randolph, has been very learnedly *investigated, and it was decided that the issue [*226 were slaves. In Kentucky, the same principle has been established. 2 Bibb 298. So, in Louisiana. *Cato* v. *Dorgenny's Heirs*, 8 Mart. 218. So, in Maryland. 6 Har. & Johns. 16.

At the same time those negroes were born, to whom did they belong? Not to the tenant for life, that is clear. Not to their mothers, for they were slaves at the time, and could hold no property. They must have belonged to the distributees, because their mothers did; subject only to have their interest divested, upon the happening of a contingency. At the instant they were born, they were born the property of the distributees. This property cannot be divested, because the will authorizing a divestiture only applies to their mothers.

But the case of *Hope* v. *Johnson* is not admitted to be law. According to the laws of Tennessee, no man can emancipate his slaves by will. The acts of 1777, ch. 6; 1779, ch. 12; 1788, ch. 20; and 1801, ch. 27, all declare, that no slave shall be emancipated, except for meritorious services, to be adjudged of by the county court. These acts, in their details, prescribe the method of proceeding in cases of emancipation; require security to be given

that the slave to be manumitted shall not become a public charge; and provide for the sale of the slave, when the master suffers him to go at large, or attempts to free him, without complying with the directions of the law. Emancipation, therefore, cannot take place, consistently with these acts, by mere testamentary regulation.

It would, at first view, seem to be strange, that a man could not renounce any right possessed by him. But slaves are a species of property, the right to which the policy of society forbids to be relinquished, without the sanction of the public authorities. Their assent, in the present instance, was not given during the lifetime of the testator; and as soon as he died, the situation of the property was so altered, that it could not be given without the precedent application of the succeeding owners. The declaration, therefore, which is contained in the will under which these negroes claim their freedom, amounts to nothing more than an expression of a wish or intention on the part of the testator, *that they should be free; but no act of manumission was consummated by the will. *227]

To counteract this position, the case of *Hope* v. *Johnson*, decided by the supreme court of Tennessee, will probably be cited. That case, when properly understood, so far as it contains anything touching the present controversy, is an authority for McCutchen. The will of David Beattie was as follows—"I will and bequeath that the plantation I now live on, be sold at public or private sale, to the best advantage, and the proceeds thereof laid out in lands in the Indiana territory, as well situated as can be procured, and the right thereof vested in my negroes, which I now own, to wit, London, George, &c., each and all of whom I give their entire freedom, and the settling of them on the above-named lands, under the direction of my executor." Robert Johnson was the executor. Mrs. Hope, the sister of Beattie, and his only heir-at-law, filed a bill against the executor, to enjoin him from executing that part of the will which related to the sale of the land and investment of the proceeds, upon the ground of its being a void devise, as the negroes could not be emancipated by will, and as they were the objects of the devise in question. The direct object of the bill was not to prevent the emancipation of the slaves, but that matter was incidentally involved in the question growing out of the devise of the land. Mrs. Hope set up no claim to the negroes in her bill; she was willing that they might be just as free as the testator wished them to be; she only contended for the land, that having descended from her father. The case came on before the court, in the first instance, upon a motion by the executor to dissolve the injunction. Whyte, Judge, delivered a very able, elaborate and learned opinion in support of the injunction, and of the grounds assumed in the bill. Haywood and Emmerson, Judges, without either dissolving the injunction, or refusing to do (and that was the issue which they were called upon to decide), made the collateral order, that the injunction should be held up twelve months longer, to give the executor an opportunity of procuring the emancipation of the slaves, by any means by which it could be accomplished. Previous to the date of this very order, an application had been, unsuccessfully, made by the executor to the county court of Davidson, to have said negroes emancipated. *It cannot escape the observation of the supreme court of the United States, that had said negroes been then (at the time of moving for the dissolution of the injunc- *228]

tion) actually free, or that had they been then capable of taking by devise, the executor would have been entitled to an unconditional dissolution of the injunction. The course taken by Judges HAYWOOD and EMMERSON, therefore, unprecedented as it was, proves, however, that until there was a complete emancipation of the negroes, they could not be devisees, and also that they were not *ipso facto* emancipated by the will. These are the reasons which have authorized us to say, that the case of *Hope* v. *Johnson*, so far as it has any bearing upon this case, operates in favor of the appellants.

The executor, taking advantage of the hint afforded by the aforesaid anomalous order of Judges HAYWOOD and EMMERSON, applied to the legislature, and obtained the passage of a special law, having no reference to any body in the world but him, Robert Johnson, and to no other case of emancipation but that of Beattie's negroes; nor pretending to lay down any general rule upon the subject, or to legislate beyond that particular case: whereby the said executor was authorized and empowered to prefer a petition to any county or circuit court, other than that of Davidson, for the emancipation of said negroes; and said law further enacted, that the sentence or decree of such court, when made, should be valid, and should entitle the negroes to their freedom. In pursuance of that law, by which the legislature assumed omnipotence, an application was subsequently made to the circuit court of Sumner county, and the judge of that court sustained the constitutionality of a statute which undertook to divest private vested rights. After the decree of Sumner circuit court was obtained, under the circumstances and in the manner aforesaid, establishing the freedom of Beattie's negroes, the counsel of the executor, not relying altogether upon the validity of the decree, entered into a written agreement with the counsel of Mrs. Hope, whereby it was admitted, that the negroes were free, and should be so considered, whatever the supreme court might determine in relation to the land. In this agreement, the counsel of Mrs. Hope were certainly overreached, as it precluded any discussion as to the legal condition of the negroes, before said decree of *Sumner circuit court, and by virtue of it. The object of Mrs. Hope, in sanctioning said agreement of her counsel, was merely to waive any claim to the negroes as property, and to go exclusively for the recovery of the land. But, by admitting that said negroes had been emancipated by the decree, or were so at any rate, the necessary implication arose, that they were capable of being so emancipated, notwithstanding the legal rights of Mrs. Hope, as attaching to them from the situation in which they were left at Beattie's death; and the conclusion, that the emancipation of them not having been effected in the testator's lifetime, they belonged to the executor as assets, and afterwards went to the distributee was entirely repelled. In this state of the case, it was brought to a final hearing, and the bill dismissed, WHYTE, Judge, still dissenting; and the strength of the argument in favor of the executor, was rested upon the fact that the negroes were then free, if not by the decree, by the said written agreement. [*229

It will be seen from the particular phraseology of Beattie's will, that his land was not devised to his negroes; but the direction was, to his executor, to sell it, and invest the proceeds in the purchase of other land in Indiana, and to invest his negroes with the title to that, and settle them upon it. If it can be considered as a devise of the land to the executor, as

a trustee, it was well enough, provided the trust was of such a nature as could be executed. If, however, *cestui que trust* was incapable of taking, the devise to the executor was just as void as if he himself had been under such a disability. In this case, the negroes not having been freed by the will of Beattie, they descended as property, contemporaneously with the origin of the devise of the land to the executor, in trust for them ; and, consequently, there was no *cestui que trust* that could be recognised as such, for whose benefit the trust could be executed, or which could sustain the devise in trust. *Baptist Association* v. *Hart*, 4 Wheat. 1.

To avoid the operation of the principle last adverted to, the counsel for the executor contended, that the portion of Beattie's will, above quoted, amounted to an executory devise of the land in favor of the negroes. And that if the object of an executory devise have not a natural existence, or have no civil capacity, at the death of the devisor, but should afterwards
*230] *acquire it ; that the devise is good, if the contingency upon which it is to take effect, happen within proper time. The general principle here stated, is undoubtedly true ; but it is very much qualified in its application to the case of *Hope* v. *Johnson*. To give it effect, the object of such a devise must be capable in its own nature of coming into existence, or of acquiring the requisite faculties to take, independently of the conflicting and inconsistent rights of other persons to the subject of the executory devise ; and it must actually come into existence, and acquire the faculties, before such adverse rights accrue. As, for example, an executory devise to an unborn child is good, provided the child be born before the devise is to take effect. But if it be not born at the time the devise is to take effect, although, had it been born, it would have taken the property ; yet, not being then born, the property will go in a different direction ; and having once gone in that direction, it cannot afterwards be recalled, notwithstanding the child designated as the executory devise, should be subsequently born. Again, if a person attainted is an executory devisee, the devise will take effect, provided the attainder be reversed, before the time appointed for that purpose. But suppose, the attainder be not reversed, until after the arival of the time, and the property in the meantime should be cast upon another, in that case, it is very manifest, that the right of that other to it would be good, and the subsequent reversal of the attainder could make no difference. Applying the principle thus explained to the case of *Hope* v. *Johnson*, and it will be seen, that, although there might have been an executory devise of the land to the executor, as the negroes were the executory devisees, who were slaves, and as such went as property to the distributees, before they were emancipated (if ever they were emancipated at all), they could not, therefore, take the land, or its proceeds, by virtue of such subsequent emancipation ; and, indeed, that they were not, and could not, be endowed with the capacity to take. To get over this difficulty, Johnson's counsel founded himself upon the agreement and admission of Mrs. Hope, that the negroes had been emancipated by virtue of the decree of Sumner circuit court ; and from that fact, he declared their capacity to take and hold land, as executory devisees.

*Whether the direction contained in Beattie's will relative to the
*231] disposition of his land, does amount to an executory devise of it, which may well be doubted, it is foreign to my present purpose to inquire.

implication, according to the terms of the said act of 1829, slaves cannot *ipso facto* be freed by will. That they are to receive their freedom, by an act to be performed after the death of the testator. Then, what was the legal condition of the slaves in controversy, *eo instanti* that the testator died? They were undoubtedly slaves still. And if so, they were the property of some person, inasmuch as the title to them could not be in abeyance. That person must have been the distributee, subject to the right of the executor to them, as assets for the payment of debts. They were not needed as assets, as the attempt to emancipate them shows. Then, how have the distributees been divested of their property? It is said, by this act of the executor, done after the death of the testator, and the order of the county court made thereon; to which the distributee was neither a party nor a privy, and concerning which he had no notice whatever. Now, it is humbly apprehended, that the gift of freedom to slaves must proceed *from the owner, with the sanction of the court; and that it can, by no possibility, be derived from one who is not the owner, although he may sustain the character of a court, or of an executor! And it is apprehended further, that it was not competent for the court and the executor to divest the distributee of his property, without affording him any opportunity whatever to prevent it.

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If it were competent for a testator to free his slaves by will, it would be a most alarming doctrine to creditors. To prevent such a prejudice to creditors, no act of assembly has ever gone so far as to prescribe that it might be done; and I presume that no court, of common prudence, would permit an executor to do it, under any circumstances, until he first adduced proof that the creditors were all satisfied, and his administration completed. If then slaves directed to be set free by a testator, could be considered as property for any purpose, after his death, they must be subject to all the incidents of property; and would, consequently, go to the distributee, after the satisfaction of creditors. The case of *Hope* v. *Johnson* is very imperfectly reported. This is a true and full history of it.

White, for the appellees, contended:—That the laws of Tennessee do not prohibit the emancipation of slaves by last will and testament, and that the executors are authorized to observe the directions of the will, if the sovereign power, through the medium of their legislature, or the judicial tribunals, assent to such emancipation. The next of kin have no vested interest to be affected by such acts of the legislature, or decisions of any tribunal in whom jurisdiction is reposed.

The act of North Carolina of 1777, ch. 6, § 2, which was in force in Tennessee, provided, "that no negro or mulatto shall hereafter be set free, except for meritorious services, to be adjudged of and allowed by the county court, and license first had and obtained thereupon." The act of the legislature of Tennessee of 1801, ch. 27, § 1, repealed and modified the former law, and allowed owners of slaves to petition the county court, in all cases, not restricting their power to the case where meritorious services were performed. By the act of 1801, if *the court, upon examining the reasons set forth in the petition, are of opinion, that acceding to the same would be consistent with the interest and policy of the state, the chairman thereof reports on the petition. Under the restrictions of that law, slaves

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can be emancipated. By the act of 1829, ch. 29, in force on the 26th November 1830, when the present bill was filed, it was made the duty of an executor, where a testator had by his will directed any slaves to be set free, to petition the county court accordingly, and if the executor refused, the slaves were authorized to file a bill for their freedom. Upon what ground can the argument be supported, that the directions of a testator to emancipate his slaves are void, and that the executor holds them in trust for the next of kin? It must be, because there is a positive law forbidding such a mode of emancipation. No such law exists. The act of 1777, it is true, provided, that no slave should be emancipated, but for meritorious services, and the county court was the tribunal to adjudge whether those services had been performed. To adjudge between whom? The master and the state. The act of 1801 leaves out the restriction, and gives the county court general powers, because the legislature had been harassed by the frequent applications for emancipation.

The question arising in this cause has been decided in the supreme court of errors and appeals, in the state of Tennessee, in the case of *Anne Hope* v. *Robert Johnson*, executor of the will of David Beattie, which was finally decided in January 1826, and a copy of the record in that cause, and the opinion of the court, is submitted for the inspection of this honorable court. In that case, the testator had given his slaves their freedom, and the bill was filed by the next of kin and heir-at-law, stating that the devises directing the emancipation of the negroes, and the purchasing of lands, were void, and an injunction was granted to prevent the removal of the negroes. The case first came on to be heard on the 4th September 1821, and the supreme court ordered that the executor, or any other of those appointed in said will, who might take upon themselves the execution thereof, should be allowed twelve months from that time, to procure the emancipation of said slaves, by any legal means whatever. In January 1826, the cause was finally heard, and the court, in the decree, pronounced *that the devises and bequests [*235
in the will were legal and valid, and that thereby the executors had full power and authority to procure the emancipation of the negroes, and to sell and dispose of real estate for the use of the negroes. In their opinion, the court says, "that no particular mode of emancipation is specified by either the act of 1777, ch. 6, or of 1801, ch. 27. As between the master and the slave, the intent and volition of the master to emancipate may be made known by any species of instrument that will completely evince it, and then nothing more is wanted, but the assent of the state, expressed by its organ, the court, which may show its determination, by reporting on the petition and certifying the same, and by causing both the petition and report to be filed amongst the records of the court. The mind and desire of the owner may be as well expressed by will, as by deed or any other instrument; and when it is made known by his will, the duty of his executor is, to use such legal means as may be effectual for the completion of his purpose." No decision adverse to this has been made by the supreme court of Tennessee, and the principles established by that decision are believed to be conclusive, in favor of an affirmance of the decree of the circuit court.

The only other case in Tennessee known to the counsel of the defendants, where the power of emancipation by will is alluded to, is the case of *McCutchin* v. *Price*, 3 Hayw. 212. The court says, that "a testator may

I have now gone through the analysis which I intended, of the case of *Hope* v. *Johnson;* and I have but one or two observations more to make concerning it. It will probably be cited by the opposite counsel as a decision upon a statute of a state, by its own tribunal; and he may, in that view, claim for it a particular weight upon the supreme court of the United States. How far is it a decision or exposition of a state statute? Only so far as to settle that slaves cannot be emancipated by will. And so far, as I have before stated, it is an authority for McCutchen. But so far as it respects executory devises, or devises in trust, it is a decision, founded on the general principles of the common law, and is no more to be regarded by the supreme court of the United States, than would be the decision of any other tribunal equally respectable.

By the laws of Tennessee, and the practice under them, petitions for emancipation are always preferred by the owners of slaves, who are desirous of conferring on them freedom; and the only object of such petitions is, to obtain the public sanction, and give the requisite guarantee that the slaves, if superannuated, shall not become a charge to the community. And the county court, which is the public organ for this purpose, has to judge of the policy and propriety, in a moral point of view, of increasing the number of this species of population. Such being the case, there is no necessity for the service of process on any one; the very party to be affected by the decision, to wit, the owner of slaves, being the petitioner and in court. But in the proceeding before Sumner circuit court, under the special statute before referred to, Robert Johnson, the executor of Beattie, was the petitioner; and Mrs. Hope, the distributee, to whom the negroes really belonged, was not cited to defend the petition, nor required by the law to be notified in any way; nor was she in court, and the act of the court upon the petition was wholly *ex parte.*

Hope v. *Johnson* is, moreover, a solitary decision, of a very important character, which has not been generally acquiesced in. And as a proof that it has not been considered as sustaining *the principle determined by it, the act of 1829, ch. 29, was passed; for the provisions [*232
of which there would have been no necessity, if the law had been as attempted to be settled in that case. That act merely carries out the principle of *Hope* v. *Johnson*, by making it the duty of an executor, where the will of a testator directs his slaves so be set free, to prefer a petition to the court for that purpose; and gives the court power, "if it shall appear to them, that the slaves ought of right to be set free," so to order it; he giving bond and security as required by former acts. It further provides, that if the executor fails or omits to prefer such petition, any person may file a bill in equity, as the friend of the negroes, for the same purpose. The act further contemplates, that if the petition is filed, it must be done in the county court; in which case, it requires no notice to the distributee. And although the act is silent as to the process or manner of proceeding, in case the *prochein ami* of the negroes should file a bill in equity; yet, it is to be presumed, that it was intended, that the proceeding there was to be after the manner of that court. Upon this act, and his petition to the county court under it, Marshall, the executor of McCutchen, founds himself, in addition to the authority of the case of *Hope* v. *Johnson.*

The answer to that view of the case is simply this. That by inevitable

direct that the executor shall endeavor to procure the emancipation of his slaves; and if the executor can do so, then all claims founded upon the legal impossibility of doing so vanish."

It is true, that in North Carolina, it has been decided, in the case of *Haywood* v. *Craven*, 2 N. C. Law Repos. 557, and some other cases, that a devise to emancipate slaves is void. But these decisions are not applicable to the state of things in Tennessee, for in North Carolina they have no law similar to the act of Tennessee of 1801, ch. 27, § 1, before mentioned. Their decisions are founded upon the acts of 1741, ch. 24, § 56, and 1777, ch. 6, § 2; and their courts say, that such devises are repugnant to positive provisions by statutes which have pointed out one method only, in which slaves
*236] can be liberated, and that in one case only, to *wit, for meritorious services. Such is not the law of Tennessee, and therefore, the decisions in North Carolina have no application.

It is the settled law of Tennessee, that the issue of a female slave follows the condition of the mother. The case of *Timms* v. *Potter*, 1 Hayw. 234; *Craig* v. *Estes*, Cooke 381; *Preston* v. *McGaughey*, Ibid. 113, establish, that the issue belong to the remainder-man, and not to the tenant for life. These cases have never been disputed. If then the children were born of mothers who were not absolutely slaves, but only for a limited period, having a right to their freedom, if the executor could procure the assent of the legislature, or of the sovereign power; does it not follow, that the children are entitled also to the privilege of freedom? What was the situation of the mother, at the time of the birth of the child? The executors were required to procure her emancipation, at the death of the wife of the testator. She was not a slave, in the usual meaning of the word, she was entitled to freedom, unless that right was refused from principles of public policy, and a court of equity will not prevent the executor from complying with the direction of the testator, upon the application of next of kin who had no vested interest at the time of the death of the testator.

2. But suppose the directions for emancipation are void, are the complainants entitled to sustain this bill? By the codicil to the will, Elizabeth Larkins is made sole residuary legatee of the personal property, which should remain at the death of his wife. Then, the executor, if he could not legally emancipate the slaves, would hold them in trust for the residuary legatee, and not for the next of kin. Slaves are personal property by the laws of Tennessee.

Thompson, Justice, delivered the opinion of the court.—This case comes up by appeal from the decree of the circuit court of the United States for the district of West Tennessee, by which the bill of the complainants was dismissed. The bill states, that Patrick McCutchen, a citizen of the state of Tennessee, departed this life, some time in the year 1812, having shortly before, in the same year, made his last will and testament, which, after his
*237] death, had been duly proved and *recorded. By which will, the testator among other things, bequeathed to his wife Hannah, during her natural life, all his slaves, and provided, that they, specifying them by name, should, at the death of his wife, be liberated from slavery, and for ever and entirely set free; except those that were not of age, or should not have arrived at the age of twenty-one years at the death of his wife. And

those were to be subject to the control, and under the direction of his brother and brother-in-law, until they were of age; at which period they were to be liberated. Samuel McCutchen, James Marshall, and his wife Hannah, were made executors, and all qualified. Patrick McCutchen died without issue; his widow had the possession of the slaves during her life; and James Marshall is the only surviving executor. The bill further states, that the complainants and the defendants, except James Marshall and two others, who are not made parties, because they reside out of the jurisdiction of the court, are the distributees and next of kin to the testator, and that the slaves and their increase are liable to be distributed to and among the complainants and the other next of kin; and that the executor, James Marshall, refuses to distribute them, because the will directs their emancipation. And that he has actually presented a petition to the county court of Williamson, and procured the emancipation of some of them. And the bill charges, that the county court had no power to emancipate upon the application of an executor; that, by the laws of Tennessee, slaves cannot be set free by last will and testament, or by any directions therein; that if the law does authorize emancipation, that they are still slaves until the period for emancipation; and that the increase born after the death of the testator, and before their mothers were actually set free, are slaves, and as such, liable to be distributed. The bill then states the names of the several children, born after the death of the testator; and prays an account of hire, and the distribution of all the slaves and their increase; and an injunction to prevent the executor from proceeding to establish the freedom of the negroes, or removing them beyond the jurisdiction of the court, and also for general relief.

This statement of the allegations in the bill, thus far, is all that is necessary for the purpose of raising the material questions in the case, viz., the right of the owner of slaves in the *state of Tennessee, to manumit such slaves by his last will and testament. To this bill, there is a [*238 demurrer by the executor, Marshall, for want of parties, and also because there is no equity in the bill. The other defendants not having appeared, the bill is taken for confessed by them, and set for hearing *ex parte*. The demurrer admits the facts stated in the bill, and the question already mentioned is raised for the consideration of the court.

As a general proposition, it would seem a little extraordinary, to contend, that the owner of property is not at liberty to renounce his right to it, either absolutely, or in any modified manner he may think proper. As between the owner and his slave, it would require the most explicit prohibition by law, to restrain this right. Considerations of policy, with respect to this species of property, may justify legislative regulation, as to the guards and checks under which such manumission shall take place; especially, so as to provide against the public's becoming chargeable for the maintenance of slaves so manumitted. It becomes necessary, therefore, to inquire what legislative provision has been made in the state of Tennessee on this subject; and it will be found, that the legislature has been gradually relaxing the restrictions upon the right of manumission. By the act of North Carolina, 1777, ch. 6, § 2, which was in force in Tennessee, it is declared, that no negro or mulatto shall hereafter be set free, except for meritorious services, to be adjudged of, and allowed by the county court. The act of Tennessee of 1801, ch. 27, § 1, modified the former law, and allowed the owners of

slaves to petition the county court in all cases; setting forth the intention and motive for such emancipation, without any restriction as to meritorious services. And if the county court, upon examining the reasons set forth in the petition, shall be of opinion, that acceding to the same would be consistent with the interest and policy of the state, they are authorized to allow the manumission, under the provisions therein prescribed, to guard against the slave, so manumitted, becoming a public charge for maintenance.

This act does not, in terms, extend the right of application to the county court for the manumission of slaves, to any one, except the *owner* of the slaves. And it is argued, on the part *of the appellants, that no such *239] application can be made by executors; and that the declaration and direction in the will of Patrick McCutchen, in relation to the manumission of his slaves, amounts to no more than an expression of a wish on the part of the testator, that his slaves should be free; but did not amount to a manumission, or confer any authority on the executor to consummate the manumission, by application to the county court. And the power of the county court to manumit on the application of the executor, is denied; and their proceedings in the present case, alleged to be entirely void.

This question came under the consideration of the court of appeals in the state of Tennessee, in the case of *Anne Hope* v. *Robert Johnson*, executor of David Beattie, decided in January 1826. In that case, Beattie, by his will, directed certain parts of his property to be sold, and the proceeds thereof to be laid out in lands in the Indiana territory; the right to which he vested in the negroes he then owned, naming them. "Each and all of whom I give their entire freedom, and the settling of them on the above lands, under the direction of my executor." The bill was filed by the next of kin and heir-at-law; alleging, that the direction, with respect to the manumission of the slaves, and the purchase of the land, was void. The court decided, that the devises and bequests in the bill, were legal and valid; and that thereby the executor had full power and authority to procure the manumission of the slaves; and to sell and dispose of the estate for their use, according to the directions in the will. The court, in pronouncing their opinion, say, "that no particular mode of emancipation is specified, either by the act, of 1777 or of 1801. As between the master and the slave, the intent and volition of the master to emancipate, may be made known by any species of instrument that will completely evince it; and then nothing more is wanted but the assent of the state, expressed by its organ, the court; which may show its determination by reporting on the petition, and certifying the same; and by causing both the petition and the report to be filed among the records of the court. The mind and desire of the owner may be as well expressed by will, as by deed or any other instrument; and when it is made known by his will, the *duty of his executor is, to *240] use such legal means as may be effectual for the completion of his purpose."

This is a judicial interpretation by the highest court in the state, of one of its own statutes, which has always been held by this court as conclusive; especially, if such interpretation has not been called in question in its own tribunals, and no case has been referred to, tending in any measure to shake this decision. And indeed, it is very much strengthened, if not absolutely confirmed, by the subsequent act of 1829, ch. 29, by which it is made the

duty of an executor, or administrator with the will annexed, where a testator had, by his will, directed any slaves to be set free, to petition the county court accordingly, and if the executor or administrator shall fail or refuse to do so, the slaves are authorized to file a bill for their freedom, under certain regulations pointed out by the statute. (Digest. Ten. Laws 327, where all the laws are collected.)

This act having been passed since the death of the testator in the case now before us, and since the manumission by the county court of Williamson county (as is presumed, though that time does not appear in the record), may not ratify and confirm the manumissions, in the present case. Yet having been passed since the decisions in the case of *Hope* v. *Johnson*, it may well be considered a legislative sanction of the construction which had been given by the court of appeals to the act of 1801. At all events, the decision in the case of *Hope* v. *Johnson*, must be considered as settling the construction of the act of 1801, and authorizing the executor to petition the court for the manumission of the slaves, and justifying the proceedings of the court thereupon.

This construction of the act of 1801, puts at rest the claims of the appellants to all the slaves, except the children of the females, which were born after the death of the testator, and before the death of his widow, to whom all his slaves were bequeathed, during her natural life. And this class includes the children of Eliza and Cynthia only. For, with respect to Rose and her children, the testator declares, that upon the death of his wife, they shall be liberated from slavery, and for ever and entirely set free. The question then arises, how the children of Eliza and Cynthia, born during the continuance of the life-estate of the *widow, are to be considered. It [*241] is admitted to be a settled rule in the state of Tennessee, that the issue of a female slave follows the condition of the mother. If, therefore, Eliza and Cynthia were slaves, when their children were born, it will follow, as matter of course, that their children are slaves also. If this was an open question, it might be urged with some force, that the condition of Eliza and Cynthia, during the life of the widow, was not that of absolute slavery; but was, by the will, converted into a modified servitude, to end upon the death of the widow, or on their arrival at the age of twenty-one years, should she die before that time. If the mothers were not absolute slaves, but held in the condition just mentioned, it would seem to follow, that their children would stand in the same condition, and be entitled to their freedom on their arrival at twenty-one years of age. But the course of decisions in the state of Tennessee, and some other states where slavery is tolerated, go very strongly, if not conclusively, to establish the principle, that females thus situated, are considered slaves. That it is only a conditional manumission, and that, until the contingency happens, upon which the freedom is to take effect, they remain, to all intents and purposes, absolute slaves. And we do not mean to disturb that principle. Cooke 131, 381; 2 Rand. 228; 1 Hayw. 234. The children of Eliza and Cynthia must, therefore, be considered slaves; and the question arises, whether the allegations in the bill are sufficient to call upon the executor to account for their wages, or to restrain him from taking any measures to establish their freedom.

The bill charges, that Pleasant and ten others, naming them, the children of Cynthia and Eliza (or perhaps Rose), were all born after the death of the

said Patrick, and before the time arrived, when, by the directions of the said will, they were to be set free; and that they are (if no others) to be distributed among the representatives of the said Patrick; and prays, that the executor, James Marshall, may be compelled to distribute said slaves among the complainants, and account for their hire in the proportions to which they are entitled. We think these allegations are too vague and uncertain to call upon the executor to account, in any manner, for those children. *In the first place, it is left entirely uncertain, which of *242] the persons named are the children of Eliza or Cynthia. They are alleged to be the children of Eliza and Cynthia (or perhaps Rose), that is, perhaps the children of Rose. Now, if they, or any of them, are the children of Rose, such children are expressly manumitted by the will. In the next place, it is not alleged, which of them are the children of Eliza, and which of Cynthia. And by the will, a special and different disposition is made of these two. The testator directs, that Eliza shall be at the control and under the direction of his brother, Samuel McCutchen, until her arrival at the age of twenty-one years, and then to be set free. And that Cynthia shall be at the control and under the direction of James Marshall, until she arrives at the age of twenty-one years, when she shall be liberated and for ever set free. The bill does not charge the appellee with having the possession or control of these children; or that he has received any wages for, or on account of them. Nor, under the various dispositions of these slaves, by the will of Patrick McCutchen, will the law charge the surviving executor with a breach of trust or neglect of duty, in not taking the charge and management of these children. If they are slaves, and the complainants have a right to them, they have an adequate remedy at law, to assist and enforce that right.

But it is contended on the part of the appellee, that, independent of all other considerations, the appellants have no right to these slaves, or any part of them—for, by the codicil to the will, Elizabeth Larkins is made sole residuary legatee of the personal property which should remain at the death of the testator's wife; and that slaves in Tennessee, being personal property, the executor holds them in trust for the residuary legatee, and not for the next of kin. We do not, however, think this is the true construction of the codicil. It professes to explain one of the articles in the will, but not to make a different disposition of the property mentioned in that article. The article referred to, is the fifth, which in the will reads thus: "I will and bequeath to the said Patrick McCutchen, fourth son of my brother, Samuel McCutchen, and to Elizabeth Larkins, daughter of John Larkins, by his first wife, Margaret, jointly and equally, the land *on which I now live, *243] with all its appurtenances, together with all the residue of my personal property (slaves excepted) which shall remain after payment of my just debts, &c., to take effect at the death of my beloved wife," &c. The codicil reads thus: "Whereas, some doubts may be entertained respecting the construction of the fifth article, and as I find upon review of the subject, I have not expressed my meaning with sufficient perspicuity, I declare this to be my will and meaning of the said fifth article; Patrick McCutchen, named in that article, is to be the joint legatee with Elizabeth Larkins, of the land only, and Elizabeth Larkins sole residuary legatee of the personal property which shall remain at the death of my wife." The personal property referred to in the codicil, must mean the same personal property men-

tioned in the fifth article, otherwise, the codicil would not be what it professed to be, explanatory of that article, but would be a different disposition of the property. The codicil must, therefore, be read with the same exception of the slaves as is contained in the fifth article. And that the testator did not intend to include any slaves in this codicil is very evident, because by the will, at the death of his wife, all his slaves were to be manumitted; so that there could be no slaves to pass under the residuary clause in the will, or the codicil.

But upon the other grounds stated in this opinion, we think the bill contains no equity which entitles the appellants to relief. And the decree of the circuit court dismissing the bill, is accordingly affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of West Tennessee, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of this said circuit court in this cause be and the same is hereby affirmed, with costs.

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*Sidney Gregg by N. B. Craig, her committee, Plaintiff in error, [*244
v. The Lessee of Gabriel Sayre and wife.

Statute of limitations.—Bills of exception.—Concurrent jurisdiction in cases of fraud.

The 8th section of the statute of limitations of Pennsylvania fixes the limitation of twenty-one years as taking away the right of entry on lands; and the 9th section provides, that if any person or persons, having such right or title, be, or shall be, at the time such right or title first descended or accrued, within the age of twenty-one years, *femes covert*, &c., then such person or persons, and the heir or heirs of such person or persons, shall and may, notwithstanding the said twenty-one years be expired, bring his or their action, or make his or their entry, &c., within ten years after attaining full age, &c. The defendant in error was born in 1791, and was twenty-one years of age in 1812; an interest in the property, for which this ejectment was brought, descended to her in 1799; the title of the plaintiff in error commenced on the 13th April 1805, under deeds adverse to the title of the defendant in error, and all others holding possession of the property under the same; on the 13th April 1826, twenty-one years prescribed by the statute of limitations for a right of entry against her possession, expired; and the bar was complete at that time, as more than ten years had run from the time the defendant in error became of full age; this suit was not commenced until May 1830.

This court have frequently remonstrated against the practice of spreading the charge of the judge at length upon the record, instead of the points excepted to, as productive of no good, but much inconvenience.

It is an admitted principle, that a court of law has concurrent jurisdiction with a court of chancery, in cases of fraud; but when matters alleged to be fraudulent are investigated in a court of law, it is the province of a jury to find the facts, and determine their character.

Fraud, it is said, will never be presumed, though it may be proved by circumstances. Now, where an act does not necessarily import fraud, where it is more likely to have been done through a good than a bad motive, fraud should never be presumed.[1]

Even if the grantor in deeds be justly chargeable with fraud, but the grantees did not participate in it; and when they received their deeds, had no knowledge of it, but accepted the same in

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[1] Fraud is not to be presumed, without satisfactory proof of its existence; which cannot be affirmed, where a proper motive exists, which might as readily have been the operating motive, as one that was fraudulent. Bear's Estate, 60 Penn. St. 430.

good faith, the deeds upon their face purporting to convey a title in fee, and showing the nature and extent of the premises, there can be no doubt, the deeds do give color of title, under the statute of limitations.

Error to the District Court for the Western District of Pennsylvania.

*245] This case was submitted to the court upon printed arguments, *by *Watts*, for the plaintiff in error; and *Fetterman*, for the defendant. The case is fully stated in the opinion of the court.

As the decision of the court was upon the application of the statute of limitations of Pennsylvania only, the arguments of the counsel, upon other points presented to the court, are omitted. Upon the effect of the statute of limitations on the case, the counsel for the plaintiff in error contended, that the defendant having shown an actual, adverse, notorious and continuous possession of the land in controversy, from the year 1799, until after the institution of this ejectment; and having also exhibited deeds of conveyance for the same, dated the 24th of November 1804, and the 13th of April 1805, from John Ormsby to Isaac Gregg and Sidney his wife; the court erred in their charge to the jury, that the defendant was not protected by the statute of limitations.

McLean, Justice, delivered the opinion of the court.—An action of ejectment was originally commenced, between the above parties in the district court (which possesses circuit court powers) for the western district of Pennsylvania, and a judgment was obtained by Sayre and wife, to recover possession of certain lots of land within the original manor of Pittsburgh. To reverse this judgment, a writ of error was prosecuted, which brings the case before this court.

On the trial in the district court, a bill of exceptions was taken, out of which arise certain points that are now to be considered and decided. The bill of exceptions reads in part, as follows:

"And the counsel for the plaintiffs, to maintain and prove the issue, gave in evidence, among other matters, a deed from John Penn, Jun., and John Penn to Nathaniel Bedford, dated the 31st day of May 1786, for sixty-two acres of land on the Monongahela river, in the manor of Pittsburgh, being acknowledged on the 1st day of June 1786, in the city of Philadelphia, and duly recorded, &c.; also an assignment, indorsed upon said deed, of all the right, title, claim and interest of the said Nathaniel Bedford to the premises, to Mrs. Jane Ormsby, dated the 1st day of June 1786, and duly acknowledged, &c.; also a certificate of the recorder of the county of Washington,

*246] dated the 15th of October 1831, that there is *no record of the transfer of the title to the premises aforesaid, by said N. Bedford to Mrs. Jane Ormsby, in the office of Washington county. It was then admitted, by the attorneys for the parties, that the children of John and Jane Ormsby were, Mrs. Bedford, who died on the 8th of July 1790, without issue; John Ormsby, Jun., who died in August 1795; Joseph B. Ormsby, who died on the 20th of December 1803; Oliver Ormsby, who died in the year 1832; and the present defendant, Mrs. Sidney Gregg, who is the only survivor, and, under the providence of God, a lunatic. It was further admitted, that Mrs. Jane Ormsby, the wife of John Ormsby, died intestate, on the 13th day of June 1799, and that her husband, John Ormsby, died on the 19th day of December 1805."

The possession of Mrs. Gregg, of the twenty-five acres, and of the eight acres and one hundred and twenty-two perches, the upper part of the sixty-two acre tract, was then admitted by the counsel for the defendants.

"The plaintiffs further offered in evidence, a petition to the orphans' court of the county of Allegheny, signed by O. Ormsby and N. B. Craig, the committee of Mrs. Sidney Gregg, and filed in November term 1828.

"Among other evidence, the counsel for the defendants proved, by the testimony of John Hutchinson, that he had known the family of Mr. Ormsby for forty years, and lived as a tenant under the old gentleman and his son Oliver Ormsby, about thirty-five years, and sometimes in their families, before old John Ormsby's death. Isaac Gregg, his son-in-law, as early as 1799, employed hands to clear out the piece of property where the ferry-house now stands; the part next the hill being cleared, and the part next the river being in woods. That the said Gregg employed his brother and himself, who cut off the timber into cord wood; that Mr. Gregg was cautious in showing them the lines marked by a post on the bank, and a buttonwood tree blazed, four or five rods above the run that falls into the river, that we should not cut the timber below it, as the land belonged to Mr. Ormsby; that in the year 1800, Mr. Gregg employed them to go up the hill, and to cut timber to build a house and four fences; and in the autumn *of 1800, the house was put up by them, and that he paid them [*247
seventy-five or eighty dollars for doing it. Mr. Gregg put Alexander Gibson, as a tenant, in the house, who occupied it that fall and the succeeding winter, and made an agreement with Mr. Gregg, to rent it for several years, but afterwards abandoned it. Samuel Emmet went into the house, in the spring of 1801, and occupied it for a great number of years. George Kintzer was in it for many years after Emmet. Andrew Rearick was there; and Young lived in it a year; George Bonners for six months; Jacob Drake for three years. These tenants were all put in by Isaac Gregg and his family. Witness also stated, that he recollected that Isaac Gregg got another lot adjoining the twenty-five acre lot, and between it and the bridge, about twenty-nine years ago. Mr. Gregg was to allow John Tate, his tenant, out of the rent, for putting up a barn, and witness assisted him, &c. On the twenty-five acre lot, there was the ferry-house, a stable and a large shed; these improvements were all made by Mr. Gregg. The fences were put around the upper lot in 1800; the lower lot was fenced long before. The fences, since that time, have been kept up, and the witness never understood, that any one, except Mr. Gregg, had any claim to the lots. Witness refers to the two lots in controversy.

"James Ross, Esq., testified, among other things, that he was acquainted with John Ormsby's family in 1782. In 1784, Colonel Woods, as the agent of the Penns, surveyed the sixty-two acres in controversy, and noted, in his draft, that the tract was platted for John Ormsby. After the reservation of this lot, from Mr. Ormsby, the manor was subdivided. Mr. Woods and Mr. Brackenridge, who were the counsel for Mr. Ormsby, recommended that the deed should be taken out in the name of Mrs. Ormsby; and Dr. Bedford, her son-in-law, proceeded to Philadelphia for that purpose, and brought back the title; the consideration money had, probably, been accumulated by Mrs. Ormsby. Isaac Gregg was in possession of the property, before the dates of

the deeds to him. In 1802, Mr. Gregg had the ferry, and he and his tenants have held possession ever since.

*248] "Other witnesses were examined, who corroborated the facts *already stated. Defendants also produced, and read in evidence, two deeds; the first from John Ormsby, Jun., to Isaac and Sidney Gregg, dated the 24th day of November 1804, which had been duly acknowledged and recorded, for twenty-five acres of the land in dispute; and also a deed from the same to Sidney Gregg, dated the 13th of April 1805, for eight acres and one hundred and twenty-two perches. Several leases of the tenants of Isaac Gregg and his family were read, and proof was made of the payment of taxes on the lots. The defendants also read in evidence, the will of Joseph B. Ormsby, and reference was made to an action of partition, instituted by the plaintiffs against the defendants, in which a judgment had been rendered in favor of defendants; to reverse which judgment, a writ of error was brought, and was still pending in the supreme court of Pennsylvania.

"The plaintiff's counsel then proved, by the testimony of Samuel Pettigrew, Esq., that he was one of the viewers appointed by the orphans' court, under the petition of the 23d of December 1832, before referred to; that the viewers went on the ground, and allotted a portion of the upper part of the tract to Mrs. Gregg, and the lower part to Mrs. Ormsby.

"The counsel for the defendants then offered to prove, by the testimony of H. M. Watts, who was attorney for Mr. Ormsby, and presented the petition above referred to, that it was done at the instance of Mr. Ormsby, for the purpose of establishing his title to the lower part of the tract; that at the time said petition was signed, it was done reluctantly by Mr. N. B. Craig, as the committee of Mrs. Gregg, and understood that Mrs. Gregg had heretofore claimed the portion of the tract she occupied, in severalty, and that the said petition, and the decree of the court upon it, were not to affect her right. Which testimony, on being objected to, was overruled by the court."

The evidence being closed, the counsel for the defendants prayed the court to instruct the jury on the following points:

1. To entitle the plaintiffs to recover, on the ground that Mrs. Sayre is a child and heir of John Ormsby, they must prove that there was an actual marriage between him and her mother.

2. That the statute of limitations does apply to tenants in common; and if the jury shall believe, that the land in question *belonged to *249] Jane Ormsby, and descended to Mary Sayre and the other heirs, yet the statute of limitations would be a bar to plaintiff's recovery, if there was an actual adverse and continuous possession in the defendant, and those under whom she claims, for twenty-one years.

3. That if the jury shall believe the testimony of James Ross, John Hutchinson and George Kintzer, the facts sworn to by them, establish that kind of actual continuous and adverse possession, acknowledged by the courts, as coming up to, and fully within, the statute of limitations. Several other points were made in the special prayer for instructions, but it is not important, now, to advert to them.

The court instructed the jury, in substance, that the deeds from John Ormsby to the defendants, dated in the years 1804 and 1805, and which purported to convey the fee-simple, in consideration of natural love and

affection, did not transfer the fee, as Ormsby only had a life-estate in the premises. "That the deed of the husband cannot pass his wife's lands, and no possession of the lands by the grantee, under the grant, can create a presumption of title, or become adverse to the true owner. An act or deed which is void, cannot be the foundation of an adverse possession, for it can give no color of title; and a void title is not such a conveyance as that a possession under it will be protected, under the statute of limitations. The conveyance of N. Bedford to Jane Ormsby, was indorsed on the deed from the Penns to N. Bedford; and the conveyance by John Ormsby to Isaac and Sidney Gregg, recites the conveyance to Bedford. It must, therefore, be presumed, that John Ormsby had possession of the deed from the Penns to N. Bedford; and that he, at least, was conusant of the title of the heirs of John Ormsby. The deeds to Isaac Gregg and to Sidney Gregg, set forth a conveyance from N. Bedford to John Ormsby; such a conveyance, however, was never made; and while that is admitted, the recital is attempted to be justified on other grounds. It is clear, that the deed from N. Bedford to Jane Ormsby, was withheld from the record by John Ormsby; and there is evidence enough to infer, that it was suppressed by him, for, being in possession of the deed, he had power to direct it to be recorded. His omission to do so, his false recital of a deed to himself from N. Bedford for the same land, and *his concealment of the existence of any conveyance to Jane Ormsby, leave no doubt of his intention to suppress that conveyance. This conduct was fraudulent on the part of John Ormsby; and it is not material, whether Isaac Gregg and Sidney Gregg were parties to it or not, since no estate can be acquired by a fraudulent grant; covinous conveyance of land is as no conveyance, as against the interest intended to be defrauded. And it must follow, that no act or deed which is fraudulent, can be the foundation of an adverse possession; because being absolutely void, and not merely voidable, it cannot afford color of title; and without color of title, there is nothing by which an adverse possession can be obtained, and for this reason: the statute of limitations does not extend to cases of fraud, and only begins to run from the time the fraud becomes known to the person then having the title. That all purchasers, for a valuable consideration, are affected with constructive notice of all that is apparent upon the face of the title deeds under which they claim. [*250

"The right of Sidney Gregg, as one of the heirs of John Ormsby, if any she has as such, to the actual possession of the land, accrued after the death of John Ormsby, Jun. She may have then entered as one of the heirs of Jane Ormsby; and since that time, to the time of bringing this suit, has held, as she alleges, adversely to her co-tenants in common, and relies upon the statute of limitations to protect her in her claim. A possession, to prevent a recovery, or vest a right, under the statute of limitations, must be actual, continued, adverse and exclusive; and it is a settled principle, that the doctrine of adverse possession is to be taken strictly, and not to be made out by inference, but by clear and positive proof. Every presumption is in favor of possession in subordination to the title of the true owner; and whenever an adverse possession is relied on, there should be some proof of an actual ouster. The possession of one tenant in common, is *primâ facie* the possession of his companion; and the possession of the one can never be

considered as adverse to the title of the other, unless it be attended with circumstances demonstrative of an adverse intent. And if one tenant in common enters, generally, without saying for whom, it will be implied, that he enters according to law; that is, for himself, and the other tenant or
*251] tenants. To rebut *this presumption of the law, an actual ouster must be proved; which, however, may be inferred from circumstances, of which the jury are to judge. They may presume an actual ouster, where one tenant in common enters on the whole, takes the profits and claims the whole exclusively, for twenty-one years. Under such circumstances, his possession becomes adverse, and the act of limitations begins to run. But a bare perception of profits by one tenant in common, is not an ouster of his co-tenant. The statute will not run, where one holds as tenant in common, during the minority of his co-tenant. That one tenant in common may oust his co-tenant, and hold in severalty, is not to be questioned. But a silent possession, accompanied with no act which can amount to an ouster, or give notice to his co-tenant that his possession is adverse, ought not to be construed into an adverse possession. What facts constitute an ouster, and what adverse possession, must be determined by a jury. The party against whom the adverse possession is claimed cannot be concluded by it, if he labor under any of the disabilities pointed out in the statute; or where his co-tenant, claiming adversely, has been guilty of fraud, by concealing or suppressing the title.

"If Isaac Gregg entered upon the land adversely, fenced and occupied it exclusively, and that occupation has been uninterruptedly continued for twenty-one years, it would be available as a bar, although Isaac Gregg may have entered as a trespasser; but the acceptance of the deeds from John Ormsby, in 1804 and 1805, although these deeds were void as to the inheritance, must lead to the conclusion, that he held under John Ormsby, sen. The petition to the orphans' court for a partition of the land, in December 1828, supports this view of the case, and both acts show a disaffirmance of the title by the settlement and improvement, if any existed.' The residue of the charge affirms principles, some of which are not controverted, and it need not be noticed.

This court have frequently remonstrated against the practice of spreading the charge of the judge at length upon the record, instead of the points excepted to, as productive of no good, but much inconvenience.

The principal question in this case, and, indeed, the only one of much
*252] importance, arises under the statute of limitations. *By this statute, an adverse possession of twenty-one years, under a claim of title, will bar a recovery, though the occupant have no title. Possession of the lots in controversy was taken by the defendants, in the court below, and is still continued, but the court instructed the jury, that the acceptance of the deeds by Gregg and wife, from John Ormsby, sen., in the years 1804 and 1805, was an abandonment of their prior claim by occupancy, and that they must be considered as holding under those deeds. If it were necessary to a decision of this controversy, the correctness of this instruction might well be questioned. Ormsby had a life-estate in the property, and it is not seen how the grantees of this estate abandon their title in fee, or any other claim beyond that of a life-estate, which they might have to the

premises. But, as the decision of the case must turn upon another point, it is not necessary to examine this one.

It is true, as stated in the charge, that the husband cannot convey his wife's land so as to bind the inheritance. That as he holds only an estate for life in such land, he can convey no greater interest. But were the circumstances under which the deeds of 1804 and 1805, by John Ormsby to Gregg and wife, such as to make those deeds fraudulent, and wholly inoperative, under the statute of limitations? And was it immaterial, whether Gregg and wife participated in this fraud of Ormsby, or had any knowledge of it, as expressly charged by the court?

It is an admitted principle, that a court of law has concurrent jurisdiction with the court of chancery, in cases of fraud. But when matters alleged to be fraudulent are investigated in a court of law, it is the province of a jury, to find the facts, and determine their character, under the instruction of the court. Ormsby, in the opinion of the district court, was guilty of fraud, in not having the deed from N. Bedford to Jane Ormsby recorded, in reciting in his deeds to Gregg and wife, in 1804 and 1805, that a conveyance had been made to him by Bedford, when he knew that it had been made to Jane Ormsby his wife.

It would be difficult to assign any fraudulent motive to Ormsby, in either of the acts stated. The deed to his wife, from Bedford, was valid, though it was not recorded; and that he did not withhold it from the record, with any view to his *personal advantage, is evident, from the fact of his having conveyed the property, in consideration of [*253 natural affection, to the only surviving child of himself and the grantee. In making these conveyances, on whom did he design to practise a fraud? Not on the grantees, for he received no other consideration from them than the impulse of fraternal attachment. Not on creditors, for it does not appear that they have been prejudiced. Did he design to defraud his grand-daughter, who prosecuted the action of ejectment in the district court? There is no foundation in the facts and circumstances of the case for such an imputation. Does the recital in these deeds, that Bedford had conveyed to Ormsby, afford evidence of fraud? This recital may have been made, and, indeed, it would seem, under the circumstances, was, most probably, made, through a mistake of the law. Bedford had conveyed to his wife, Jane Ormsby, and he might suppose that a *feme covert* could not take an estate in fee, and that the conveyance inured to his benefit.

It appears, from the arguments of counsel, that this question was not considered entirely free from difficulty, under the laws of Pennsylvania, among some of the learned profession, at that early day. Fraud, it is said, will never be presumed, though it may be proved by circumstances. Now, where an act does not necessarily import fraud; where it has more likely been done through a good than a bad motive, fraud should never be presumed. But it is not necessary to decide, whether these conveyances were fraudulently made by Ormsby, or not. The important point is, to know whether Gregg and his wife had any knowledge of the fraud, if committed, or participated in it. This knowledge, the court charged the jury, was immaterial; as the fraud of Ormsby rendered the deeds void, and, consequently, they could give no color of title to an adverse possession.

This instruction is clearly erroneous. If Ormsby be justly chargeable

with fraud, yet if Gregg and wife did not participate in it; if, when they received their deeds, they had no knowledge of it, there can be no doubt, that the deeds do give color of title, under the statute of limitations. Upon
*254] their face, the deeds purport to convey a title in fee; *and having been accepted in good faith by Gregg and wife, they show the nature and extent of their claim to the premises. Ormsby could convey no greater interest in the land than he possessed; but there is no evidence to show that the grantees in this case knew that his estate was limited, or that, in accepting the deeds, holding possession of the property, and improving it, they did not act in good faith. The possession which they hold under these deeds was adverse to Sayre and wife, and all other persons. The titles were for the whole property, and in fee; consequently, there can be no presumption that the possession was held as co-tenants with the plaintiffs in the court below. Both the possession and the titles were exclusive; and they were, consequently, adverse to all other claimants.

The eighth section of the statute fixes the limitation of twenty-one years as taking away the right of entry; and in the ninth section it is provided, "that if any person or persons having such right or title be, or shall be, at the time such right or title first descended or accrued, within the age of twenty-one years, or *femes covert;* then such person or persons, and the heir and heirs of such person or persons, shall and may, notwithstanding the said twenty-one years be expired, bring his or their action, or make his or their entry, &c., within ten years next after attaining full age," &c. Mary Sayre, the defendant in error, was born in 1791, and she was twenty-one years of age in 1812. Her father having previously died, an interest in the property descended to her, on the decease of her grandmother, Jane Ormsby, in 1799. The second deed, from Ormsby to Sidney Gregg, was made on the 13th of April 1805, the first one having been executed the year before. On the 13th of April 1826, the twenty-one years prescribed by statute expired, and the bar was complete at that time, if the possession had been uninterrupted, as more than ten years had run from the time Mary Sayre became of full age. The suit in the district court was not commenced until May 1830.

As this point decides the case, it is not necessary to examine other parts of the charge to the jury. For the reasons assigned, the judgment of the district court must be reversed.

*255] *This cause came on to be heard, on the transcript of the record from the district court of the United States, for the western district of Pennsylvania, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court, for further proceedings to be had therein, according to law and justice, and in conformity to the opinion of this court.

*Joseph Mandeville and others, Appellants, *v.* Roderick Burt, Complainant.

The same Appellants *v.* J. and W. Southgate, Complainants.

The same Appellants *v.* William Neale, Administrator of Francis Keene, Complainant.

The same Appellants *v.* Alexander Sangston, Complainant.

The same Appellants *v.* John and Reuben Withers, Complainants.

The same Appellants *v.* Thomson Mason, Administrator.

Practice.

In the circuit court of Alexandria, in 1817, several suits were brought against sundry individuals who had associated to form a bank, called the Merchants' Bank of Alexandria; the proceedings were regularly carried on in one of them, brought by Romulus Riggs; and a decree was pronounced by the court, from which the defendants appealed; on a hearing, the decree was reversed and the cause remanded for further proceedings, in conformity with certain principles prescribed in the decree of reversal. It appeared, that decrees were pronounced in all the causes, though regular proceedings were had only in the case of Romulus Riggs; appeals were entered in these cases from the decrees of the court. Under such circumstances, the court can only reverse the decree in each case, for want of a bill.

The whole business appearing to have been conducted, in the confidence that the pleadings in the case of Romulus Riggs could be introduced into the other causes, the cases were remanded to the circuit court, with directions to allow bills to be filed, and to proceed thereon according to law.

Appeals from the Circuit Court of the district of Columbia, in the county of Alexandria.

These cases were submitted to the court by *Lee*, for the appellants; no counsel appeared for the appellees.

Mr. Lee stated, that the cases depend mainly upon the principles of the decision of the supreme court, rendered at January term 1829, in the case of *Romulus Riggs* v. *The Stockholders *of the Merchants' Bank*, reported in 2 Pet. 482, under the name of *Mandeville* v. *Riggs*. [*257

In the present cases, there is an additional objection to the decree in each of them, which is, that no bill was ever filed. It appears, from the proceedings, that it was agreed, that the answers in the case of Riggs were to be filed in these cases; it is contended, that that was to be done when bills were filed.

The appellants insist, in these cases, on the same objections to the decree of the circuit court, which were urged in the case of Riggs, with that of a want of a bill.

Marshall, Ch. J., delivered the opinion of the court.—This is an appeal from a decree pronounced by the circuit court of the United States for the district of Columbia, sitting in chancery for the county of Alexandria. A *subpœna*, which was regularly issued, was served on some of the defendants; after which, the record states, that the complainant appeared by his attorney, and filed his bill, which was taken for confessed against those defendants, on whom process was served. The clerk certifies, that no bill appears among the papers in the cause. Several answers are then filed, which purport to

be answers to a bill filed, not by the plaintiff, Roderick Burt, but by Romulus Riggs. The record contains several accounts, and a report by certain trustees of an unchartered bank, the members of which, as may be inferred from the statements on the record, are the defendants in this case, against whom the suit is brought, to recover a note or notes held by the plaintiff. The court then proceeds to render a decree in the cause, from which the defendants have prayed an appeal to this court.

There being no bill, the court cannot inquire into the merits of this decree. The regular course of proceeding would be, on the suggestion of diminution, to award a *certiorari* for a fuller record. But no counsel appears to suggest diminution, or ask for a *certiorari;* and the court is satisfied that no fuller record could be brought up.

In the year 1817, several suits were brought against sundry individuals
*258] who had associated to form a bank called the *Merchants' Bank of Alexandria. The proceedings were regularly carried on in one of them, brought by Romulus Riggs; and a decree was pronounced by the court, from which the defendants appealed. On a hearing, the decree was reversed (2 Pet. 482), and the cause remanded for further proceedings, in conformity with certain principles prescribed in the decree of reversal. It appears, that decrees were pronounced in all the causes, though regular proceedings were had only in the case of Romulus Riggs. Under such circumstances, the court can only reverse the decree for want of a bill. Under the particular circumstances, the whole business appearing to have been conducted in the confidence that the pleadings in the case of Romulus Riggs could be introduced into the other causes, the case is remanded to the circuit court, with directions to allow a bill to be filed, and to proceed thereon according to law.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Alexandria, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the decree of the said circuit court, under the circumstances of the case, should be reversed, for the want of a bill; and that the cause should be remanded to the said court, with directions to allow a bill to be filed, and to proceed thereon according to law. Whereupon, it is considered, ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby reversed for want of a bill; and that this cause be and the same is hereby remanded to the said circuit court, with directions to allow a bill to be filed in this cause, and to proceed thereon according to law.

*The Chesapeake and Ohio Canal Company, Plaintiff in error, *v.* The Union Bank of Georgetown.

Appellate jurisdiction.—Final judgment

In conformity with the charter of the Chesapeake and Ohio Canal Company, an inquisition, issued at the instance of the company, by a justice of the peace, in the county of Washington, district of Columbia, addressed to the marshal of the district, was executed and returned to the circuit court of the county of Washington, estimating the value of the lands mentioned in the warrant, and all the damages the owners would sustain by cutting the canal through the land, at $1000. Certain objections being filed to the inquisition, the court quashed the same; and a writ of error was brought on this judgment.

The order or judgment, in quashing the inquisition in this case, is not final; the law authorizes the court, "at its discretion, as often as may be necessary, to direct another inquisition to be taken." The order or judgment, therefore, quashing the inquisition is in the nature of an order setting aside a verdict, for the purpose of awarding a *venire facias de novo*.

Error to the Circuit Court of the District of Columbia, and county of Washington.

This case was argued by *Coxe* and *Swann*, for the plaintiff in error; and by *Key*, for the defendant.

Marshall, Ch. J., delivered the opinion of the court.—In pursuance of a warrant of inquisition, issued at the instance of the Chesapeake and Ohio Canal Company, by John Cox, a justice of the peace in and for the county of Washington, in the district of Columbia, and addressed to the marshal of the said district, an inquest of office was held by the said marshal, on certain lands in the said warrant mentioned, lying in the said county. The inquisition of the marshal and jurors, returned to the circuit court for the county of Washington, estimated the value of the lands in the warrant mentioned, and all the damages that the owners thereof would sustain by cutting the said canal through the said land, at $1000. Upon the return of the said warrant, the Chesapeake and Ohio Canal Company, by their counsel, moved the court for an order to have the same affirmed and recorded, unless good cause *be shown to the contrary. At a subsequent day, the Union Bank of Georgetown appeared by attorney, and filed certain objections to the said inquisition, which being argued, it was considered by the court, that the said inquisition be quashed; which judgment was brought before this court, by writ of error. [*260

This proceeding is in conformity with the charter of the Chesapeake and Ohio Canal Company, which was originally passed by the legislature of Virginia, in January 1824; and afterwards by the legislature of Maryland, in December of the same year. The act of Virginia was ratified and confirmed by the congress of the United States, in March 1825; so far as may be necessary for enabling the company formed by authority of the act, to carry into effect the provisions thereof in the district of Columbia.

The charter empowers the president and directors of the company "to agree with the owners of any land through which the said canal is intended to pass, for the purchase, or use and occupation thereof; and in case of disagreement, to apply to a justice of the peace of the county in which the land may lie, for a warrant of inquisition, on which such proceedings are directed as have been had in this case. The officer is to return this inquisition to the

clerk of his county, and unless good cause be shown against it, it shall be affirmed by the court and recorded; but if the said inquisition should be set aside, or if, from any cause, no inquisition shall be returned to such court, within a reasonable time, the said court may, at its discretion, as often as may be necessary, direct another inquisition to be taken, in the manner prescribed."

Before entering on the merits of the judgment of the circuit court for quashing this inquisition, a preliminary question is made to the jurisdiction of this court. Its appellate jurisdiction is extended by the act of congress, creating the circuit court for the district, to "any final judgment, order or decree, in said circuit court, where the matter in dispute, exclusive of costs, shall exceed the value," &c. The order or judgment in quashing the inquisition in this case, is not final. The law authorizes the court, "at its discretion, as often as may be necessary, to direct another inquisition to be taken."

*261] The order or judgment, therefore, quashing *the inquisition, is in the nature of an order setting aside a verdict, for the purpose of awarding a *venire facias de novo*. The writ of error is to be dismissed, the court having no jurisdiction of the cause.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States, for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is considered, ordered and adjudged by this court, that this writ of error be and the same is hereby dismissed, for want of jurisdiction.

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*262] *The Bank of the United States, Appellants, *v.* Jacob White, David Cummins and Robert Bennefil.

Chancery practice.

The 20th of the rules made by this court at February term 1822, for the regulation of proceedings in the circuit courts in equity cases, prescribes, "if a plea or demurrer be overruled, no other plea or demurrer shall be thereafter received; and the defendant shall proceed to answer the plaintiff's bill; and if he fail to do so, within two calendar months, the same, or so much thereof as was covered by the plea or demurrer, may be taken for confessed, and the matter thereof be decreed accordingly."

By the terms of this rule, no service of any copy of an interlocutory decree, taking the bill *pro confesso*, is necessary, before the final decree; and therefore, it cannot be insisted on as a matter of right, or furnish a proper ground for a bill of review. If the circuit court should, as matter of favor and discretion, enlarge the time for an answer, or require the service of a copy, before the final decree; that may furnish a ground why that court should not proceed to a final decree, until such order was complied with; but any omission to comply with it, would be a mere irregularity in its practice; and if the court should afterwards proceed to make a final decree, without it, would not be error for which a bill of review lies; but it would be to be redressed, if at all, by an order to set aside the decree for irregularity, while the court retained possession and power over the decree and the cause.

No practice of the circuit court, inconsistent with the rules of practice established by this court for the circuit courts, can be admissible to control them.[1]

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[1] In the case of Packer *v.* Nixon, in November 1831, Mr. Justice Hopkinson said, that though the profession may have been in the habit of disregarding one of the rules of equity practice, adopted by the supreme court, this can only be sustained, on the ground of waiver; when the objection is made, the court is bound to enforce the rule. MS. These rules are obligatory on the circuit courts. Jenkins *v.* Greenwald, 1 Bond 126.

United States Bank v. White.

The principle is unquestionable, that all the parties to the original decree ought to join in the bill of review.

Appeal from the Circuit Court of Ohio. The case, as stated by Mr. Justice Story, was as follows:

The Bank of the United States, in 1826, brought a bill in equity against the appellees, and Hugh Glenn, James Glenn and Thomas Graham. The object of the bill was, to set aside certain conveyances of real estate, made by the appellee, White, to the other appellees, Cummins and Bennefil, upon which estates, the bank, as judgment-creditors of White, the Glenns and Graham, had levied executions to satisfy those judgments. The bill charged the conveyances to be fraudulent.

The appellees appealed, and filed a demurrer to the bill; and at the July term of the court, in 1828, the demurrer was overruled, and the cause remanded to the rules, and a rule taken for an answer in sixty days. At the September rules 1828, *an entry "decree *pro confesso*" was minuted [*263 in the rule-book; and thereupon, the cause was continued from term to term, until July 1830, when a final decree was entered, as follows: "It appearing to the court, that the defendants in this cause are in default for answer, it is ordered, adjudged and decreed, the matters set forth in the complainant's bill, be taken as confessed and true; and the court, therefore, order and decree, that the several deeds set forth in the complainants' bill, as having been made by the said Jacob White, without any valuable consideration, and with a view to delay and hinder the complainants in the collection of their debts, set forth in the bill, are void; and that the same are, therefore, fraudulent as to the complainants. It is, therefore, ordered, adjudged and decreed, that the several tracts of land in said several deeds described, are liable to be sold for the satisfaction of the said several judgments, held by the said complainants against said Jacob White and others, mentioned and set forth in the complainants' bill. And it is further ordered, that so far as said deeds may interfere with the complainants in the collection of their said judgments, the same are hereby declared void; and the said defendants are perpetually enjoined from setting up or asserting title under the said deeds, as against the complainants, or any persons who may claim as purchasers at sales made on execution under any or either of the said judgments, held by the complainants; and it is further ordered, that the said complainants recover of the said defendants their costs in this behalf expended."

In July 1830, the appellees filed the present bill of review, for the purpose of reversing the foregoing decree; and the charging in the bill is, that the decree was irregularly and illegally made and entered as a final decree; when, according to law, and the rules of the circuit court, the same ought only to have been entered as an interlocutory decree, and a copy thereof served upon the appellees, before the same became final. The appellants filed an answer, admitting the proceedings and decree to have been as stated in the bill of review. But the answer avers, that at the time when the demurrer was overruled, the solicitor for the appellees gave the court and the solicitors for the appellants notice, that the appellees, then defendants in the cause, do not wish to file any answer to the said bill. And the answer expressly denies, that any error or *irregularity exists in said decree; [*264 or that the same was erroneously entered; or that the decree ought

to have been interlocutory ; and it does not admit that a copy ought to have been served upon the appellees, previous to rendering a final decision thereon, after they had appeared and demurred to the said bill.

The cause was set down for a hearing upon the bill of review and answer; and at the hearing, the circuit court reversed the original decree, for the reasons stated in the bill of review. The Bank of the United States appealed from this decree of reversal.

A printed argument was delivered to the court, in which *Fox* and *Caswell*, for the appellants, contended, that the decree, reversing the original decree, was erroneous.

1st. Because all the parties interested in the original decree were not parties to the bill of review.

2d. Because after defendants in an chancery cause have appeared and demurred to a bill, it is not necessary to serve them with copies of any decree made in the subsequent progress of the cause.

3d. That even admitting the necessity of the service of such a decree in ordinary cases ; in the present case, the pleadings show a waiver of a compliance with the rule, the answer not being replied to.

The appellants contend, that a decree on a bill of review is one from which an appeal can be taken. 10 Wheat. 146. It is a final determination of the suit ; and in case the party plaintiff succeeds, he gains the right of litigating again a matter once decided. It is precisely like a writ of error in its effects. The decree made on a bill of review, is the subject of a new bill of review. Cooper's Equity Pl. 92 ; 2 Chan. Pract. 633 ; Mitford's Pleading 79–80 ; 1 Vern. 417. And it makes no difference in this respect, whether the original decree was reversed or sustained, on the proceeding to review. If a decree reversing a former decree is the subject-matter for a new bill of review, it follows as a matter of course, that the decree is final; because none but a final decree can be either reviewed or reversed : and if final, then it is such a decree as can be appealed from.

*265] In support of the first error assigned, the appellants consider *the law as settled, that in bills of review, as in cases of writs of error, all parties to the original suit must be made parties, either plaintiffs or defendants, to the proceeding brought to be reviewed. Cooper's Eq. 95 ; Beames' Pleas in Eq. 314. In the present case, neither the Glenns nor Graham were made parties to the bill of review.

In support of the second error assigned, it is contended, that after a defendant in chancery has once appeared and demurred to a bill, it is not necessary to give him any further notice of the proceedings in the cause. A decree *nisi* need in no case be served upon such a party. The omission to file an answer is an admission, on his part, that the case is correctly stated in the bill, and that he has no valid defence to offer. The 20th rule established by the supreme court, for the practice of the courts of the United States, does not require the service of a copy of the decree. On the contrary, it is expressly provided, that if the defendant fail to answer the plaintiff's bill within two months (after the demurrer is overruled), the bill "may be taken as confessed, and the matter thereof be decreed accordingly." The clause attached to the sixth rule in these words, "which decree shall be absolute, unless cause be shown at the term next succeeding that to which

the process shall be returned executed," is altogether omitted in the 20th rule. By the ordinary rules of practice in courts of chancery, no decree could be taken *pro confesso*, until the defendant had entered an appearance. The plaintiff had no remedy against the obstinacy of the defendant, in refusing to enter his appearance. To remedy this defect in the administration of justice, the statute of 5 Geo. II., c. 25, was passed, by which the courts are authorized to enter an appearance for the defendant, and the cause is then prosecuted in the same manner as though the defendant had voluntarily appeared.

We suppose, the object of the sixth rule is, to enable the complainant to proceed without an actual appearance. The provisions of the sixth and seventh rules embrace substantially the provisions of the British statute, and the same construction applied to the statute, must be applied to the rules. 1 Harr. Chan. Pract. 203; 1 Newland's Chan. Pract. 97. If the court had intended to require the service of a copy of *the decree *pro confesso*, in cases where an appearance had been entered, and demurrer filed [*266 and overruled, language would have been used leaving no doubt of such intention. Such a requisition being contrary to be settled practice of the English courts, would not have been permitted to rest on mere inference or implication.

In support of the third error assigned, it is contended, that if the court should be of the opinion, that a copy of the decree ought to have been served, previous to its being finally entered; yet it is manifest, in the present case, that the service of the decree was waived. The court were distinctly informed, that the defendants in the cause did not wish or intend to file an answer; under such circumstances, it would have been useless to have served a copy of the decree upon the parties; without an answer, no other decree could have been pronounced than the one entered; and as it was known no answer would be filed, the service of a copy of the decree would have been a useless act. It is tantamount to a consent that the decree shall be entered. 5 Johns. Ch. 68. Why may not a party rest his case upon a demurrer? He knows the facts are correctly stated in the bill. He finds the law arising from those facts against him; upon what principle of law or justice is a party so circumstanced obliged to pay the expense of a copy and service of such a decree?

Sergeant, also for the appellants, after presenting to the court the printed arguments of *Fox* and *Caswell*, stated, that the whole case turned upon the rules for the regulation of equity proceedings in the circuit courts, as established by this court. He particularly referred to the 20th rule; and he contended, that the proceeding in the circuit court of Ohio was against those rules. Those rules were established for the general regulation of proceedings in chancery cases, and they form a part of the law of the land. A bill of review must be founded on new matter, and this of a peculiar character; but there is no allegation of new matter in this proceeding. The parties in this case demurred to the bill; they were thus in court, and there was no necessity, under the rules of practice, to serve a copy of the subsequent decree upon them. But in addition to this, the solicitor of the *original defendants expressly declared, the defendants had nothing [*267

to allege against the original bill. This is conclusive upon the appellees; they were bound by the admissions of their solicitor.

Hammond, for the appellees.—The first error alleged is, that all the parties interested in the original decree, were not parties to the bill of review. We reply, that none were affected by that decree but White, and Cummins and Bennefil, who claimed under him. Nothing was decreed affecting the other parties. The decree did not touch them. Consequently, they could not, properly, be complainants in a bill of review. As it respected them, there was nothing to be reviewed.

The second error alleged is, that the appellees having appeared and demurred, although their demurrer was overruled, and the cause remanded to the rules for further proceeding, service of a decree *nisi* was not necessary. The supreme court of the United States have established rules of practice touching this point. The circuit courts may not give them, everywhere, exactly the same construction; but may blend with them, in that construction, an existing practice. There is no reason why a cause, at the rules, upon rule for answer, should be distinguished from a decree *pro confesso*, for non-appearance. The object of serving on the respondent himself, a decree *nisi*, is, that the court may be assured he is wilfully in default. This is alike indispensable, in every case, where a decree *pro confesso* is to be taken. The supreme court will not readily control the circuit court in deciding any matter respecting its own practice. So it is decided in *Duncan* v. *United States*, 7 Pet. 451–2. The decision of the circuit court, in the case now under consideration, is predicated upon its own knowledge of its own practice. That decision is in aid of a full and fair administration of justice, and therefore, ought to be sustained, if possible.

The third error assigned assumes, that the pleadings, in this case, involve a waiver of the rule. That is, there being no replication, the allegation, in the answer to the bill of review, that the counsel for the appellees, the
*268] respondents in the original *suit, declared in court that the appellees did not wish to file an answer to the original bill, is a fact confessed. There can be nothing in this. No declarations of counsel, in court, unless formally made and recorded, or noted in writing, can authorize a departure from the established modes of practice. It seems an odd apology for error in a decree, that opposing counsel made declarations that induced the party to commit that error. But we go further; we maintain, that parties are not to be concluded by loose and general declarations of counsel. Parties are as well to be protected against these, as against the apprehended negligences, which the service of a decree *nisi* is intended to prevent. It is denied, that any declaration, either of the party himself, or of his counsel, can be set up in answer to a bill of review, for error on the face of the record, unless such declaration appears in the record of the proceedings, or on the face of the decree. With these remarks, the case is submitted.

Story, Justice, delivered the opinion of the court. After stating the case, he proceeded:—Several objections have been taken by the appellants to the decree. In the first place, it is said, that all the parties to the original decree are not made parties to the bill of review. How this matter is, does not distinctly appear, as the proceedings on the original bill, though made a part of the bill of review, are not, as they ought to have been,

spread upon the present record. The principle is unquestionable, that all the parties to the original decree ought to join in the bill of review; but, for aught that appears, no decree was ever had against the other defendants. If this constituted the turning point of the cause, we should deem it necessary to award a *certiorari*, as there is reason, from the answer, to doubt, if any decree was had against the other defendants, not made parties to the bill of review.

In the next place, it is objected, that, after an appearance and demurrer overruled, it is not necessary to serve the party defendant with a copy of the decree, taking the bill *pro confesso*, for want of an answer. The answer to the bill of review having expressly denied any error and irregularity in the decree, and not having admitted, that the service of any such *copy is necessary, that matter was directly put in controversy; and the [*269 cause having been set down for a hearing upon the bill and answer, without a replication, it is difficult to perceive, how this court can take judicial notice of what the practice of the circuit court is upon this subject, when that practice is the very hinge of the controversy. But it is not, in our opinion, necessary to enter upon this point; because, we are of opinion, that the decree is perfectly regular, without the service of any copy, according to the rules prescribed by this court, in equity causes, to the circuit courts; and no practice of the circuit court, inconsistent with those rules, can be admissible to control them. The 20th of the rules, made by this court at February term 1822, in equity causes, is as follows. "If a plea or demurrer be overruled, no other plea or demurrer shall be thereafter received; and the defendant shall proceed to answer the plaintiff's bill; and if he fail to do so, within two calendar months, the same, or so much thereof as was covered by the plea or demurrer, may be taken for confessed, and the matter thereof be decreed accordingly." By the terms of this rule, no service of any copy of an interlocutory decree, taking the bill *pro confesso*, is necessary, before the final decree; and therefore, it cannot be insisted on as a matter of right, or furnish a proper ground for a bill of review. If the circuit court should, as matter of favor and discretion, enlarge the time for an answer, or require the service of a copy, before the final decree, that may furnish a ground, why that court should not proceed to a final decree, until such order was complied with. But any omission to comply with it, would be a mere irregularity in its practice; and if the court should afterwards proceed to make a final decree, without a compliance with it, it would not be error for which a bill of review lies; but it would be to be redressed, if at all, by an order to set aside the decree for irregularity, while the court retains possession and power over the decree and the cause.

In the present case, the circuit court did proceed to make a final decree, after taking the bill *pro confesso*. There is no error on the face of that decree. It conforms to the requisitions of the rules of this court; and we are, therefore, of opinion, that it is not liable to reversal upon the present bill of review. *The decree of the circuit court is reversed, and [*270 the cause remanded to that court, with directions to dismiss the bill of review.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Ohio, and was argued

by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said circuit court, with directions to dismiss the bill of review in this cause.

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*271] *UNITED STATES, Plaintiffs in error, *v.* ANDREW HACK, THOMAS SEWALL and JAMES WILKES, JR., Assignees of JOHN STOUFFER.

Priority of the United States.—Partnership.

The priority of the United States does not extend so as to take the property of a partner from partnership effects, to pay a separate debt, due by such partner to the United States, when the partnership effects are not sufficient to satisfy the creditors of the partnership.[1]

It is a rule too well settled to be now called in question, that the interest of each partner in the partnership property, is his share in the surplus, after the partnership debts are paid; and that surplus, only, is liable for the separate debts of such partner.

ERROR to the Circuit Court of Maryland. The United States instituted an action of *assumpsit* against the defendants, in the circuit court of the United States for the district of Maryland. The defendants pleaded *non assumpsit*, and the case was submitted to the court by the counsel for the plaintiffs and the defendants, on the following statement of facts agreed:

"It is agreed between the parties in this case, by their counsel, that John Stouffer is largely indebted to the plaintiffs on sundry judgments rendered against him on custom-house bonds; that the said John Stouffer was, at the date of the said bonds, and of the rendition of the said judgments, a partner in trade with his brother Jacob Stouffer, and so continued until the execution of the deed of trust hereinafter referred to; that the said John and Jacob Stouffer becoming embarrassed and insolvent in their affairs, on the 19th day of May 1832, executed a deed of trust to and in favor of the defendants, of all their joint and partnership property, for the benefit of their joint and partnership creditors, having no private or undivided estate; that the said property is not sufficient for the payment of all said creditors, but that the said John Stouffer's undivided half, now in the possession of the said trustees, amounts to $974.71. It is also agreed, that the amount of the unsatisfied judgments of the United States against
*272] the said John Stouffer is, at *this date, $2100, and upwards, after exhausting his private and individual estate. And the amount now in the possession of the aforesaid trustees, being the proceeds of the said partnership estate, is $1942.42, one-half of which is $974.71. Upon the foregoing statement of facts, the district-attorney contends, that the plaintiffs are entitled to receive from the defendants the sum of $974.71, being the proceeds of John Stouffer's undivided half of, in and to the aforesaid partnership estate, to be applied to the satisfaction of the aforesaid judgments recovered against the said John Stouffer. The counsel for the defendants contends, that the plaintiffs are not entitled to receive anything from the defendants in this action, on the ground, that the money in their hands is the proceeds of partnership property, the whole of which is inadequate to

[1] United States *v.* Duncan, 4 McLean 607; United States *v.* Evans, Crabbe 60; Ex parte Webb, 2 Bank. Reg. 183.

the entire payment of the partnership debts; and that the plaintiffs are creditors of John Stouffer only, and not of the said partners. The question submitted to this court is, whether the plaintiffs are entitled to recover from the defendants in this case the said sum of $974.71, being one-half of the aforesaid partnership estate. It is finally agreed, that all errors in pleading be mutually released, and that either party shall have the privilege of prosecuting a writ of error to the supreme court of the United States."

The circuit court gave judgment for the defendants; and the United States prosecuted this writ of error. The case was argued by the Attorney-General for the United States. No counsel appeared to argue the cause for the defendants.

For the United States, the *Attorney-General* contended, that under the provisions of the acts of congress, the United States, as judgment-creditors of John Stouffer, were entitled to be first paid to the extent of his share of the property assigned to the defendants, in preference to the creditors of the partnership; and that the judgments of the court below ought, therefore, to be reversed. The attorney-general conceded, that by the general law of *partnership, both in the United States and in England, the property of the partnership was first liable to the debts of the firm; and [*273 although an execution may go against such effects, in favor of a separate creditor of one of the partners, yet the purchaser under such proceedings, could only take the property of the partner, subject to such debts. He referred to the authorities on this point in the reports of cases decided in the United States. 1 Gallis. 367; Pet. C. C. 460; *Matter of Smith*, 16 Johns. 102, and the cases in the notes; 15 Mass. 82; 1 Wend. 311; 2 Ibid. This being the general law of partnership, and this court having decided in the case of *Conard* v. *Atlantic Insurance Company*, 1 Pet. 389, that the priority of the United States does not divest anterior liens, the foundation of the claim of the United States in this case can rest only on the local law of Maryland. The case of *Wallace* v. *Patterson*, 2 Har. & McHen. 463, arose under the act of the legislature of Maryland, and was decided in 1790. That act is now in force. The act was passed in 1715, ch. 4, of the laws of that year, and it authorizes a debtor to pursue the property of his creditor wherever it may be found. If, in the state of Maryland, a debtor may proceed under this law against partnership property, may not the United States? No case entirely applicable to the case before the court, has been found in the Maryland reports. In a case where the private property of the parties had gone into the partnership effects, would not the rights of the creditors be equal? Suppose, an importation of goods liable to duties had been passed over to a partnership, would not the United States have a right to call on the partnership for the unpaid duties?

The attorney-general stated that he had found this case on the docket of the court; and had felt himself bound to submit it for decision, with these remarks.

Thompson, Justice, delivered the opinion of the court.—This cause comes up on a writ of error, from the circuit court of the United States for the district of Maryland. The action in the circuit court was, for the recovery of a sum of money, which came into the hands of the defendants, as *assignees of John and Jacob Stouffer, who were partners in [*274

had become insolvent. The material facts in the case, as agreed between the parties, are :

That John Stouffer, one of the partners, is largely indebted to the United States on sundry judgments rendered against him on custom-house bonds. That at the date of said bonds, and at the time of the rendition of the judgments, he was a partner in trade with Jacob Stouffer, and so continued until the 19th day of May 1832, when they became embarrassed and insolvent, and executed a deed of trust, to and in favor of the defendants, for all their joint and partnership property, for the benefit of their joint and partnership creditors, they having no private or individual estate. The property then assigned, is not sufficient to pay the partnership creditors ; but the undivided half of John Stouffer, now in the possession of the defendants, amounts to $974.71.

Upon this state of facts, the question submitted to the circuit court was, whether the United States were entitled to recover from the defendants the sum of $974.71, being John Stouffer's half of the proceeds of the partnership estate. Upon which the court gave judgment for the defendants.

It is claimed, on the part of the plaintiffs in error, that, under the provisions of the acts of congress, the United States, as judgment-creditors of John Stouffer, are entitled to be first paid, to the extent of his share of the property assigned to the defendants, in preference to the creditors of the partnership. The act of congress, § 65 (1 U. S. Stat. 676), declares, that when any bond for the payment of duties shall not be satisfied on the day it becomes due, the collector shall forthwith cause a prosecution to be commenced, &c. And in all cases of insolvency, or where any estate, in the hands of the executors, administrators or assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due from the United States on such bonds, shall be first satisfied, &c.

The construction of this clause of the act of congress has frequently come under the consideration of this court, although not under the circumstances in which it is now presented. It was held, at an early day, in the case of the *United States* v. **Fisher*, 2 Cranch 358, in the construction of a similar clause in the act of 3d March 1797, ch. 74, that no *lien* is created by this law. No *bonâ fide* transfer of property, in the ordinary course of business, is overreached, And in a late case of *Conard* v. *Atlantic Insurance Company*, 1 Pet. 439 ; this question received a very full examination, and explanation of some former decisions which seem not to have been fully understood. And in the course of which it is observed : "What then is the nature of the privity thus limited and established in favor of the United States ? Is it a right which supersedes and overrules the assignment of the debtor, as to any property which the United States may afterwards elect to take in execution, so as to prevent such property from passing, by virtue of such assignment, to the assignee ? Or is it a mere right of prior payment, out of the general funds of the debtor, in the hands of the assignee ? We are of opinion, that it clearly falls within the latter description."

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If, then, the debt of the United is not a *lien*, but only entitled to priority of payment out of the general funds of the debtor, in the hands of the assignee, what are the funds out of which this priority is set up in the present case ? They are not the funds of John Stouffer, the debtor of the

United States, but of John & Jacob Stouffer, who have become insolvent, having no separate property; and the partnership property is insufficient to satisfy the partnership creditors. It is a rule too well settled to be now called in question, that the interest of each partner in the partnership property, is his share in the surplus, after the partnership debts are paid; and that surplus only is liable for the separate debts of such partner. And this is the rule in the exchequer in England, with respect to debts due to the crown. In the case of *The King* v. *Sanderson*, 1 Wightwick 50, it was held, that upon an extent against one partner, the crown, like a separate private creditor, took the separate interest of the partner, subject to the partnership debts.

It has been a question very much ligitated in England, and in this country, both in the courts of law and equity, as to the manner in which the separate creditor of one partner was to avail himself of the share of such partner in the joint property of the firm, where the partnership is solvent. But whatever *course is adopted, it is the interest only of [*276
the separate partner that is taken, and always subject to the rights of the partnership creditors. 16 Johns. 106, and cases in note; 2 Johns. Ch. 548; 4 Ibid. 525. But that question does not arise here, as it is admitted, that the partnership property is insufficient to pay the partnership debts. We entertain no doubt, therefore, that the United States are not entitled to recover the $974.71. The judgment of the circuit court is accordingly affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Maryland, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed.

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*United States, Appellants, *v.* One hundred and twelve Casks [*277
of Sugar: Nathan Goodale, Claimant.

Entry of merchandise.

A seizure was made in the port of New Orleans, under the 67th section of the act of 1799, for the collection of duties (1 U. S. Stat. 677), which authorizes the collector, where he shall suspect a false and fraudulent entry to have been made of any goods, wares or merchandises, to cause an examination to be made, and if found to differ from the entry, the merchandise is declared to be forfeited, unless it shall be made to appear to the collector, or to the court in which a prosecution for the forfeiture shall be had, that such difference proceeded from accident or mistake, and not from an intention to defraud the revenue. After hearing the testimony offered in the cause, the court decreed and ordered, that the property seized be restored to the claimant, upon the payment of a duty of fifteen per cent. *ad valorem;* that the libel be dismissed, and that probable cause of seizure be certified of record; the United States appealed from this decree.

The court not being able to decide from the evidence sent up with the record, that the article, in point of fact, differs from the entry at the custom-house, affirmed the decree of the court below.

The denomination of merchandise, subject to the payment of duties, is to be understood in a commercial sense, although it may not be scientifically correct; all laws regulating the payment of duties are for practical application to commercial operations, and are to be understood

in a commercial sense; and it is to be presumed that congress so used and intended them to be understood.[1]

Appeal from the District Court for the Eastern District of Louisiana.

This case was presented to the court on printed statements and arguments, by *Butler*, Attorney-General, for the appellants.

Thompson, Justice, delivered the opinion of the court.—The sugars in question in this case were seized by the collector of the district of Mississippi, and libelled in the district court of the United States for the eastern district of Louisiana, under the allegation that they had been falsely entered at the custom-house of the port of New Orleans, as syrup; when, in fact, they were casks of sugar in a state of partial solution in water. The libel charges, that this entry was made by a false designation of the merchandise with an intent to defraud the revenue *of the United State, by subjecting the article to an *ad valorem* duty of fifteen per cent. only, instead of a specific duty of three cents and four cents per pound, if entered as sugars, which, as is alleged, they in fact were.

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This seizure was made under the 67th section of the act of 1799, for the collection of duties (1 U. S. Stat. 677), which authorizes the collector, when he shall suspect a false and fraudulent entry to have been made of any goods, wares or merchandise, to cause an examination to be made, and if found to differ from the entry, the merchandise is declared to be forfeited, unless it shall be made to appear to the collector, or to the court in which a prosecution for the forfeiture shall be had, that such difference proceeded from accident or mistake, and not from an intention to defraud the revenue.

The answer and claim of Goodale denies that the contents of the casks were sugar, or that they differ from the entry, or that the entry was made with intent to defraud the revenue.

After hearing the testimony offered in the cause, the court decreed and ordered, that the property seized be restored to the claimant, upon the payment of a duty of fifteen per cent. *ad valorem* thereupon, that the libel be dismissed, and that probable cause of seizure be certified of record. From this decree, the present appeal is taken.

The decision in this case turns entirely upon the question, whether, in point of fact, the merchandise was different from the denomination under which it was entered; that is, whether the article was sugar, and not syrup; and if not syrup, then whether such entry was made with intent to defraud the revenue. It is deemed unnecessary to go into a particular and detailed examination of the testimony on the trial. A number of witnesses were examined on both sides, for the purpose of ascertaining the character and denomination of the article in question. It was a pure question of fact, and the nature of the inquiry admitted of nothing more certain than an expression of opinion, and which resulted, as is generally the case in such inquiries, in a difference of opinion. In such cases, the court must be governed, in a great measure, by the character and intelligence of the witnesses, and the opportunities they have had of becoming acquainted with the subject upon which they are called upon to express an opinion; and the weight of the

[1] Elliott *v.* Swartwout, 10 Pet. 137; Curtis *v.* Martin, 3 How. 106; Maillard *v.* Lawrence, 16 Id. 251. See Jaffray *v.* Murphy, 19 Int. R. Rec. 143.

*opinion of a witness, and the influence it is to have upon the tribunal, whether court or jury, which is to decide upon it, will depend very much upon seeing and hearing the witness give his testimony. When, therefore, a case rests upon a mere question of fact, and especially, when that fact is to be ascertained by the uncertain evidence of opinion, the appellate court ought to place much reliance upon the decision of the court below, and not reverse a decree, unless it is very satisfactorily shown to be against the weight of evidence.

One of the witnesses examined on the part of the United States was a chemist, who had analyzed a portion of the article in question, and found it composed of nothing but sugar, dissolved in water, and was not syrup, according to his understanding; which, as he says, is prepared by pouring water on sugar, and boiling it to that consistency which prevents crystallization, and that to produce this effect, it is necessary to introduce other agents, such as the white of eggs, &c. With respect to this and all other testimony of this description, it is only necessary to observe, that the denomination of merchandise, subject to the payment of duties, is to be understood in a commercial sense, although it may not be scientifically correct. All laws regulating the payment of duties are for practical application to commercial operations, and are to be understood in a commercial, sense. And it is to be presumed that congress so used and intended them to be understood.

Two of the witnesses on the part of the United States, who were merchants, and had dealt largely in sugars, and apparently very competent judges on the subject, testified, that sugar dissolved in water is not considered syrup, in the sense generally used in common parlance, as an article of commerce. To make syrup, the sugar must be boiled and clarified. They say, that sugar barely dissolved in water is a new article, not known in common as an article of trade. Some other witnesses were examined on the part of the United States, who express an opinion, that this article is not syrup. Their situation and knowledge of the article, however, do not seem to qualify them to form a very satisfactory opinion on the subject. But none of these witnesses undertake to say, that the article could, with any propriety, be called sugar.

On the part of the claimant, a greater number of witnesses were examined, one of whom was a sugar-refiner, who says, that *speaking as a merchant and sugar-refiner, he should consider this article syrup. It [*280 cannot, he says, be called by ony other name. Several other merchants and dealers in sugar concur with him; some say, the basis of all syrup is sugar and water boiled together; that the different kinds of syrups are produced by putting into the sugar the different articles from which the syrup takes its name, such as orange, lemon, &c. Some call it natural syrup; others speak of it as an inferior kind of syrup; but all deny that it can, with any propriety, be called sugar. The district-attorney testifies, that when the seizure was made, it was supposed by the collector, to be the expressed juice of the cane, boiled to a certain consistency; that it was not then known, that it had been prepared by the dissolution of sugar with water. There is certainly very strong reason for suspecting that this was done for the purpose of evading the specific duty on sugar; especially, as it is admitted on the record, that the claimant has an establishment at Matanzas for preparing

sugar in this manner, for the purpose of shipment to New Orleans, to be made into refined sugar, at his establishment or refinery at that place. Yet we do not think, under the evidence in the cause, we, as an appellate court, ought to reverse the decree of the court below, and decree a forfeiture, especially, as we cannot say, from the evidence, that the article, in point of fact, differs from the entry at the custom-house. It is difficult to say, what is its true denomination; the witnesses speak of it as a new article, not known in trade; none call it sugar; all seem to think it may be called syrup, in some sense, though several think it is not such, according to the understanding of that article in trade and commerce. Upon the whole, we think the decree of the court below ought to be affirmed, and a certificate of probable cause of seizure be certified of record.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the eastern district of Louisiana, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said district court in this cause be and the same is hereby affirmed, and that a certificate of probable cause of seizure be certified of record.

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*281] *Jacob Mumma, Plaintiff in error, *v.* The Potomac Company.

Dissolution of corporation.

The 13th section of the act of Virginia, of January 1824, incorporating the Chesapeake and Ohio Canal Company, declares, that upon such surrender and acceptance, "the charter of the Potomac Company shall be, and the same is hereby, vacated and annulled, and all the powers and rights thereby granted to the Potomac Company shall be vested in the company hereby incorporated." By this provision, the Potomac Company ceased to exist, and a *scire facias* on a judgment obtained against the company, before is was so determined, cannot be maintained.

There is no pretence to say, that a *scire facias* can be maintained, and a judgment had thereon, against a dead corporation, any more than against a dead man.

The dissolution of the corporation, under the acts of Virginia and Maryland (even supposing the act of confirmation of congress out of the way), cannot, in any just sense, be considered, within the clause of the constitution of the United States on this subject, an impairing of the obligation of the contracts of the company, by those states, any more than the death of a private person may be said to impair the obligation of his contracts. The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation, which has not passed into the hands of *bonâ fide* purchasers; but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws.[1]

A corporation, by the very terms and nature of its political existence, is subject to dissolution, by a surrender of its corporate franchise, and by a forfeiture of them for wilful misuser and non-user; every creditor must be presumed to understand the nature and incidents of such a body

[1] Upon general principles of law, a creditor of an insolvent corporation can pursue its assets into the hands of all persons, except *bonâ fide* creditors and purchasers. Curran *v.* Arkansas, 15 How. 304. Valid contracts made by a corporation survive even its dissolution by voluntary surrender or sale of its corporate franchises, and the creditors of the corporation, notwithstanding such surrender or sale, may still enforce their claims against the property of the corporation, as if no such sale had taken place. Mississippi and Missouri Railroad Co. *v.* Howard, 7 Wall. 410. Moneys derived from the sale and transfer of the franchises and capital stock of an incorporated company are the assets of the corporation, and, as such, constitute a fund for the payment of its debts. Seaman *v.* Kimball, 92 U. S. 367.

politic, and to contract with reference to them; and it would be a doctrine new in the law, that the existence of a private contract of the corporation should force upon it a perpetuity of existence, contrary to public policy, and the nature and objects of its charter.[1]

Error to the Circuit Court of the District of Columbia and county of Washington.

At a circuit court of the district of Columbia, held at Washington city, on the first Monday of June 1818, Jacob Mumma, the plaintiff in error, recovered a judgment against the Potomac Company, the defendants in error, for the sum of $5000. No steps were taken to enforce the payment of the judgment, nor any further proceedings had in relation thereto, until the 18th day of April 1828, on which *day, a writ of *scire facias* was issued from the clerk's office of said court, against the said Potomac [*282 Company, to revive said judgment, which case was continued, by consent of parties, from term to term, until December term of said court, in the year 1830, at which term, the following plea and statement were filed by the consent of parties.

"The attorneys upon the record of the said defendants, now here suggest and show to the court, that since the rendition and record of said judgment, the said Potomac Company, in due pursuance and execution of the provisions of the charter of the Chesapeake and Ohio Canal Company, enacted by the states of Maryland and Virginia, and by the congress of the United States, have duly signified their assent to said charter, &c., and have duly surrendered their charter and conveyed, in due form of law, to the said Chesapeake and Ohio Canal Company, all the property, rights and privileges by them owned, possessed and enjoyed under the same, which surrender and transfer from the said Potomac Company, have been duly accepted by the Chesapeake and Ohio Canal Company, as appears by the corporate acts and proceedings of said company, and final deed of surrender from the said Potomac Company, dated on the 15th of August 1828, duly executed and recorded in the several counties of the states of Virginia and Maryland and the district of Columbia, wherein said Potomac Company held any lands, and wherein the canal sand works of said company were situated; which said corporate acts and proceedings the said attorneys here bring into court, &c., whereby the said attorneys say, the charter of said Potomac Company became and is vacated and annulled, and the company and the corporate franchises of the same are extinct, &c."

Whereupon, the following statement and agreement were entered into and signed by the counsel for both parties, and made a part of the record. "The truth of the above suggestion is admitted; and it is agreed to be submitted to the court, whether, under such circumstances, any judgment can be rendered against the Potomac Company upon this *scire facias*, reviving the judgment in said writ mentioned, and that reference for the said corporate acts and proceedings, and the deed in the above *suggestion [*283 mentioned, be had to the printed collection of acts, &c., printed and published by authority of the president and directors of the Chesapeake and Ohio Canal Company in 1828."

[1] A decree dissolving a national bank, at the suit of the comptroller of the currency, operates to abate a pending suit against it, commenced by attachment, to enforce the demand of an individual creditor. National Bank *v.* Colby, 21 Wall. 609.

The circuit court gave judgment to the defendants, and the plaintiff prosecuted this writ of error.

The case was argued by *Brent* and *Tabbs*, for the plaintiff in error; and by *Jones* and *Coxe*, for the defendants.

For the plaintiff in error, it was contended: 1st. The corporate existence of the Potomac Company, was not so totally destroyed by the operation of the deed of surrender, as to defeat the rights and remedies of its creditors. 2d. The deed of surrender violates its obligation of contract, and can derive no legal effect from the several legislative acts which purport to authorize it.

After the counsel for the plaintiff in error, and for the defendant, had proceeded in the discussion of the case, the court intimated, that "the agreement of the counsel completely covered the first point, and precluded any examination of it." The arguments on this point are, therefore, omitted.

Upon the second point, the counsel for the plaintiff in error contended, that the surrender of the property by the Potomac Company to the Chesapeake and Ohio Canal Company, was void, as it operated to impair the lien acquired by the judgment. The acts of the legislatures of Virginia and Maryland would be unconstitutional, if such were their operation, as they would violate the contract under which the judgment was obtained. Upon this point, the following authorities were cited. *Sturges* v. *Crowninshield*, 4 Wheat. 207; *Green* v. *Biddle*, 8 Ibid. 84; *Fletcher* v. *Peck*, 6 Cranch 87; *Terrett* v. *Taylor*, 9 Ibid. 43; *Town of Pawlet* v. *Clarke*, Ibid. 292; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Calder* v. *Bull*, 3 Dall. 386; *Dash* v. *Van Kleeck*, 7 Johns. 492, 499; 2 *Gallis. 139; *Gilmoure* v. *Shuter*, 2 Mod. 310; 2 Lev. 227; *Couch* v. *Jeffries*, 4 Burr. 2460.

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Jones and *Coxe* argued, that the lien of the judgment remained, and thus no violation of the constitutional guarantee of the vested right of the plaintiff in error was the consequence of the surrender of the property. If the judgment of the plaintiff could have been enforced against the property of the Potomac Company, the same right to proceed against the same property in the lands of the Chesapeake and Ohio Company existed. Under this view of the case, the proceedings of the Potomac Company could have no effect on the rights of the plaintiff in error.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Columbia, for the county of Washington. The case presented on the record is shortly this: The plaintiff in error, Mumma, in June 1818, recovered a judgment against the Potomac Company, for the sum of $5000. No steps were taken to enforce the payment of the judgment, nor any further proceedings had in relation thereto, until the 18th day of April 1828, on which day a writ of *scire facias* was issued from the clerk's office of said court, against the said Potomac Company to revive said judgment, which case was continued, by consent of parties, from term to term, until December term of said court, in the year 1830, at which term, the following plea and statement were filed by consent of parties.

"The attorneys upon the record of the said defendants, now here suggest and show to the court, that since the rendition and record of said judg-

ment, the said Potomac Company, in due pursuance and execution of the provisions of the charter of the Chesapeake and Ohio Canal Company, enacted by the states of Maryland and Virginia, and by the congress of the United States, have duly signified their assent to said charter, &c., and have duly surrendered their charter, and conveyed, in due form of law, to the said Chesapeake and Ohio Canal Company, all the property, rights and privileges by them owned, possessed and enjoyed under the same; which *sur- [*285
render and transfer from said Potomac Company, have been duly accepted by the Chesapeake and Ohio Canal Company, as appears by the corporate acts and proceedings of said company, and final deed of surrender from the said Potomac Company, dated on the 15th day of August 1828, duly executed and recorded in the several counties of the states of Virginia and Maryland, and the district of Columbia, wherein said Potomac Company held any lands, and wherein the canals and works of said company were situated; which said corporate acts and proceedings, the said attorneys here bring into court, &c., whereby the said attorneys say, the charter of the said Potomac Company became and is vacated and annulled, and the company and the corporate franchises of the same are extinct," &c.

Whereupon, the following statement and agreement were entered into and signed by the counsel for both parties, and made a part of the record. "The truth of the above suggestion is admitted; and it is agreed to be submitted to the court, whether, under such circumstances, any judgment can be rendered against the Potomac Company upon this *scire facias*, reviving the judgment in said writ mentioned, and that reference for the said corporate acts and proceedings, and the deed in the above suggestion mentioned, be had to the printed collection of acts, &c., printed and published by authority of the president and directors of the Chesapeake and Ohio Canal Company in 1828." Upon this statement and agreement, the circuit court gave judgment, that the plaintiff take nothing by his writ; and the question now is, whether this judgment is warranted by law.

Two points have been made at the bar. 1. That the corporate existence of the Potomac Company was not so totally destroyed by the operation of the deed of surrender, as to defeat the rights and remedies of the creditors of the company. 2. That the deed of surrender violates the obligation of the contracts of the company, and that the legislative acts of Virginia and Maryland, though confirmed by the congress of the United States, are on this account void; and can have no legal effect.

We think, that the agreement of the parties completely covers the first point, and precludes any examination of it. That *agreement admits [*286
the truth of the suggestions in the plea of the attorneys for the Potomac Company; and by that it is averred, that the charter of the Potomac Company was duly surrendered to the Chesapeake and Ohio Canal Company, and was duly accepted by the latter; and that thereby the charter of the Potomac Company became, and is, vacated and annulled. And if we were at liberty to consider the last averment, not as an averment of a fact, but of a conclusion of law, the same result would follow; for the 13th section of the act of Virginia, of January 1824, incorporating the Chesapeake and Ohio Canal Company, declares, that upon such surrender and acceptance, "the charter of the Potomac Company shall be and the same is hereby vacated and annulled; and all the powers and rights thereby granted

to the Potomac Company shall be vested in the company hereby incorporated."

Unless, then, the second point can be maintained, there is an end of the cause; for there is no pretence to say, that a *scire facias* can be maintained, and a judgment had thereon, against a dead corporation, any more than against a dead man. We are of opinion, that the dissolution of the corporation, under the acts of Virginia and Maryland (even supposing the act of confirmation of congress out of the way), cannot, in any just sense, be considered, within the clause of the constitution of the United States on this subject, an impairing of the obligation of the contracts of the company by those states, any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation, which has not passed into the hands of *bonâ fide* purchasers; but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws. Besides, the 12th section of the act incorporating the Chesapeake and Ohio Canal Company, makes it the duty of the president and directors of that company, so long as there shall be and remain any creditor of the Potomac Company, who shall not have vested his demand against the same in the stock of the Chesapeake and Ohio Canal Company (which the act enables him to do), to pay to such creditor or creditors, annually, such divi-
*287] dend or proportion of the net amount of *the revenues of the Potomac Company, on an average of the last five years preceding the organization of the said Chesapeake and Ohio Canal Company, as the demand of the said creditor or creditors, at that time, may bear to the whole debt of $175.800, (the supposed aggregate amount of the debts of the Potomac Company). So that here is provided an equitable mode of distributing the assets of the company among its creditors, by an apportionment of its revenues, in the only mode in which it could be practically done upon its dissolution; a mode analogous to the distribution of the assets of a deceased insolvent debtor.

Independently of this view of the matter, it would be extremely difficult to maintain the doctrine contended for by the plaintiff in error, upon general principles. A corporation, by the very terms and nature of its political existence, is subject to dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuser and non-user. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law, that the existence of a private contract of the corporation should force upon it a perpetuity of existence, contrary to public policy, and the nature and objects of its charter.

Without going more at large into the subject we are of opinion, that the judgment of the circuit court ought to be affirmed. But as there is no such corporation *in esse* as the Potomac Company, there can be no costs awarded to it.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On considera-

tion whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, without costs.

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*United States *v.* Adam Randenbush. [*288

Autrefois acquit.

The defendant was indicted, in April 1833, in the circuit court for the district of Pennsylvania, for passing a counterfeit note, of the denomination of ten dollars, purporting to be a note of the Bank of the United States, with intent to defraud the bank, &c.; he pleaded, that the note described in the indictment had been heretofore given in evidence on the trial of the defendant, upon a former indictment found against him for passing another counterfeit ten dollar note, upon which indictment he had been acquitted.

The offence for which the defendant was indicted, and to which indictment he pleaded the plea of a former acquittal, was entirely a distinct offence from that on which the verdict of acquittal was found; the plea does not show that he had ever been indicted for passing the same counterfeit bill, or that he had ever been put in jeopardy for the same offence: The matter pleaded is no bar to the indictment.[1]

Certificate of Division from the Circuit Court of Pennsylvania. The defendant was indicted, in April 1833, in the circuit court for the district of Pennsylvania, for passing a counterfeit note of the denomination of ten dollars, purporting to be a note issued by the bank of the United States, with intent to defraud the bank, *scienter*, &c.

He interposed three several pleas to this indictment, in the second of which he averred, that the note describe in the indictment, &c., was heretofore given in evidence, with the facts and circumstances attending the said passing thereof, on the trial of defendant, upon a certain former indictment found against him for passing another ten dollar counterfeit note, to sustain that indictment; and that he was thereupon acquitted, &c. To this plea, the United States demurred, and the defendant joined in demurrer; but as the opinions of the judges were opposed as to the judgment to be given thereon, the case was certified for the opinion of this court.

The case was argued by the *Attorney-General*, for the United States. No counsel appeared for the defendant.

*The attorney-general submitted to the court the following points; [*289
and referred the court to the authorities on both sides of the question presented by them.

1. It appears by the record, that the offences for which the defendant was indicted, were not the same. 2 Hale's P. C. 244; 4 Hawk. 316, 314; 1 Chit. Crim. Law 453, 456; 1 Leach's Crown Law 242; 2 Ibid. 716; *Rex* v. *Clark*, 1 Brod. & Bing. 473; 9 East 437; *Van Houton* v. *Harvey*, 2 New York City Hall Recorder 73.

2. The acquittal upon the first indictment does not necessarily involve any decision upon the question presented by the last. 2 East 519. For the general principle: Ibid. 522; *Jackson* v. *Wood*, 3 Wend. 27; 8 Ibid. 9; Stark. Evid. part 2, § 65, 198, 202.

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[1] A prisoner having been tried and acquitted on a charge of having possession of a plate for printing counterfeit notes, may plead the same in bar to a second indictment, for having, at the same time, possession of another such plate; the act of possession is a single one. United States *v.* Miner, 11 Bl. C. C. 511. See United States *v.* Fleeke, 2 Ben. 456.

3. The passing of the note described in the last indictment, was not a fact embraced within the issue formed upon the former indictment; and if given in evidence on the trial of that issue, it could only have been as a collateral circumstance tending to prove the *scienter* in respect to the note described in the first indictment; and this does not protect the party from answering directly for the fact, in an indictment founded thereon. Stark. part 4, § 379–80, 382.

Marshall, Ch. J., delivered the opinion of the court.—The defendant was indicted, in April 1833, in the circuit court for the district of Pennsylvania, for passing a counterfeit note of the denomination of ten dollars, purporting to be a note of the Bank of the United States, with intent to defraud the bank, &c. He pleaded, that the note described in the indictment had been heretofore given in evidence, on the trial of the defendant, upon a former indictment found against him, for passing another counterfeit ten dollar note, upon which indictment he had been acquitted. The United States demurred to this plea, and the defendant joined in demurrer. The judges were opposed in opinion, on the question whether the judgment on the demurrer should be entered in favor of the United
*290] States or of the prisoner, which division of *opinion was ordered to be certified to the supreme court of the United States.

The offence for which the defendant was indicted, and to which indictment he pleaded the plea of a former acquittal, was entirely a distinct offence from that on which the verdict of acquittal was found.[1] The plea does not show that he had ever been indicted for passing the same counterfeit bill, or that he had ever been put in jeopardy for the same offence. We are, therefore, of opinion, that the matter pleaded is no bar to the indictment, and that the demurrer ought to be sustained. A certificate to this effect will be given.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Pennsylvania, and on the question and point on which the judges of the said circuit court were opposed in opinion, and which was certified to this court for its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel: On consideration whereof, it is the opinion of this court, that judgment on the demurrer to the second plea pleaded by the defendant to the indictment found against him, ought to be rendered for the United States. Whereupon, it is ordered and adjudged by this court, that it be certified to the said circuit court, that judgment on the demurrer to

[1] On the trial of an indictment for passing counterfeit notes, to prove the *scienter*, evidence may be given of the passing of similar counterfeit notes, or of the passing of notes of a different bank, at the same time, or of the defendant having them in his possession. United States *v.* Randenbush, Bald. 514. S. P. United States *v.* Hinman, Id. 292; United States *v.* Mitchell, Id. 366; United States *v.* Doebler, Id. 519. Where guilty knowledge, or an intent to defraud, is an ingredient of the crime, acts of a similar character, indicating such knowledge or intention on the part of the accused, may be proved, though they go to establish the commission of another separate offence. People *v.* Lyon, 1 N. Y. Crim. 400; Kramer *v.* Commonwealth, 87 Penn. St. 299; People *v.* Shulman, 76 N. Y. 624; Mayer *v.* People, 80 Id. 364. Thus, on a trial for the offence of receiving stolen goods, other acts of receiving, not too remote in point of time, may be given in evidence, to establish the guilty knowledge. Kilrow *v.* Commonwealth, 89 Penn. St. 480. But see Coleman *v.* People, 55 N. Y. 81.

the second plea pleaded by the defendant to the indictment found against him, ought to be rendered for the United States.

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*In the Matter of The Life and Fire Insurance Company of New York, Plaintiffs, *v.* The Heirs of Nicholas Wilson. [*291

Mandamus.—New trial.

The district judge of Louisiana refused to sign the record of a judgment rendered in a case by his predecessor in office; by the law of Louisiana, and the rule adopted by the district court, the judgment, without the signature of the judge, cannot be enforced; it is not a final judgment, on which a writ of error may issue, for its reversal; without the action of the judge, the plaintiffs can take no step in the case; they can neither issue execution on the judgment, nor reverse the proceedings by writ of error.

On a motion for a *mandamus*, the court *held:* The district judge is mistaken in supposing that no one but the judge who renders the judgment, can grant a new trial; he, as the successor of his predecessor, can exercise the same powers, and has a right to act on every case that remains undecided upon the docket, as fully as his predecessor could have done; the court remains the same, and the change of the incumbents cannot, and ought not, in any respect, to injure the rights of litigant parties. The judgment may be erroneous, but this is no reason why the judge should not sign it; until his signature be affixed to the judgment, no proceedings can be had for its reversal; he has, therefore, no right to withhold his signature, where, in the exercise of his discretion, he does not set aside the judgment. The court, therefore, directed, that a writ of *mandamus* be issued, directing the district judge to sign the judgment.

On a *mandamus*, a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised, but they will, in a proper case, require an inferior court to decide. But so far as it regards the case under consideration, the signature of the judge was not a matter of discretion; it followed as a necessary consequence of the judgment, unless the judgment had been set aside by a new trial; the act of signing the judgment is a ministerial and not a judicial act. On the allowance of a writ of error, a judge is required to sign a citation to the defendant in error; he is required, in other cases to do acts which are not strictly judicial.

The writ of *mandamus* is subject to the legal and equitable discretion of the court, and it ought not to be issued in cases of doubtful right; but it is the only adequate mode of relief, where an inferior tribunal refuses to act upon a subject brought properly before it.

A motion for a new trial is always addressed to the discretion of the court, and this court will not control the exercise of that discretion by a circuit court, either by a writ of *mandamus*, or on a certificate of division between the judges.

Motion for a *mandamus* to the District Court for the Eastern District of Louisiana. *This case, as stated in the opinion of the court, was as follows: [*292

This suit was commenced in the district court of the United States for the eastern district of Louisiana, on the 26th May 1826. The action was brought on a mortgage on real property and slaves, in the state of Louisiana, to secure the payment of a large sum of money; and at the first term, the following judgment was entered.

"In this case, the plaintiffs having filed in this court a transaction, entered into between the parties, before Greenbury Ridgley Stringer, Esq., a notary-public in and for the city of New Orleans, and the same being read to the court, it is thereupon ordered, adjudged and decreed, that, in pursuance of said transaction, judgment be entered up in favor of the plaintiffs, for all the notes therein specified, which have become due and payable, with seven per cent. interest thereon, from the time they and each of them respectively arrived at maturity, to wit, the sum of $1100, due on the 18th

of November 1824 ; the sum of $4000, due on the 18th of January 1825 ; the sum of $960, due on the 18th day of May 1825 ; the sum of $725, due on the 18th of November 1825 ; and the sum of $4000, due on the 18th of January 1826. It is further ordered, adjudged and decreed, in pursuance of the transaction aforesaid, that whenever any of the notes mentioned in said transaction, as yet not arrived at maturity, shall become due and payable, that then judgment shall be entered up for the plaintiffs, upon all and every of the said notes, as they arrive at maturity, with seven per cent. interest, from the time they become due and payable, until their final payment. It is further ordered, adjudged and decreed, that there shall be a stay of execution on said judgment, until the 18th day of January 1829 ; and that if the amount of the judgment in this suit, is not then paid, including principal, interest and costs, on said day, that the said slaves and movable property, described in the mortgage mentioned in plaintiff's petition, shall be sold, according to law, to satisfy the judgment in the premises."

By the code of practice of Louisiana, § 3, art. 546, it is provided, that,
*293] "the judge must sign all definitive or final *judgments rendered by him, but he shall not do so, until three judicial days have elapsed, to be computed from the day when such judgments were given." In conformity with the practice of the state courts, under this law, it seems, the district court of the United States in Louisiana, adopted a rule which required all its judgments to be signed. But the judge who rendered the above judgment departed this life, before he signed it, and no proceedings were had in the case until the 21st of May 1832, when a notice was filed in the clerk's office, to the heirs of Wilson, that at the next term, application would be made to the district judge, on behalf of the plaintiffs, to sign the judgment. A motion to this effect was made, which was overruled by the court.

At the last term of this court, a rule was granted on the district judge, to show cause why a *mandamus* should not be issued, commanding him to sign the judgment and direct execution. And at the present term, the district judge, in obedience to the rule, gave the following reasons why he refused to sign the judgment and award execution in the case.

"At the May term 1826, Judge Robinson caused the judgment to be entered. That he did not sign the judgment, although he held three terms afterwards, and did not die until in the autumn of 1828. And now the plaintiffs move, that I, as his successor, shall sign the judgment, in order to render it executory. This application is resisted by the defendants, on several grounds, but principally, 1st. Because they say, there never was any legal judgment given : 2d. That the record of the proceedings does not exhibit such a case as entitled the plaintiffs to judgment.

"If the first position of the defendants be correct, viz., that no legal judgment has been given, the application of the plaintiffs must fail. By a positive law of the state of Louisiana, all judgments rendered, if not set aside for legal cause, within a given number of days, must be signed by the judge, before execution can be taken out upon them ; in other words, the judgments are not complete, or rather are no judgments at all, until they are so signed. A law of this state expressly requires the signature of the judge, before the judgment can be carried into effect ; for there may arise
*294] sufficient reasons between the rendition *of a judgment *pro formâ*, and the time allowed for signing it, to induce the judge to withhold

his signature. That such reasons did arise in this case, may be presumed; for it is a legal presumption, that public functionaries perform their duty when required; and although it is not expected that a judge will call for and sign judgments, without being so required; yet it is strange, that a party so much interested, should not have made application to the judge, in the course of two years, to sign this judgment; and it is also remarkable, that the plaintiff's attorney of record, who procured the making of the judgment entries, never has, to this day, made any such application; but on the contrary, the record shows, that they subsequently instituted new suits, in the name of the assignees of the original plaintiffs, against the same defendants, to recover the amount now in controversy. Why did they proceed in this manner, if they had a right to the original judgment? The judge's signature to a judgment being, by our law, an essential part of it, inasmuch as it is a dead letter without it; it follows, that he who signs it, thereby makes it his own judgment. Therefore, were I to give validity to what is here called a judgment, by affixing to it my signature would it not be to pronounce on the rights of the parties whose cause I have never heard?"

These and other reasons assigned in illustration of the principles above stated, induced the district judge to refuse his signature to the judgment.

The case was argued by *Selden* and *Jones*, for the plaintiffs; and by *Coxe* and *Porter*, for the defendants.

The opinion of the court was given upon no other question argued by counsel, but the right of the judge to refuse to sign the judgment.

Upon this question, it was contended on the part of the plaintiffs, that the signing of the judgment was a ministerial, and not a judicial act. The signing is not of the essence of the judgment. It is a mere formality, not required at common law. It was not required by the Spanish law. That law required, that it should be rendered by day, in a judicial proceeding, in a proper place, after the parties were cited or had appeared; and that it should *be written in the records, and read publicly. 5 Partida, 3d tit. 22, l. 5. After it was pronounced, the judge could not alter it, [*295 except during the day on which it was rendered. Ibid. law 3, 1 Morcau and Carleton's translation, p. 264–5.

The statute (commonly called the practice act, which by the act of congress of 26th May 1824, adopting the practice of the state courts, regulates the practice of the United States courts in Louisiana) which contains the provision requiring judgments to be signed, is of the 10th April 1805 (5 Martin's Dig. 164); and is not to be found in Morcau's Digest. The code of practice has changed the course of proceeding in the state courts; but that code is not observed in the district court of the United States; it was enacted on the 2d October 1825, since the act of congress regulating the practice of the United States courts in Louisiana. The inquiry, then, is to be directed to the laws in force previous to the adoption of the code of practice. The statute of 10th April 1805, follows the Spanish law, and requires all judgments to be pronounced in open court, entered on the minutes, and three days thereafter, signed—not by the judge who rendered them—but by the presiding judge of the court; provided they should not be set aside by motion for a new trial. This statute, in the same section, requires judgments to be docketed, and in the next (5 Martin's Dig. 166), provides, that

no execution shall issue on any judgment not docketed in form aforesaid. Will any one contend, that the docketing is of the essence of the judgment? It is required in the same manner as the signing is; and it is clear, that they are both purely ministerial acts—the rendition of the judgment, and the hearing of the motion for a new trial within the three days, being judicial acts, and after the three days, the judgment is then perfect in all its essential parts, and is to be completed in its formalities by being signed and docketed.

The present application is not an attempt to control the discretion of the judge. Under this Louisiana act, one of three things must be done—the judge must grant a new trial—arrest the judgment—or sign it. If he cannot arrest the judgment, and will not grant a new trial, the only other alternative is to sign the judgment. If no application be made for a new trial, *296] within three days, it is then the duty of the judge *to perfect the judgment, and the right of the party to have it perfected. No exercise of judicial functions is afterwards required, and it only remains for the judge to do the mere ministerial act of signing the judgment, which the parties, by omitting to apply for a new trial, have tacitly admitted must be carried into effect.

No application was ever made for a new trial. Indeed, on what ground could it be asked for or granted, on a judgment confessed with a stay of execution? Could it have been, Judge Robinson lived long enough for the application to have been made to him; he lived three terms after the confession of judgment. The case comes then before the court as one in which no application was made for a new trial to the only judge who, according to the argument, could grant it, and in which the defendants did not desire to have a new trial.

Though the discretion of a judge will not be controlled, and though a *mandamus* will not go to compel him to decide in a particular way, it will go to make him decide, so that a writ of error may be had. A *mandamus* lies to compel the signing of a bill of exceptions by the circuit court. *Ex parte Crane*, 5 Pet. 190. In 11 Mod. 137, is the case of a *mandamus* to a judge of probates, to grant administration to the next of kin; though it is a judicial act to grant it, a *mandamus* lies to compel the grant to the next of kin, in preference to any other. So, it lies to compel a court to proceed to judgment; as in *People* v. *Justices of Sessions of Chenango*, 1 Johns. Cas. 179; *Haight* v. *Turner*, 2 Johns. 371; *Smith* v. *Jackson*, 1 Paine 453. Also, to admit a deed to record, which is a mere ministerial act of the court. *Dawson* v. *Thruston*, 2 Hen. & Munf. 132. At the last term of the supreme court, in *Ex parte Bradstreet*, 7 Pet. 635, the district judge was ordered to reinstate the causes, make up the records, try the causes, and enter judgment, in order to give the demandant the benefit of a writ of error. The words of the statute of Westm. 2 (13 Edw. I.), c. 31, which requires the signing of the bill of exceptions, are not more imperative than are those of this Louisiana act: "if the party write the exception, and pray that the justices may put their seals to it for a testimony, the justices shall put their seals, and if one will not, another shall." By the *297] act of congress *of May 26th, 1790, ch. 38, the "presiding magistrate" is required to certify the proceedings of the court, so as to make them evidence in other courts. Could he refuse? And would there be any

greater interference with judicial discretion in granting the application at bar, than there is in the instances here enumerated.

It is not required by the Louisiana statute, that the judge who rendered the judgment should sign it. Had such been the provision of the statute, an impossibility might have been required. The judge who tried the cause might die within the three days, or he might resign, or be displaced, before the signing of the judgment. Could his successor, on general principles, in any of these cases, refuse to sign it, after the lapse of the three days? The judgment is the act of the court, and not merely on the individual judge. A court never dies; it will see that its judgments are completed and carried into effect. It is the duty of the successor to perfect and carry into effect all acts begun by his predecessor, and pending in the court at the time of his appointment.

And let it not be lost sight of, that no law or decision of Louisiana can be produced, requiring the judge rendering the judgment to sign it. Judge HARPER, in his reasons, cites a section of an act of 1817. But that section makes no change in the act of 1805, as to the formality of the signing the judgment, and the judge by whom that act may be done. The requisition of the statute is not, that "the judge rendering a judgment must remain long enough at the place of holding the court in order to sign it;" but that he shall remain three days after pronouncing judgment, to hear motions for new trials: the words are, "that seven judicial days from that on which a final judgment shall have been rendered, shall be allowed to make a motion for a new trial in the district court for the first district, and the parish court of New Orleans, and that until then the judgment shall not be signed by the judge; and that in all the other district courts of the state, the motion shall be made and the judgment signed within three judicial days only, and for that purpose it shall be the duty of judges of the district courts to sit three days longer after the last cause which they shall have determined in each term." The judge who tried the cause must remain the three days, to hear motions for new *trials, because no judge [*298
can hear such a motion, who has not heard the cause, and because this is a judicial act and not a ministerial act.

It is not necessary that the judgment should be signed on the third day; it may be signed afterwards. This is decided in *Thompson* v. *Chretien*, 12 Mart. 250 (1822). There were other questions in that cause; but one was, whether the judge must not sign the judgment on the third day, and whether it is not void, if signed afterwards. The court say, "the object of the legislature in the section quoted from 2 Mart. Dig. 164, was, to afford the party a delay of three days to state his objections, and for this purpose prohibited the judge to give effect to it by his signature, till the expiration of that delay." It is not intended to require the judge's signature on that day. In that case, the judgment was not signed till several days after its rendition.

There was no occasion for urgency in signing this particular judgment. It was confessed in May 1826, with a stay of execution till the 18th January 1829—very nearly three years. No execution could be issued till then. Why sign the judgment before? Signing virtually authorizes an execution to issue. Of what use would signing be, until the stay expired and an execution was wanted? Inadvertently omitted as it was, still the application

for this formal act to be done, would seem to be in full time, when execution was necessary, and the parties had become entitled to it.

Judge Harper's refusal to perfect the judgment, renders the condition of plaintiff and defendants unequal. Had he signed it, the defendants could have brought a writ of error, and obtained a review of the question, whether he, as the successor of Judge Robertson, was bound to sign the judgment, and also of the alleged irregularities. But the plaintiffs, by such refusal, are deprived not only of all remedy and benefit under their judgment in the court below, but also of the right of suing out a writ of error to this court. The district judge ought either to have signed the judgment, and put the defendants to a writ of error, or arrested the judgment, and afforded the plaintiffs the opportunity of suing out such writ—a right of which they ought not to be deprived.

*299] This is not a question of practice. There are no precedents *on the subject. The death of the judge has occasioned the difficulty; and judges so seldom die, that there is no jurisprudence yet formed in relation to their demise. It is a question of law, depending upon the statute and the ancient jurisprudence of Louisiana, and is simply this: Is or not the signing of a judgment, after the delays for granting a new trial have expired, a judicial or simply a ministerial act? The signing by the judge who rendered the judgment is not required by any law of Louisiana. It is not of the essence of the judgment, but is a mere formality, which does not affect its substantial properties and force.

Upon the whole, it is submitted, that Judge Harper ought to have signed this judgment. The act is merely ministerial. On general principles, as the successor of Judge Robertson, he was bound to complete the judgment. So, under the Louisiana act of 1805: there is not only nothing in that act which requires the judge who presided at the confession of the judgment to sign it, but by its express provisions, the signing is required to be by the presiding judge of the court—presiding at the time the application to sign should be made; words used, no doubt, to avoid the difficulty which would arise from the death, resignation or removal of the judge who presided at the trial.

Coxe and *Porter* contended, that this was not a case in which a judge was called upon to do an act merely ministerial. The district judge has given the facts and reasons which operated on him, judicially, to refuse his signature to the judgment. They are briefly these. The first fact on which he relies is the *laches* of the plaintiffs. He states that, from the records of the court, it appears, that Judge Robertson held three terms of the court, after the entry of the judgment, and did not die until more than two years after. He next adverts to the state law, which requires that to render a judgment valid, it must be signed within a certain number of days, unless set aside. He states that this has been the invariable practice of the court of the United States, in Louisiana; and he draws the inevitable consequence from the neglect of the plaintiffs in obtaining this signature, that they were conscious of the existence of good causes that would have induced Judge

*300] Robertson *to refuse signing it. He states positively, that the same attorneys who instituted the suit, have subsequently, in the same court, instituted new suits, in the name of assignees of the original plaintiffs,

against the same defendants, for the same cause of action. This alone would be sufficient to prevent his acting.

The signing of the judgment has been improperly called a ministerial act, a mere formality—it is neither. Whatever a judge may do, or may refuse to do, according to the circumstances of the case, is a judicial act. Here, after a judge has pronounced his opinion in open court, and had it entered on the minutes, he may refuse to perfect it, if he sees that injustice has been done, and order a new trial; or he may arrest the judgment for such radical errors in the proceedings as show that no valid judgment can be founded on them. Ordering the judge to sign this judgment, would be directing him what judgment to render; for it would be saying, You shall not grant a new trial; you shall not arrest the judgment; but you must confirm it. Now this is contrary to an express decision of this court, in the case of the *United States* v. *Lawrence*, 3 Dall. 42.

In his reasons, the judge remarks with some force on the injustice of forcing him, by a process of this kind, to decide a case on evidence which had not been offered to him, but to another; which (if the argument to show that this is a judgment, not a ministerial act, be correct) would be conclusive against the motion. Ought he not to be permitted to look into the proceedings? to see whether the defendant has appeared? whether he has been cited? whether the court has jurisdiction of the case? whether the party who appears by attorney is not stated to be an infant? to examine, in short, whether the proceedings are in legal form? Should any hardship on the part of the plaintiffs be urged, the answer is ready. Whatever of inconvenience exists, is of the plaintiffs' own creation; the delay has been produced by their own negligence; or worse, by their desire to overreach—and they are not without remedy. A new action, avoiding all the irregularities of this, would have produced a decision on the merits, in less time, and at less expense, than by this application; at the same time, that the mortgage, if it be a legal one, binds all the property as effectually *as a judgment, and carries back the lien to an earlier date. Authorities [*301 to show that the signature of the judgment is necessary, need scarcely be produced. For the satisfaction of the court, however, the following statutory provisions are referred to: 1 Acts of the Territory of Orleans, p. 234, § 13; 2 Martin's Digest 164, No. 11; Acts of 1817, p. 32, § 11. All these acts may be found in Leslet's Digest, Code of Practice 546.

The act required of the judge of the district, by the *mandamus*, was entirely judicial. He had refused to sign the judgment, and had given his reasons for the same, and he is now to reverse this judgment. A *mandamus* is not the proper remedy. It is never issued, when the act required to be done under it is other than ministerial; it is properly to be directed to the judge, and not to court; and in this case, it is judicially known, that the court is composed of but one judge. There was no judgment rendered by Judge Robertson. The case was not, therefore, judicially disposed of, before his death; and the present judge, before he can sign the judgment, must examine the record. This was done by him, and he judicially decided, that he could not sign the record. This is conclusive; if the judge is anything more than a mere clerk to perfect the record. What acts of a judge are ministerial? They are all judicial. Does this court act ministerially, in any case, or on any occasion?

The law of Louisiana requires the judge to remain three days at the place where the court is held, before he signs the judgment, which affords an opportunity to examine if there are any reasons for a new trial. But in this case no opportunity for a new trial can be allowed, if the duty of the judge is absolute, if he must sign the judgment. The law does not require that a new trial shall be asked in three days; if it is not asked in that time, and judgment has not been signed, the case is open for the application. Upon the authority of the civil code of Louisiana, the judge may order a new trial, up to the time of signing the judgment. And in this case, a new trial could have been given by the judge of the district court, if he had been required to grant it. No application was before him for any purpose but
*302] to obtain his *signature to the judgment. The proceedings in this case are evidently defective, as it is admitted, the minors, heirs of Nicholas Wilson, had not notice of the application for signing the judgment.

Jones, in reply, contended, that after the judgment had been entered on the minutes, as the oral judgment of Judge ROBERTSON, the proceedings to complete the record were mere matters of form. In this case, particularly, the form of signing was all that was necessary, for the party had made no application for a new trial. The state of record was such as that the judge could sign the judgment; as is done when a warrant of attorney is given, which fully authorizes the entry of judgment. Judges frequently act ministerially. The certificate to a record, and the signature of a judge in allowing a writ of error, are ministerial acts.

There is no force in the objection, that as the present judge did not sit on the trial of this cause, he cannot grant a new trial. It often occurs, that new trials are moved for and granted by other judges than those before whom the cases have been tried. New trials are moved for "in banc," before all the court; trials take place at *nisi prius*, before a single judge.

MCLEAN, Justice, delivered the opinion of the court.—In the argument, on the motion to make the rule for a *mandamus* absolute, various objections were taken against the jurisdiction of the district court. It is insisted, that the plaintiffs, in their corporate capacity, can neither make a contract in Louisiana, nor enforce it in that state by suit; and if they could, the proceedings in the case were erroneous, and might be reversed on a writ of error. In the consideration of the question now before the court, they do not consider themselves authorized to examine into the regularity of the proceedings in the case before the district court, as they would do on a writ of error. The point of inquiry is, whether the district judge, under the circumstances of the case, was bound to sign the judgment.

The writ of *mandamus* is subject to the legal and equitable discretion
*303] of the court, and it ought not to be issued in cases *of doubtful right. But it is the only adequate mode of relief, where an inferior tribunal refuses to act upon a subject brought properly before it. In this case, the district judge seems to think, that as the judgment was not rendered by him, he has no power to grant a new trial, as he is not acquainted with the facts and circumstances which should influence his discretion in making such an order; and that, consequently, he is not bound to sanction the judgment, by his signature. By the law of Louisiana, and the rule adopted by the district

court, the judgment, without the signature of the judge, cannot be enforced. It is not a final judgment, on which a writ of error may issue for its reversal. Without the action of the judge, the plaintiffs can take no step, unless it be the one they have taken, in this case. They can neither issue execution on the judgment, nor reverse the proceedings by writ of error. And if the reasons assigned by the judge shall be deemed a sufficient answer to the rule, the plaintiffs are without remedy on their judgment.

But the district judge is mistaken, in supposing that no one but the judge who renders the judgment, can grant a new trial. He, as the successor of his predecessor, can exercise the same powers, and has a right to act on every case that remains undecided upon the docket, as fully as his predecessor could have done. The court remains the same, and the charge of the incumbents cannot and ought not, in any respect, to injure the rights of litigant parties. The case referred to in 6 Wheat. 542, asserts nothing in opposition to this principle. A motion for a new trial is always addressed to the discretion of the court, and this court will not control the exercise of that discretion, by a circuit court, either by a writ of *mandamus*, or on a certificate of division between the judges.

After the rendition of the judgment, three days are allowed by the law of Louisiana, within which to more for a new trial; and if no new trial shall have been granted, the judge is required to sign the judgment, at the expiration of this time. It may be in the power of a judge, under this law, in the state court, where the judgment has not been signed, to grant a new trial, after the lapse of a much longer time than is specified in *the act; [*304
but this question is not raised in the present case, as the district judge has, in not granting a new trial, decided against it. It is immaterial, what reasons may have influenced this decision, as it was a matter which rested in his discretion. But the important inquiry is, whether, after refusing to grant a new trial, either on a full consideration of the merits, or because he had not a sufficient knowledge of them, he was not bound to sign the judgment.

On a *mandamus*, a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised; but they will, in a proper case, require the inferior court to decide. But so far as it regards the case under consideration, the signature of the judge was not a matter of discretion. It followed as a necessary consequence of the judgment, unless the judgment had been set aside by a new trial. The act of signing the judgment is a ministerial and not a judicial act. On the allowance of a writ of error, a judge is required to sign a citation to the defendant in error; he is required in other cases, to do acts which are not strictly judicial.

The judgment may be erroneous, but this is no reason why the judge should not sign it. Until his signature be affixed to the judgment, no proceedings can be had for its reversal. He has, therefore, no right to withhold his signature, where, in the exercise of his discretion, he does not set aside the judgment. As well might a judge refuse to enter up the judgment upon a verdict, which he would not, or could not, set aside, as to withhold his signature in the present case. The cause should be placed in such a posture as to enable the plaintiffs to proceed to another trial, or to take out execution on their judgment. As the former has not been done, the latter may be claimed by the plaintiffs as a matter of right.

This court, therefore, direct, that the writ of *mandamus* be issued, directing the district judge to sign the judgment, agreeable to the prayer of the plaintiffs.

On motion of plaintiff for a *mandamus* to the district court of the United States for the eastern district of Louisiana: On consideration of the rule granted in this cause by this court, on the 14th day of March, in the year of
*305] our Lord *1833, which was duly served on the judge of the district court of the United States for the eastern district of Louisiana, as by reference to the proof of service, on file in the clerk's office, will appear, and of the return of the said judge, setting forth his reasons at large, as also of the arguments of counsel, for both the plaintiff and defendant in this cause, thereupon had, it is now here considered, ordered and adjudged by this court, that the said rule be and the same is hereby made absolute; and it is further ordered and adjudged by this court, that a writ of *mandamus* be and the same is hereby awarded, directing the said district judge to sign the judgment, and to award execution thereon, agreeable to the prayer of the plaintiff in the proceedings mentioned.

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*306] *In the Matter of the Life and Fire Insurance Company of New York, Plaintiff, *v.* Christopher Adams.

Mandamus.

Motion for a *Mandamus* to the District Court for the Eastern District of Louisiana.

McLean, Justice, delivered the opinion of the court.—At the last term of this court, a rule was granted on the district judge of the United States for the eastern district of Louisiana in this, the same as in the preceding case of the same plaintiffs, against the Heirs of Nicholas Wilson; and as the principles in both cases are substantially the same, the court also direct that a *mandamus* be issued in this case, commanding the district judge to sign the judgment, agreeable to the prayer of the plaintiffs' counsel.

On motion of plaintiff for a *mandamus* to the district court of the United States for the eastern district of Louisiana: On consideration of the rule granted in this cause by this court, on the 14th day of March in the year of our Lord 1833, which was duly served on the judge of the district court of the United States for the eastern district of Louisiana, as by reference to the proof of service, on file in the clerk's office, will appear, and of the return of said judge, setting forth his reasons at large, as also of the arguments of counsel, for both the plaintiff and defendant in this cause, thereupon had, it is now here considered, ordered and adjudged by this court, that the said rule be and the same is hereby made absolute; and it is further ordered and adjudged by this court, that a writ of *mandamus* be and the same is hereby awarded, directing the said district judge to sign the judgment, and to award execution thereon, agreeable to the prayer of the plaintiff, in the proceedings mentioned.[1]

[1] For further proceedings in this case, see 9 Pet. 573.

*Colin Mitchell, Appellant, *v.* United States.

Appeal from the Superior Court of East Florida.

Marshall, Ch. J., said :—A pamphlet has been sent to the judges touching the questions in controversy in this cause. The court desire it to be understood, that the practice of the court is not to receive or examine such papers, unless they have been presented in court, and shown to the opposite counsel.

It was, afterwards, on the same day, stated to the court by Mr. *White*, of Florida, counsel for the appellant, that the counsel on neither side had any knowledge of the pamphlet's having been sent to the court ; nor did they in any manner countenance the same. The pamphlet was sent to the judges by an agent of the appellant, who was not in any manner aware of the irregularity of the proceeding.

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*Richard R. Keene, Plaintiff in error, *v.* John McDonough. [*308

Florida land-claims.

An adjudication made by a Spanish tribunal in Louisiana, is not void, because it was made after the cession of the country to the United States; for it is historically known, that the actual possession of the country was not surrendered, until some time after the proceedings and adjudication in the case took place. It was the judgment, therefore, of a competent Spanish tribunal, having jurisdiction of the case, and rendered whilst the country, though ceded, was, *de facto*, in the possession of Spanish, and subject to Spanish laws; such judgments, so far as they affect the private rights of the parties thereto, must be deemed valid.

Error to the District Court for the Eastern District of Louisiana.

This case was argued by *Grimes*, for the defendant. No counsel appeared for the plaintiff in error.

Thompson, Justice, delivered the opinion of the court.—The writ of error in this case, brings up the record of a judgment rendered aganst the plaintiff in error, in the district court of the United States for the eastern district of Louisiana. The plaintiff, according to the course of proceedings in that state, presented his petition to the court, stating, that on the 22d of May 1803, in virtue of a lawful purchase, at public sale, duly and legally made by Don Carlos de Grand Pre, governor of the post and establishment of Baton Rouge, he became the owner and proprietor of a tract of land, appertaining to the "*testamentaria*," or succession of the deceased Poussett, particularly describing the same (being the land in question) and annexing to his petition the document or adjudication, by which he alleges that the title to the land was vested in him, of which he was never thereafter legally divested, as he alleges.

A plea to the jurisdiction of the court was interposed by the defendant, alleging that the plaintiff was a citizen of Louisiana, of which state the defendant was also a citizen. Upon the trial of the issue joined upon this plea, the jury found that the plaintiff was not a citizen of the state of Louisiana.

The defendant then filed an answer to the petition, denying all and singular the allegations contained in the petition, and *averring [*309

that the petitioner has no title whatever to the land in question. That if any such adjudication as is pretented by him ever was made, the same was afterwards annulled. And he further pleads, that he is the true and legal owner of the said tract of land, by good and valid title, and that he has had possession under the same, for thirty years and upwards, &c.

The adjudication upon which the plaintiff rests, as the evidence of his title, states, that he being the last and highest bidder, the land was adjudicated to him; and he having no security to offer, he engages to execute a mortgage in trust on the property, which was accepted by the testamentary executors, on condition that he shall immediately pay to Don Thomas Dunford, one of the executors, $600, a portion of the purchase-money, to be applied to the payment of the claim of Joyce & Turnbull, against the said estate.

According to the plaintiff's own showing, therefore, his title was not absolute, but conditional; and the record contains subsequent proceedings by the executors of Poussett, to annul the former adjudication for non-fulfilment of the conditions upon which the sale is made. For this purpose, a petition was presented to Governor Grand Pre, setting forth the sale, and the condition upon which it was made, and alleging that the plaintiff had not paid the $600, nor given the mortgage to secure the purchase-money, and praying a decree to make null and void the former sale, and that the land might be again exposed to sale. And on the 24th of April 1804, a decree was entered, setting forth that it having been proved that Don Richard Raynal Keene had absented himself from the country, without having complied with the conditions of sale made to him, it is decreed, according to law, and the rules which govern in like cases, that the adjudication to him is annulled, and that the plantation be again exposed to public sale, which was accordingly done on the 2d of June 1804, and finally adjudged to Don Miguel Mahier, for the sum $5500, if he being the last and highest bidder at that sum; and the adjudication alleges that possession was given to him; and the defendant then deduces a title from Don Miguel Mahier to himself.

The plaintiff in error not having appeared to argue his cause, or suggest
*310] the errors of which he complains, the court cannot *perceive on what grounds he can rely, to reverse the judgment of the court below. The record contains no evidence whatever of his having paid any part of the purchase-money. This is not even alleged in the petition; and, indeed, a contrary inference is to be drawn from what he does allege; for, he states, that although not bound to account for a greater sum than the price at which the land was sold to him, yet he will agree to pay not only that price, but any sum that shall be equivalent to the price for which the land sold on the second sale. The petition alleges that the proceedings under which the second sale was made were irregular and unlawful.

Should it be admitted, that it was competent for the plaintiff to impeach this adjudication, and show that the proceedings were irregular and unlawful, the record contains no offer, at the trial, to show any irregularity or illegality in those proceedings; they must, at least, be taken as *primâ facie* evidence of a judicial proceeding, to pass the title of land, according to the course and practice of the Spanish law in that province.

The authority of the governor to take jurisdiction in such cases, is

admitted by the plaintiff's own showing; for the title set up by him rests upon the authority of the same governor, who adjudicated the second sale, under which the defendant claims; and the first sale being conditional, and the conditions not performed, no doubt can be entertained, but that the second proceeding and sale must be considered, at least, as *primâ facie* evidence of what they purport to have been; and this is sufficient to warrant the judgment or decree of the court below.

The adjudication having been made by a Spanish tribunal, after the cession of the country to the United States, does not make it void; for we know, historically, that the actual possession of the territory was not surrendered, until some time after these proceedings took place. It was the judgment, therefore, or a competent Spanish tribunal, having jurisdiction of the case, and rendered whilst the country, although ceded, was, *de facto*, in the possession of Spain, and subject to Spanish laws. Such judgments, so far as they affect the private rights of the parties thereto, must be deemed valid.

This view of the case supersedes the necessity of considering the question of prescription. *The judgment or decree of the court below is accordingly, affirmed. [*311

This cause came on to be heard, on the transcript of the record from the district court of the United States, for the eastern district of Louisiana, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said district court be and the same is hereby affirmed, with costs.

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*Charles A. Davis, Consul to the King of Saxony, Plaintiff in error, *v.* Isaac Packard, Henry Disdier and William Morphy. [*312

Error in fact.

At a former term of this court, the judgment of the court for the correction of errors of the state of New York, was reversed in this case, this court being of opinion, that Charles A. Davis, being consul-general of the king of Saxony, was exempted from being sued in the state court and that by reason thereof, the judgment rendered against him by the court for the correction of errors was erroneous, and ordered and adjudged that the judgment of the court for the correction of errors should be and the same was thereby reversed; and that the cause be remanded to the court for the correction of errors, with directions to conform its judgment to this opinion. A mandate issued in pursuance of this judgment to the court for the correction of errors, and that court declared and adjudged, "that a consul-general of the king of Saxony is by the constitution and laws of the United States, exempt from being sued in a state court;" and that court further adjudged, that the supreme court of the state of New York from which court this case has been brought, by a writ of error, to the court of errors of New York, is a court of general common-law jurisdiction, and that the court of errors has no power, jurisdiction or authority, for any error in fact, or any error than such as appears upon the face of the record of the proceedings of the supreme court, to reverse a judgment of that court; that no other error can be assigned or regarded as a ground of reversal of the judgment of said supreme court, than such as appears upon the record of the proceedings of the said court, and which relates to questions actually before the justices of the court, by a plea to its jurisdiction or otherwise; and that the court of errors is not authorized to notice the allegations of Davis assigned for error in that court, that he was consul-general of the king of Saxony, or to try or regard said allegation; and there being no error on the face of the record of the proceedings of the supreme court of New York, the defendant in error was entitled to a judgment of affirm-

ance according to the laws of that state, any matter assigned for error in fact to the contrary notwithstanding. The court of errors further declared, that for any error in the judgment of the supreme court or its proceedings, assignable for error in fact, the party aggrieved by such error may sue out a writ of error *coram vobis*, returnable to the supreme court, upon which the plaintiff may assign errors in fact; and if such fact is admitted or found by the verdict of the jury, the supreme court may revoke their judgment, and for any error in the judgment of the supreme court upon the writ of error *coram vobis*, the court of errors has jurisdiction, upon a writ of error to the supreme court, to review the last judgment. The defendants in error having, upon the filing of the mandate to the supreme court, applied to the court of errors to dismiss the writ of error to the supreme court of that state, the same was quashed, and
*313] the *defendants in error adjudged to recover their costs against the plaintiff in error.

The judgment of the court of errors was brought up by a writ of error, and it was argued, that the mandate on the former judgment had been disregarded, and that, consequently, the second judgment ought to be reversed.

The court has felt great difficulty on this question; the importance of preserving uniformity in the construction of the constitution, laws and treaties of the United States must be felt by all; and the impracticability of maintaining this uniformity, unless the power of supervising all judgments in which the constitution, laws or treaties of the United States may be drawn into question, be vested in some single tribunal, is too apparent for controversy; the people of the United States have vested that power in this tribunal, and its highest duty is to exercise it with fidelity. The point of difficulty in this case is, to decide, whether the legitimate exercise of this power has been obstructed by the judgment of the court of errors for New York, now under consideration.

It is not admitted, that the court whose judgment has been reversed or affirmed can rejudge that reversal of affirmance; but it must be conceded, that the court of dernier resort, in every state, decides upon its own jurisdiction, and upon the jurisdiction of all the inferior courts to which its appellate power extends.

Neither the judgment nor mandate of this court prescribed in terms the judgment which should be rendered by the court of errors of New York; this court proceeded to order that the cause be remanded to the said court for the correction of errors, with directions to conform its judgment to the opinion of this court. The opinion expressed therein was, that Charles A. Davis, being consul-general of the king of Saxony, exempted him from being sued in the state court.

The judgment rendered in the court of errors being thus reversed, because of this exemption, it was for the court of errors to inquire and decide in what manner it should conform its judgment to this opinion; had that court re-entered its former judgment, the direct opposition of this proceeding to the mandate would have been apparent; but this was not done; the court of errors admitted the exemption of Charles A. Davis from being sued in the courts of a state, but added, that the fact did not appear in the record of the proceedings of the supreme court of New York; and that its own power did not extend to the reversal of any judgment of that court, for an error of fact, not apparent on the face of the record, though it should be assigned as error in the court for the correction of errors.

The judgment of the court of errors, thus affirming the judgment of the supreme court of the state, stands reversed, and the writ of error to that judgment is quashed, leaving the defendant in the original action at full liberty to sue out and prosecute his writ of error *coram vobis*, for its reversal in the supreme court of New York.

If the jurisdiction of the court for the correction of errors does not, according to the laws by which the judicial system of New York is organized, enable that court to notice errors in fact, in the proceedings of the supreme court, not apparent on the face of the record, it is difficult so perceive how that court could conform its judgment to that of this court, otherwise than by
*314] *quashing its writ of error to the supreme court; had that been its original judgment, it is not believed, that this court would have reversed it, and we do not think that, as now rendered, it can be held to be erroneous.

Davis *v.* Packard, 10 Wend. 51, affirmed.

Error to the Court for the Correction of Errors of the state of New York. This case was before the court on a writ of error, at January term 1832. A motion was made to dismiss the writ of error, on the ground that it did not appear on the record of the proceedings in the case before the

supreme court of New York, from which court it had been taken to the court for the correction of errors, that the plaintiff in error was consul of the king of Saxony. The court refused the motion, considering that the official character of the plaintiff was sufficiently apparent in the proceedings. (5 Pet. 41.) Afterwards, at January term 1833 (7 Pet. 276), this case came on for argument. The court decided, that "the record of the proceedings, brought up with the writ of error to the court for the correction of errors of the state of New York, showed that the suit was commenced in the supreme court of the state of New York, against the plaintiff in error, who was consul of the king of Saxony, and who did not plead or set up his exemption from such suit, in the supreme court; but, on the same cause being carried up to the court for the correction of errors, this matter was assigned for error in fact, notwithstanding which, the court gave judgment against the plaintiff in error. The court of errors having decided, that the character of consul did not exempt the plaintiff in error from being sued in the state court, the judgment is reversed." The following mandate was issued to the court for the trial of impeachments and correction of errors of the state of New York.

"The United States of America, ss. The President of the United States of America, to the president of the senate of the state of New York, the senators, chancellor, and justices of the supreme court of the said state, being the judges of the court for the trial of impeachments and correction of errors, holden in and for the said state of New York, Greeting:

"Whereas, lately, in the court for the trial of impeachments and correction of errors, holden in and for the state of New York, before you, or some of you, in a cause between *Charles A. Davis, plaintiff in error, and Isaac Packard, Henry Disdier and William Morphy, defendants in [*315 error, the judgment of the said court for the trial of impeachments and correction of errors, was in the following words, to wit: 'Therefore, it is considered by the said court for the correction of errors, that the judgment of the supreme court aforesaid be and the same is hereby in all things affirmed. It is further considered, that the said defendants in error recover against the plaintiff in error, their double costs, according to the statute in such case made and provided, to be taxed in defending the writ of error in this cause, and also interest on the amount recovered, by way of damages,' as by the inspection of the transcript of the record of the said court for the trial of impeachments and correction of errors, which was brought into the supreme court of the United States by virtue of a writ of error, agreeably to the act of congress in such case made and provided, fully and at large appears. And whereas, in the present term of January, in the year of our Lord 1833, the said cause came on to be heard before the said supreme court, on the said transcript of the record, and was argued by counsel; on consideration whereof, it is the opinion of this court, that the plaintiff in error, being consul-general of the king of Saxony, exempted him from being sued in the state court; by reason whereof, the judgment rendered by the court for the trial of impeachments and correction of errors, is erroneous. Whereupon, it is ordered and adjudged by this court, that the judgment of the said court for the trial of impeachment and correction of errors be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said court, with directions to conform its judgment to the opinion of this court.

"You, therefore, are hereby commanded, that such further proceedings be had in said cause, as according to right and justice, and in conformity to the opinion and judgment of said supreme court of the United States, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

*316] "Witness the Honorable JOHN MARSHALL, chief justice of said *supreme court, the second Monday of January, in the year of our Lord 1833. WILLIAM THOMAS CARROLL,
Clerk of the Supreme Court of the United States."

At the April session 1833, of the court of errors of the state of New York, the following proceedings took place, as stated in the records of that court.

"The court for the correction of errors having heard the counsel for both parties, and diligently examined and fully understood all and singular the premises, and inspected as well the record and proceedings aforesaid as the mandate of the said supreme court of the United States; it is thereupon declared and adjudged by this court, that a consul-general of the king of Saxony is, by the constitution and law of the United States, exempt from being sued in a state court. It is further adjudged and declared, that the supreme court of the state of New York is a court of general common-law jurisdiction, and that by the laws of this state, this court has no jurisdiction, power or authority to reverse a decision of the said supreme court for any error in fact, or any other error than such as appears upon the face of the record and proceedings of the said supreme court, and that no other errors can be assigned or regarded as a ground of reversal of judgment of the said supreme court, than such as appear upon the record and proceedings of the said supreme court, and which relate to questions which have actually been brought before the justices of that court for their decision thereon, by a plea to the jurisdiction of that court or otherwise; and that this court was not authorized to notice the allegations of the said Charles A. Davis, assigned for error in this court, that he was consul-general of the king of Saxony, or to try the truth of the said allegation, or to regard the said allegation as true; and that, by the laws of this state, the replication of the defendant to an assignment of errors, that there is no error in the record and proceedings aforesaid, or in the giving of the judgment of the supreme court, was not an admission of the truth of any matter assigned as error in fact, or which was not properly assignable for error in this court; and that if there was no error upon the face of the record and the proceedings in the

*317] supreme *court, the defendant in error was entitled to a judgment of affirmance according to the laws of this state, any matter assigned for error in fact, to the contrary notwithstanding. And it is further declared and adjudged, that by the laws of this state, if there is any error in a judgment of the said supreme court, or in the proceedings, which is properly assignable for error in fact, the party aggrieved by such error may sue out a writ of error, *coram vobis*, returnable in the said supreme court, upon which the plaintiff in error may assign errors in fact. And if such errors in fact are submitted, or are found to be true by the verdict of a jury, upon an issue joined thereon, the said supreme court may revoke their said judgment; and that, for any error in the judgment of the said supreme court upon

the said writ of error *coram vobis*, this court has jurisdiction and authority upon a writ of error to the said supreme court, to review the said last-mentioned judgment, and to give such judgment, in the premises as the said supreme court ought to have given. It is, therefore, the opinion of this court, that although the said Charles A. Davis, the plaintiff in error in this cause, might have been the consul-general of the king of Saxony, and as such was not liable to be sued in the state court, yet inasmuch as the fact that he was such consul nowhere appeared in the record of the judgment of the said supreme court, the defendant in error is entitled to the judgment of this court, affirming the said judgment of the said supreme court. But the defendant in error having, upon the filing of the said mandate of the said supreme court of the United States, applied to this court to dismiss the writ of error to the said supreme court of this state, it is, therefore, ordered and adjudged, that the said last-mentioned writ of error be quashed; and it is further ordered and adjudged, that the said defendants in error recover against the plaintiff in error their costs in this court, according to the statute in such case made and provided, to be taxed, and also interest on the amount of the judgment of the court below, by way of damages; and that the proceedings be remitted to the said supreme court of this state, &c." The defendant prosecuted this writ of error.

The case was argued by *White*, for the plaintiff in error; and by *Selden*, for the defendants.

* *White* stated, that the question before this court was, whether the mandate from this court has been carried into effect. It has [*318 been decided here, that a state court cannot take cognisance of a suit against a consul. That his exemption from the jurisdiction of a state court, may be assigned as error in the court of errors of the state of New York. The court of errors have assented to the exemption; but they have left the judgment of the supreme court of the state in force. That court have determined, after the reception of the mandate of this court, that they would dismiss the writ of error to the supreme court of the state; although they had, before the case was brought here, decided not to do so.

In the case of *Cohens* v. *State of Virginia*, 6 Wheat. 264, this court asserted the jurisdiction of the supreme court of the United States to revise a judgment against a foreign minister, entered in a state court. Consuls have the same privileges that belong to ambassadors and other public ministers. In that case, the jurisdiction of the court is declared to be original, "in all cases affecting ambassadors, other public ministers and consuls." This jurisdiction is exclusive. The court of errors of New York should have vacated the judgment entered there, and the party would have obtained his costs. By the mode of proceeding adopted by the court, the plaintiff in error is subjected to the whole of the costs. The question between the parties has become, principally, one of costs, as the greater part of the debt has been paid.

Mr. White cited the Revised Statutes of New York, vol. 5, p. 51; vol. 2, p. 166; 17 Johns. 473; 14 Ibid. 517; 16 Ibid. 353; 8 Cow. 661, 701; Paine & Duer's Practice 475.

Selden, for the defendants, contended, that the court of errors of New York could not exercise any jurisdiction to carry into effect the judgment of this court; and therefore, they remanded the case to the supreme court, where the errors might be, and would be corrected.

The jurisdiction of the court of errors could not be increased by any mandate from this court. All that court could do was, to *allow the
*319] party to go before the supreme court, and there plead his privilege; and if, in the proceedings of that court, upon the plea, there should be error in their judgment, the case might be taken again before the court of errors, and there corrected. This court will not undertake to decide what are the powers of a state court. They will not entertain such questions, unless a construction shall be given to the laws establishing or regulating those courts, that will defeat the powers of this court. The state court says, there is a court in which the party may have the benefit of his plea, and if that court decides wrong, the court of errors will correct the decision. Will this court claim to controvert the construction, by the court of errors of New York, of the powers and jurisdiction of the courts of that state? This is not necessary for the full and efficient exercise of its jurisdiction by this court; and the harmony of the judicial system of the federal and state courts will be promoted by avoiding the assertion of such a claim.

Although a consul has, by the decision of this court, a privilege of exemption from suit in the court of a state, and this is the privilege of his government; yet if the consul omits to plead this exemption, he is not entitled to an action of trespass against an officer who may execute process, founded on a judgment rendered in a suit, in which the plea of privilege was omitted. His government may complain, but he cannot. The court of errors have said, the plaintiff in error, as the consul of the king of Saxony, has the privilege he asserts; and if he is not allowed, in the proper court, to do so, it will be done in that court. The court of errors do not, therefore, undertake to controvert the decision of this court. Suppose, this court had said, a *venire de novo* should be issued in the court of errors, and that court should have decided, that no such proceedings could be had before it, and refused to issue the writ. Would the same have been other than what was proper. The decision referred to in 17 Johns. 473, was before the present constitution of the court of errors. It is declared in the present constitution of New York, that the court of errors can never inquire into any fact which arises after the judgment; but must send the case to a court, where the fact may be inquired into.

*320] *Thompson, Justice.—Would not the court of errors obey the mandate of this court, which only required that court to revise their judgment? They are asked to do no more.

Selden admitted, that if the simple action, required by the mandate of this court, of the court of errors, was, to revise their judgment, the proceedings of that court did not conform to it. But they have gone further, they have fully admitted the law, as decided by this court; and have given the party an opportunity to avail himself of it, by claiming his privilege in the proper court. If the court of errors had only revised their judgment, they would have left the judgment of the supreme court to remain before them.

MARSHALL, Ch. J., inquired, whether the court of errors might not, by revising their judgment, which had affirmed the judgment of the supreme court, have revised that of the supreme court, and corrected it.

White, in reply, insisted, that by the constitution and laws of New York, the court of errors had authority to direct an issue of fact to be tried before that court. He suggested, that if the action of the court of errors in this case, shall be sustained by this court, the courts of the states of the Union, may so model their proceedings, as to defeat the supervising authority of this court.

MARSHALL, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment rendered by the court for the correction of errors of the state of New York. The defendants in error had obtained a judgment against Charles A. Davis, in the supreme court of New York, which was removed by writ of error into the court for correction of errors. In that court, the said Davis assigned for error, that he was, when the suit was instituted, and has ever since continued to be, consul-general of his majesty the king of Saxony, in the United States, and ought, according to the constitution and laws of the United States, to have been impleaded in the said supreme court of the United States, or in some district *court of the [*321
said United States, and that the said supreme court had not jurisdiction, and ought not to have taken to itself the cognisance of the said cause. The defendant in error replied, that there was no error; and the court for the correction of errors affirmed the judgment of the supreme court. This last judgment was brought before this court in conformity with the 25th section of the judiciary act, and this court being of opinion, "that the said Charles A. Davis being consul-general of the king of Saxony, exempted him from being sued in the state court, and that by reason thereof, the judgment rendered by the court for the correction of errors, was erroneous; therefore, it was considered, ordered and adjudged, that the judgment of the said court for the correction of errors should be and the same is reversed; and that this cause be remanded to the said court for correction of errors, with directions to conform its judgment to this opinion."

The mandate issued in pursuance of this judgment having been received by the court for the correction of errors, that court declared and adjudged, "that a consul-general of the king of Saxony is, by the constitution and law of the United States, exempt from being sued in a state court;" and did further adjudge and declare, "that the supreme court of the state of New York is a court of general common-law jurisdiction, and that, by the laws of this state, this court [the court of errors] has no jurisdiction, power or authority to reverse a decision of the said supreme court, for any error in fact, or any other error than such as appears upon the face of the record and proceedings of the said supreme court, and that no other errors can be assigned or regarded as a ground of reversal of a judgment of the said supreme court, than such as appear upon the record and proceedings of the said supreme court, and which relate to questions which have actually been brought before the justices of that court for their decision thereon, by a plea to the jurisdiction of the court, or otherwise; and that this court was not authorized to notice the allegations of the said Charles A. Davis assigned for error in this court, that he was consul-general of the king of Saxony, or to try the

truth of the said allegation, or to regard the said allegation as true; and that, by the laws of this state, the replication of the defendant to an assign-
*322] ment of errors, that there is no error in the *record and proceedings aforesaid, or in the giving of the judgment of the supreme court, was not an admission of any matter assigned as error in fact, or which was not properly assignable for error in this court; and that if there was no error upon the face of the record and the proceedings in the supreme court, the defendant in error was entitled to a judgment of affirmance, according to the laws of this state; any matter assigned for error in fact, to the contrary notwithstanding. And it is further declared and adjudged, that by the laws of this state, if there be any error in a judgment of the said supreme court, or in the proceeding, which is properly assignable for error in fact, the party aggrieved by such error may sue out a writ of error *coram vobis*, returnable to the said supreme court, upon which the plaintiff ie error may assign errors in fact. And if such errors in fact are admitted, or are found to be true by the verdict of a jury, upon an issue joined thereon, the said supreme court may revoke their said judgment; and that for any error in the judgment of the said supreme court, upon the said writ of error *coram vobis*, this court has jurisdiction and authority, upon a writ of error to the said supreme court, to review the said last-mentioned judgment, and to give such judgment in the premises as the said supreme court ought to have given. It is therefore, the opinion of this court that, although the said Charles A. Davis the plaintiff in error in this cause, might have been the consul-general of the king of Saxony, and, as such, was not liable to be sued in the state court, yet inasmuch as the fact that he was such consul, nowhere appeared in the record of the judgment of the said supreme court, the defendant in error is entitled to the judgment of this court, affirming the judgment of the said supreme court. But the defendant in error, having, upon the filing of the said mandate of the said supreme court of the United States, applied to this court to dismiss the writ of error to the said supreme court of this state, it is, therefore, ordered and adjudged, that the last-mentioned writ of error be quashed; and it is further ordered and adjudged, that the defendants in error recover against the plaintiff in error their costs, &c."

The judgment also has been brought before this court by writ of error,
*323] and it has been argued, that the mandate on the *former judgment has been disregarded, and that, consequently, this second judgment ought to be reversed. The court has felt great difficulty on this question. The importance of preserving uniformity in the construction of the constitution, laws and treaties of the United States, must be felt by all; and the impracticability of maintaining this uniformity, unless the power of supervising all judgments in which the constitution, laws or treaties of the United States may be drawn into question, be vested in some single tribunal, is too apparent for controversy. The people of the United States have vested that power in this tribunal, and its highest duty is to exercise it with fidelity. The point of difficulty in this case is, to decide, whether the legitimate exercise of this power has been obstructed by the judgment of the court of errors of New York, now under consideration.

It is not to be admitted, that the court whose judgment has been reversed or affirmed, can rejudge that reversal or affirmance; but it must be conceded, that the court of dernier resort in every state, decides upon its own

jurisdiction, and upon the jurisdiction of all the inferior courts to which its appellate power extends. Assuming these propositions as judicial axioms, we will inquire, whether the judgment of the court of errors for the state of New York is in violation of the mandate of this court?

The original judgment of the court of errors, which was brought before this court, was reversed in terms. This reversal was not to depend upon any act to be performed, or opinion to be given by the court of errors; but stood absolute by the judgment of this court. So is the law, and so was the judgment rendered by this court. Its language, after expressing the opinion, that Charles A. Davis, being consul-general of the king of Saxony, exempted him from being sued in a state court, is, "therefore it is considered, ordered and adjudged by this court, that the judgment of the said conrt for the correction of errors be, and the same is hereby reversed." On filing the mandate there, the said judgment stood reversed. Neither the judgment nor mandate of this court, prescribed, in terms, the judgment which should be rendered by the court of errors of New York. This court proceeded to order, that the cause be remanded to the said court for the correction of errors, *with directions to conform its judgment to the opinion of this court. The opinion expressed therein was, that Charles A. Davis, [*324 being consul-general of the king of Saxony, exempted him from being sued in the state court.

The judgment rendered in the court of errors being thus reversed, because of this exemption, it was for the court of errors to inquire and decide in what manner it should conform its judgment to this opinion. Had that court re-entered its former judgment, the direct opposition of this proceeding to the mandate, would have been apparent. But this was not done. The court of errors admitted the exemption of Charles A. Davis from being sued in the courts of a state; but added, that the fact did not appear in the record of the proceedings of the supreme court of New York; and that its own power did not extend to the reversal of any judgment of that court, for an error of fact, not apparent on the face of the record, though it should be assigned as error in the court for the correction of errors. This could only be effected, regularly, by suing out a writ of error *coram vobis*, in the supreme court of the state, whose judgment on that writ might be revised in the court for the correction of errors. The court also added its opinion, that the defendant in error was entitled to its judgment, affirming that of the supreme court, but did not give the judgment of affirmance. Upon filing the mandate, the counsel for the defendant in error moved the court to dismiss the writ of error to the supreme court of the state, and the court ordered it to be quashed.

The judgment of the court of errors, then, affirming the judgment of the supreme court of the state, stands reversed, and the writ of error to that judgment is quashed, leaving the defendant, in the original action, at full liberty to sue out and prosecute his writ of error *coram vobis*, for its reversal in the supreme court of New York. If the jurisdiction of the court for the correction of errors does not, according to the laws by which the judicial system of New York is organized, enable that court to notice errors in fact in the proceedings os the supreme court, not apparent on the face of the record, it is difficult to perceive how that court could conform its judgment to that of this court, otherwise than *by quashing its writ of [*325

error to the supreme court. Had that been its original judgment, it is not believed that this court would have reversed it; and we do not think that as now rendered, it can be held to be erroneous. The judgment is affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the court for the correction of errors of the state of New York, and was argued by counsel: On consideration whereof, it is the opinion of this court, that there is no error in the judgment of the said court for the correction of errors of the state of New York, quashing the writ of error from the supreme court of judicature of New York; whereupon, it is ordered and adjudged by this court, that the said judgment of the said court for the correction of errors be and the same is hereby affirmed, with costs.

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*326] *William King, Appellant, *v.* John Mitchell *et al.*, Appellees.

Creation of a trust.

William King in his will, made the following devise: "In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King (the appellant), son of my brother James King, on condition of his marrying a daughter of William Trigg and my niece Rachel his wife, lately Rachel Finlay, in trust for the eldest son or issue of said marriage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King, or of sister Elizabeth, wife of John Mitchell, and to their issue."

Upon the construction of the terms of this clause, it was decided by this court, in 3 Pet. 346, that William King, the devisee, took the estate upon a condition subsequent, and that it vested in him (so far as not otherwise expressly disposed of by the will), immediately upon the death of the testator. William Trigg having died without ever having had any daughter born of his wife Rachel, the condition became impossible; all the children of William Trigg and Rachel his wife, and of James King and Elizabeth Mitchell, were married to other persons; and there had been no marriage between any of them, by which the devise over, upon the default of marriage of William King (the devisee) with a daughter of the Triggs, could take effect.

The case was again brought before the court, on an appeal by William King, in whom it had been decided the estate devised was vested in trust; and the court *held*, that William King did not take a beneficial estate in fee in the premises, but a resulting trust for the heirs-at-law of the testator.

There is no doubt, that the words "in trust," in a will, may be construed to create a use, if the intention of the testator, or the nature of the devise requires it; but the ordinary sense of the term is descriptive of a fiduciary estate or technical trust; and the sense ought to be retained, until the other sense is clearly established to be that intended by the testator. In the present case, there are strong reasons for construing the words to be a technical trust; the devise looked to the issue of a person not then in being, and, of course, if such issue should come *in esse*, a long minority must follow; during this period, it was an object with the testator, to uphold the estate in the father, for the benefit of his issue; and this could be better accomplished by him, as a trustee, than as a guardian. If the estate to the issue were a use, it would vest the legal estate in them, as soon as they came *in esse*; and if the first-born children should be daughters, it would vest in them, subject to being divested by the subsequent birth of a son; a trust estate would far better provide for these contingencies than a legal estate; there is then no reason for deflecting the words from their ordinary meaning.[1]

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[1] The estate of a trustee is commensurate with the purposes of the trust, and ceases when there are no further duties to perform. McMullin *v.* McMullin, 8 Watts 236; Koenig's Appeal, 57 Penn. St. 352; Poor *v.* Considine, 6 Wall. 458.

King v. Mitchell.

*Appeal from the District Court for the Western District of Virginia.

At January term 1830, the case of Alexander Finlay and John Mitchell *v.* William King's Lessee, came before this court, on a writ of error to the district court of the United States for the western district of Virginia. (3 Pet. 346.) That was an action of ejectment, and the question involved, and decided by the court in it was, as to the construction of the will of William King, deceased, formerly of Abingdon, Virginia. The suit was instituted against the present appellees, to recover a part of the real estate of the testator, William King, which the defendants claimed, as two of the co-heirs of the testator, and on which they had entered, with the consent of all the co-heirs, for the purpose of trying the title of the plaintiff, now appellant, as devisee under the will. In that action, judgment for the land in controversy was given by the district court, in favor of the plaintiff, on a case stated.

On the removal of the case to this court, the judgment of the district court was affirmed, and the court held, that all the real estate of William King, deceased, was devised to William King, the appellant; but the possession of part of it, which was given to his wife and others, was postponed until her death. The court also proceeded to say, that "the question, whether William King took an estate, which, in all the events that had happened, inures to his benefit, or whether he is, in the existing state of things, to be considered '*trustee*' for the heirs of the testator, could not be decided in that case. That question belongs to a court of chancery; and will be determined, when the heirs shall bring a bill to enforce the execution of the trust." (3 Pet. 383.)

The appellees, as heirs-at-law of William King, deceased, in September 1830, filed a bill in the district court of Western Virginia, against the appellant, William King, in which they alleged, that the estate so devised was held by the appellant, William King, as a mere trustee, holding the beneficial interest for the testator's heirs-at-law; and they prayed, that the said William King might be compelled to execute the trust confided to him by the said will, in such manner as the court should think proper; that the proceedings on the said judgment might be stayed, until the case could be fully heard, and *that a perpetual injunction might be directed; and [*328
that such other and further relief in the premises might be given, as their case might require, and as might be consistent with the principles of equity. The bill also prayed for an injunction to stay proceedings on the judgment in the ejectment. The district court gave a decree, according to the requirements of the bill, and the defendant appealed to this court.

The case agreed in the suit at law, and upon which the questions argued before the court in this case were presented, was as follows:

We agree, that William King departed this life on the 8th day of October 1808, having first made and published his last will and testament, which was afterwards admitted to record in the county court of Washington county, in Virginia, where he resided, and is in the words and figures following:

"Meditating on the uncertainty of human life, I, William King, have thought proper to make this my last will and testament, leaving and bequeathing my worldly estate in the manner following, to wit: to my beloved wife, Mary, in addition to her legal dower of all my estate, the

dwelling-house and other buildings on lot No. 10, in Abingdon, where I now reside, together with the garden, orchard, and that part of my Fruit Hill plantation, south of the great road, and lands adjacent to Abingdon, now rented to C. Finlay & Co., and at my father's decease, including those in his occupancy, on the north side of the great road, for her natural life.

"I also will and declare, that in case my beloved wife, Mary, hath hereafter a child or children by me, that the said child or children is and are to be sole heirs of my whole estate, real and personal, excepting one-third part of specified legacies and appropriations hereinafter mentioned, which, in case of my having children, will reduce each legacy hereinafter mentioned to one-third part of the amount hereafter specified, and the disposition of the real estate, as hereafter mentioned, in that case wholly void. In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King, on condition of his marrying a daughter of William Trigg and my niece Rachel, his
*329] wife, lately Rachel Finlay, in trust for the eldest son or *issue of said marriage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King, or of sister Elizabeth, wife of John Mitchell, and to their issue; and during the lifetime of my wife, it is my intention and request, that William Trigg, James King and her, do carry on my business in copartnership, both saltworks and merchandising, and equal shares; and that in consideration of the use of my capital, they pay out of the same the following legacies:

"To John Mitchell, on condition of his assisting and carrying on business with them, at the usual salary as formerly, viz., $1000 per year, for from two to five years, as they may with his assistance, an additional sum of $10,000, payable five years after my decease; and to each of his children, on coming of age, $1000 more than the general legacy hereafter mentioned, To Connally Finlay, a like sum of $10,000, payable in five years. To my nieces, Elizabeth Finlay and Elizabeth Mitchell (being called for my grandmother, with whom I was brought up), $10,000, in twelve months after marriage, provided they are then eighteen years of age, if not, at the age of eighteen; to each of my other nephews and nieces, at the age of eighteen, that is, children of my brother James, sisters Nancy and Elizabeth, $1000 each; to each of the children of my brother Samuel, and half-sister Hannah, $300 each, as aforesaid; to my said sister Hannah, in two years after my decease, $1000; and to my half-brother Samuel, in case of personal application to the manager, at Saltville, or to my executors, in Abingdon, on the 1st day of January, annually, during his life, $150; if not called for on said day, to be void for that year, and receipt to be personally given.

"It is my wish and request, that my wife, William Trigg and James King, or any two of them that shall concur in carrying on the business, should join with all the young men that may reside with me, and be assisting me in my decease, that are worthy, or furnish them with four or five thousand dollars' worth of goods, at a reasonable advance, on a credit of
*330] from three to *five years, taking bonds with interest, from one year after supply. In case my brother James should prefer continuing partnership with Charles S. Carson, in place of closing the business of King, Carson & King, as soon as legal and convenient, then my will is, that Wil-

liam Trigg and my wife carry on the business, one-third of each for their own account, and the remaining third to be equally divided between the children of my brother James, and sisters Nancy and Elizabeth.

"To my father, Thomas King, I leave, during his life, the houses he now resides in and occupies, at Fruit Hill, together with that part of my land, in said tract north of the great road, that he chooses to farm, with what fruit he may want from the orchard; the spring-house, being intended for a wash-house, with the appurtenances, subject to the direction of my beloved wife, Mary; as also the orchard, except as aforesaid. I also leave and bequeath to my father, the sum of $200 per annum, during his life; and if accidentally fire should destroy his Fincastle house and buildings, a further sum of $220 per annum, while his income from these would cease. I also leave and bequeath to the Abingdon Academy, the sum of $10,000, payable to the trustees, in the year 1816, or lands to that amount, to be vested in said academy, with the interest or rents thereon, for ever.

"Abingdon, Virginia, 3d March, 1806. WILLIAM KING.

"I hereby appoint William Trigg, of Abingdon, and James King, of Nashville, executors of my last will and testament enclosed; written by my own hand, and signed, this 3d day of March 1805. WILLIAM KING."

We agree, that William King, at the time of his death, was seised and possessed of seventy-six tracts of land in the said county of Washington, containing, in the whole, 19,473 acres of land, on one of which tracts is the salt-works, which have, since his death, been leased for years at the annual rent of $30,000. Also, of nineteen lots in the town of Abingdon, in Washington county, nine of which produced an annual rent of $660. Also, of fourteen tracts of land in the county of Wythe, containing 3494½ acres. *Also, of eighteen tracts of land in the state of Tennessee, containing, in the whole, 10,880 acres. Also, of shares in town lots, in several [*331 of the towns in the state of Tennessee. We also agree, that the said William King survived his father, in the said will mentioned; that the said William King had brothers and sisters, to wit, James King, a brother of the whole blood; Nancy, a sister of the whole blood, the wife of Connally Finlay, in the will mentioned; Samuel King, a brother of the half blood; Hannah, a sister of the half blood, the wife of John Allen; all of which brothers and sisters, before named, survived the said William King. That another sister of the said William King, of the whole blood, died before him, and was named Elizabeth, the wife of John Mitchell, who is mentioned in the will. We agree, that William King, the lessor of the plaintiff, is the same William King, the son of James King, brother of the testator, mentioned by him in the will. We further agree, that William Trigg, in the will mentioned, departed this life on the 4th day of Angust 1813, leaving Rachel Trigg, in the will mentioned, his widow, and four sons, the said Rachel having borne them to the said William, and not having borne any daughter to him, the said William Trigg, at any time, which said sons are all living. That Mary, who was the wife of the said William King, is still living, aged 43 years, and is now the wife of Francis Smith. We further agree, that William King, the lessor of the plaintiff, is married to Sarah Behum; that James King had only one daughter, named Rachel Mary Eliza, who is now the wife of Alexander McCall; and that Elizabeth, the wife of John Mit-

chell, had only two daughters, to wit, Elizabeth, who is now the wife of William Heiskell, and Polly, who is now the wife of Abraham B. Trigg. We agree, that William King, the testator, died seised and possessed of the house and lot in the declaration mentioned. We agree the lease, entry and ouster, in the declaration supposed, and that the defendants are in possession of the house and lot in the declaration mentioned. If, upon this state of facts, the lessor of the plaintiff ought to recover at this time, we agree, that judgment shall be entered for him ; and that, if the court shall be of opinion, that he *ought not to recover until after the death of Mary, the wife of Francis Smith ; or that he ought not at any time to recover, judgment shall be entered in favor of the defendants."

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The case was argued by *Webster* and *Jones*, for the appellants ; and by *Coxe*, for the appellees.

Webster, for the appellant.—This court have decided, 3 Pet. 383, that the legal estate in the property in question, has passed, under the devise in the will, to William King, the appellant. It is given to him in trust for the eldest son or issue of a marriage which can never happen ; and none of the anticipations of the testator, in the happening of which the estate would pass from the devisee, can occur. *Trust*, therefore, in the case before the court, means *use*. It was the intention of the testator, to vest the whole estate in him ; which could be divested only if persons came into existence who would take it, and thus divest it. This is not a case in which the words of a will are to be construed to pass a fee, but to enable a benefit to be enjoyed by the object of the testator's bounty.

The will has been decided to be a will to divest the heirs-at-law ; but the object of the complainants is, to establish that the very person who takes the estate, does so for the benefit of the very heirs out of which it has passed by the will. This is not a usual case, and must be shown to exist by extraordinary circumstances. It will be difficult to put this construction on the will, as, from the beginning to the end of it, there is no disposition to throw the estate into the hands of the trustees. In every part of it, there is a manifest purpose of placing it in the exclusive ownership of some one individual.

When an estate has been clearly established to have passed out of the heir-at-law, it will be difficult to fix such an estate in trust for the heir. If a trust is raised in such a case, the estate has not passed by the will. It is apparent, that the testator meant that William King should have the estate, without the interference of the heirs-at-law, to some extent. The general object was, to give the estate to his own family, bearing his own name, and who should be as near to him as any one, except his brother. It is a principle of our nature, to *dispose of property in the descending, and not in the ascending line.

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If William King had married, as the will provides, he would clearly have taken a beneficial interest. This would have been according to the very words of the will. It has been settled, that he took the legal estate, and his holding it finally, depended on a condition subsequent, which condition he had his whole life to perform, unless by the extinction of the family into which he was to marry ; and the will makes no provision for the holding during that time. It is now ascertained, that the condition subse-

quent became impossible to be performed. 2 P. Wms. 628; 1 Cruise 469; 1 Atk. 618. This question was argued, in the former case, by General Smyth, and the court are referred to that argument as fully applicable here. 3 Pet. 369.

The condition of marriage is inconsistent with the idea of William King being a trustee. If he had married, according to the terms of the will, he would not have been a trustee, but would have held the estate absolutely. 2 Atk. 150; 2 Vern. 645. Cases cited in the argument of the former case: 1 P. Wms. 309; 1 Meriv. 301, &c. See 3 Pet. 373. Where there is a consideration, there can be no resulting trust; 7 Bacon, ch. 143: and in this case, the consideration was marriage.

Coxe, for the appellees. There are, under the will, but two questions: 1. Does William King, the appellant, take an estate in trust? 2. If he does, how does this affect his beneficial interest in the property so taken. All the contingencies having failed, who takes the estate beneficially?

William King took the legal estate, and held it upon a condition subsequent, which becoming impossible, the estate is as if no condition had been annexed to it in the devise, and the devise never took effect. It is contended by the appellants, that the condition attached to the equitable, as well as to the legal estate. On the other side, it is said, the condition attached only to the legal estate. *In support of the latter position, there is the opinion of Mr. Justice JOHNSON, in 3 Pet. 385, 387, 389, who dissented from the court in the case at law, and who pronounced the true interpretation of the will; and although the rest of court declined to indicate an opinion, yet great support is derived from what is said by the court. [*334

There are two conditions. One precedent, that of the wife of the testator having a child; and no child was born subsequent to his death: and the other subsequent, which was the marriage of William King; and that marriage has become impossible; thus a state of things is presented not contemplated by the will. There being no devise over, in the event of the failure of the contingencies, the estate is vested in William King, at law, in trust for all the heirs of the testator. It was not the intention of the testator to give any beneficial interest in the estate to William King.

There can be no doubt, that if the testator had left one child, that child would have been the sole heir; if he had left ten children, they would have taken in equal proportion; such are the provisions of the will. There is nothing to indicate any intention, that if the first clause in his will had taken effect, the whole estate was to pass into a single hand, or to remain undivided. Had William King married a daughter of William Trigg, &c., he as clearly would have taken the estate, under the second clause, for the condition would then have been performed. But how, and to what extent? Clearly, as the will says, and as the court said, in trust for the eldest son or issue of that marriage. Had there been issue of that marriage, could any doubt have existed, but that the equitable estate would have vested absolutely.

It is not material to discuss the possible question, whether the eldest son would have taken to the exclusion of others; it is obvious, that had one son only been the fruit of that marriage, he would have been the

individual upon whom the estate would have devolved; had there been ten daughters, they would have all taken.

The court has said, that the will is to be construed "as if the contemplated marriage had been actually consummated." 3 Pet. 381. So it is to be construed as if the contemplated issue had actually been born. Again, in the same opinion, the *court say, "it was not very probable, at the *335] date of the will, that the devisee of this immense fortune might come into existence in less than twenty years." If William King was the devisee, he was actually in existence. And the court must, therefore, have considered, that not he, but his issue by a marriage with a person then unborn, was to be the devisee. In the examination of this clause, we cannot but observe, that in framing it, the testator looked to the single contingency, that he should die without issue. He has omitted entirely to provide for the contingency of such issue dying at an early period of life. So, in the limitation over to the child of William and Rachel Trigg, who might marry, as provided in the will; he has again placed it upon the single contingency of there being no such marriage as he had already contemplated, between William and a daughter of William Trigg, without adverting to the possibility of there being no issue of such marriage, or of such issue becoming extinct. Had there been a child of William and Rachel Trigg, who had actually married, as the testator contemplated, the limitation over to such individual, would have taken effect. The whole estate given to William King would, in that case, have terminated. The intention of the testator is manifest and undoubted as to this point. The will, however, as the court remarked, is to be construed as if the contemplated contingency had actually occurred. But this rule of construction is disregarded, this intention of the testator overlooked, by adopting the views of the appellant. 3 Pet. 381–2.

If William King took the whole interest under the will, legal and equitable, upon the condition attached to it by the testator, that condition being a condition subsequent, its becoming impossible is to operate precisely in the same manner as its fulfilment. The fulfilment would have been by the marriage; that marriage became impracticable. The estate, therefore, vesting in him, precisely as if the condition had been performed, it is obvious, that upon the construction contended for by the appellant, the words, "in trust for the eldest son, or issue of said marriage," must be erased from the will, as insensible and nugatory. Had such issue come into existence, it *336] could not *have affected the interest already given to William King, the father.

It appears to us, that this would be equally repugnant to the language of the will itself, and to the opinion pronounced by this court. The language of the court is (p. 378), "the residue was given to William King immediately, on the trust mentioned in the will, or given by implication to the testator's wife, or was permitted to descend to his heir-at-law." It is here distinctly asserted, that what estate William King did take, he took in trust. And in p. 381, "his primary object then is, the issue of a marriage between his nephew, William King, and a daughter of William Trigg, by his then wife;" not to vest the whole estate in William King himself, but passing him by, as regards the beneficial interest, to look to the issue of such marriage, and provide for them. Further (p. 383), the court says, the "intention, we think, was, to devise his whole estate to William King in trust."

If the appellant be correct, we must go further, we must erase from the will, not only the expression which points to the issue as the object of the testator's bounty, instead of William King himself, but the whole of the succeeding clause. For, if William King takes the whole interest, independently of any trust, and the fulfilment of the condition, or its becoming impossible, are equally operative; the limitation over never could have taken effect, even although a child of William and Rachel Trigg had married a child of James King or Elizabeth Mithell. This is the necessary corollary from the appellant's proposition. The will is to be construed as if the object of the testator had not been defeated (p. 381). The second object of the testator, "was the issue of any marriage which might take place, between any child of William and Rachel Trigg, and any child of his brother James, or of his sister Elizabeth; that both of these objects have been defeated by the course of subsequent events, does not change the construction of the will." Not only is such thus declared to be the intent of the testator, but the provision is pronounced to be a valid one (p. 381–2).

"Had William King, the devisee, died young, or had William and Rache Trigg died, without leaving a daughter, a fact which has actually happened, and any child of William *and Rachel Trigg had married a child of [*337
James King, or Elizabeth Mitchell, then the whole estate is given to such child, and to the issue of the marriage. Had either of these events taken place, the estate is given from the heirs. This is wholly incompatible with the position of appellant, that "he did not take *ab initio*, under the will as trustee, for any use or purpose whatever;" but that he "took and held it beneficially for himself." These important clauses cannot be rejected. 10 Wheat. 225.

In regard to this last limitation, it is observable, that it is to take effect upon the single contingency, that William King should not marry as was contemplated. Had he actually so married, this limitation over never could have taken effect; even had he died the next day, and left no issue. The testator has not provided for the case of the marriage actually taking place, unaccompanied by issue; or for that of such issue becoming extinct. These events not being provided for, had either of them occurred, the estate must have devolved upon the heirs. Nor has the testator made any provision for any state of things beyond the marriage of a child of William Trigg to one of the children of his brother or sister. The instant that state of things occurred, the whole estate would have vested absolutely in the individual who came within the terms of the limitation; and no provision is made for any failure of issue of such marriage.

Viewing the will in this aspect, it is manifest, that there were various possible, nay, probable contingencies, for which the testator had omitted to provide; and had either of them occurred, the estate must have gone in the regular course of descent.

1. Had the testator died, leaving a child by his wife Mary, and such a child had survived him but a single day, the estate must have gone to the heirs of such child; for the absolute estate had vested, and the subsequent limitation over was to take effect upon the single contingency of there being no such child.

2. Had the contingency contemplated in the devise to William King, the condition expressly annexed to it, happened, viz., his marriage; and had

there been issue, a son, of such marriage, upon the death of that son, if its
*338] father had taken, *as we suppose, merely a trust for the use of such son, the estate would have gone as the law prescribes, for there is no limitation over in such case.

3. Had there been a child of William Trigg, who had married as contemplated, the absolute interest would have vested, for nothing beyond that is provided for.

The provisions of the will are tolerably precise and distinct; but it is owing to their particularity and minuteness of detail that the present difficulty arises. Testators, like legislators, succeed best, and most effectually avoid litigation, when they avoid an enumeration of all the various circumstances for which they design to provide.

It must be conceded, that a state of things has occurred, which the testator did not anticipate, and for which he did not, as we read the will, provide. Neither one of the clauses has taken effect, as we understand this instrument; certainly, none has taken effect in the mode he contemplated. What then is the result? The result of a total failure of all the provisions of the will, would necessarily be, as this court said in the former case, to cast the real estate upon the heirs; this is so obvious, by the doctrine of the law, that it is unnecessary to do more than distinctly to state it. All the interest in real estate which is not clearly devised to some other person, descends to the heir. In the application of this general principle, it is equally and wholly immaterial, whether there was a defective execution of the will, which prevented it from taking effect; or an omission to include a part of the property; or an insufficient description, either of the thing devised, or of the party who is to take; or the occurrence of a contingency for which the testator omitted to provide; or a failure of the party who was designed to have the estate. In each and all these cases the heirs will take. It is not sufficient, that the court may entertain a private opinion of the intention of the testator, or be satisfied what he would have done, had he correctly anticipated the future. "It must," to use the language of this court in *Wright* v. *Page*, "it must see that he has expressed that intention with reasonable certainty on the face of the will; for the law will not suffer the heirs to be disinherited upon conjecture. He is favored by its policy; though the tes-
*339] tator may disinherit him, yet the law will *execute that intention only when it is put in a clear and unambiguous shape." 10 Wheat. 228. The appellant is here encountered by the same difficulty which presented itself in that case. He says, the intention of the testator was, that the heir should not take, so it is in all cases where the provisions of the will fail (from any of the causes that have been enumerated); that it was his intention that the estate should go to a single individual, and not be split up among numerous parties; that this valuable estate should be retained among those who bore his name, and inherited his blood; among those, especially, who would reunite his wife's blood with his own. He may go further than all this, and insist, that had the testator anticipated what has occurred, he would have expressed his intent, that appellant should take, in the clearest and most explicit terms. The court must, nevertheless, say, as in *Wright* v. *Page*, "the testator may have intended it, and probably did; but the intention cannot be extracted from his words, with reasonable certainty, and we have no right to indulge ourselves in mere private conjectures."

The learned editor of Powell on Devises found it necessary to introduce a caution, "that the language of the courts, when they speak of the intention as the governing principle, sometimes calling it 'the law' of the instrument, sometimes 'the pole star,' sometimes 'the sovereign guide,' must always be understood, with this important limitation, that here, as in other instances, the judges submit to be bound by precedents and authorities in point; and endeavor to collect the intention, upon grounds of a judicial nature, as distinguished from arbitrary conjecture." 2 Powell on Devises, 3. Even in cases where no reasonable doubt could exist as to the intention of the testator, in point of fact, as where, in the will of an unlettered person, real and personal property are comprehended in the same clause; the absolute estate in the one passes, and only a life-estate in the other. It was in reference to this class of cases, that Lord MANSFIELD, in *Right* v. *Sidebotham*, 2 Doug. 759, said, "I verily believe, that almost in every case, where, by law, a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted."

In reference, however, to the will under consideration, the *intent, [*340
of which the appellant invokes aid, is by no means obvious or unquestionable. It is not the paramount purpose of testator's mind. In the particular instances for which he has expressly provided, and subject to the modifications which he has distinctly prescribed, the intent may be recognised, but it does not follow, that it reached beyond those contingencies. Thus, in the particular clause under consideration, it is beyond doubt, that the testator designed the appellant to take, on the condition specified, and in trust for the issue of the contemplated marriage. This is the intention of the limitation, as clearly indicated; but the whole of this intent must be taken together. It cannot be logically inferred, that he was designed to take, without performing the condition, or to take discharged of the trust. It is not by any means apparent, that the testator regarded him as the peculiar object of his bounty; he did not unite in him the two distinct bloods; he is not an individual who proceeded "from the union of his own family with that of his wife," whom the court considered it as the primary intention of his own family to provide for. "His primary object," says the court, immediately after, "is the issue of a marriage between his nephew, William King, and a daughter of William Trigg by his then wife," not William King himself: no such intent is expressed on the face of the will, as to give him, in his own right, for his own benefit, any portion of the estate; and until he can show title under the will, the heir must take. *Barker* v. *Wood*, 9 Mass. 419.

So far as any peculiar or especial object of the testator's favor can be ascertained from the face of the instrument, it was obviously the family of William Trigg. The devise to the appellant is clogged with a condition, that he should marry a daughter of Trigg; that clause failing, the estate is limited, by the succeeding clause, to any child of Trigg, who should marry as there prescribed. William Trigg is to have one-third of the business and capital; and he is further made executor. Yet, with this especial preference, so uniformly manifested in every part of the will, the construction contended for by the appellant, would reject the whole of this branch of the testator's relatives. Nor is it easy to perceive the foundation upon which the assertion is based, that appellant was the favored object of *the testator's [*341

bounty. The clause under consideration is the only one throughout the will in which he is named. The whole argument involves a *petitio principii;* if, by the true construction of the will, he takes the whole of this valuable property, he is, in fact, the most favored of the testator's family. If this construction accords with the actual design of the testator, the argument is well founded; but the premises being established, the conclusion becomes unimportant. If he does not take under the will, to the extent of his claim, there exists no foundation for this reasoning; if he does so take, it is superfluous.

The court, in 3 Pet. 380–1, considered it as proved, that it was "the primary intention of the testator, to keep his immense estate together, and to bestow this splendid gift on some individual who should proceed from the union of his own family and that of his wife." If the first part of this design was alone to be regarded, it would have been equally effected by a descent to the heir, under the circumstances which existed at the date of the will; for the testator's father was then his sole presumptive heir. If the latter part of this design is to control the construction of the will, it must be fatal to the appellant's claim; for, as has been before remarked, he does not come within the description. Nor can a part of this general design be disregarded. It will not do, to carry the first part into full execution, at all events, and to reject the last, which was far more interesting; to effectuate it, so far as regards the estate itself, and to exclude that portion of it which looked to the person who was to receive the property. But this inferential intention, deduced by refined reasoning from scattered clauses in the will, furnishes an unsafe exposition of the instrument. Fearne on Contingent Remainders 170–71.

In further corrobaration of these views, it is material to remark, that, according to the first limitation of this estate, the parties who were to take, viz., his own issue, would have been ascertained at the period of the vesting of the estate; there was no necessity for the interposition of a trustee, to preserve the property, or to keep alive the limitation. No trustee is, therefore, provided. So, in regard to the third limitation, the individual who *342] *was to take the benefit of it, is clearly indicated—must have been married, before it could vest, and there was as little reason for the intervention of any trustee. There was no such trustee appointed. The second clause is different; the party to take, according to the testator's intention, was the unborn issue of a marriage between the parties, one of whom was yet unborn. The propriety of creating a trustee, in such case, is obvious; and that of conferring this office upon the parent of the beneficiary, equally manifest. Such a construction, therefore, gives consistency to the instrument, and makes its provisions harmonious and reasonable. It is one of the fundamental rules of construction, 2 Powell 5, "that all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole." Again, p. 6, "nor can the meaning of words be varied by extrinsic evidence."

In the clause, the words are, "in trust, &c.," and we are told, "that words, in general, are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected; and they are in all cases to receive a construction which will give them all effect, rather than one that will render some of them inoperative." 2 Powell, p. 8.

And "where a testator uses technical words, he will be presumed to employ them in their legal sense, unless the context contain a clear indication to the contrary." Here, then, appears to be a clear devise in trust, as deduced from the examination of the will itself, and from the well-established rules of construction. The case comes clearly within the language of Lord ALVANLEY, when master of the rolls, in *Malin* v. *Heighly*, 2 Ves. jr. 333, where he says, "I will lay down the rule as broad as this—wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly, that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it." The Lord Chief Baron, in *Meredith* v. *Heneage*, 1 Simons 542, says, that in the language just cited, "he has extracted and stated the result of all the cases *before that time, and the subsequent cases have, it seems to me, made no alteration." [*343 The will contains the phrase "in trust," which Lord HARDWICKE, in the case of *Hill* v. *Bishop of London*, deemed so material, and to supersede the necessity of raising a trust by construction. 1 Atk. 620.

If the appellant, then, took, what he did take, in trust; if the property thus to be held is clearly described; if the persons for whom he is to take are distinctly marked; the question arises, whether, in the events which have happened, William King has an estate which inures to his own benefit? or is he to be deemed trustee for the heirs-at-law, the complainants in the court below. This is not a question as to the construction of the will, for the principle is perfectly well settled, "that the construction is not to be varied by events subsequent to the execution, 2 Powell 10; and this principle was fully recognised by this court in 3 Peters. It is a general principle of law which is involved, what becomes of the trust, when the objects of the creation, from any cause, are unable to take. To narrow down the question still more, it may be observed, that it is an immaterial circumstance, that an express provision is made in the will, for the heir. This was a point ruled in *Randall* v. *Bookey*, 2 Vern. 425, and in *Starkey* v. *Brooks*, 1 P. Wms. 390; 1 Chan. Cas. 196. Nor is it at all material, that the testator obviously designed to exclude the heir from inheriting this property; for, notwithstanding such obvious intention, as the court formerly observed, "this may be the result of a total failure of all the provisions of the will." If this circumstance were to operate, it would effectually shut out the heir, in all cases of the failure of the objects for which testator designed to provide, even if the will had in terms excluded the heir at all events. *Pugh* v. *Goodtitle*, 3 Bro. P. C. 454.

If we have succeeded in establishing, as the true and legal construction of the clause in which the appellant is named, that he took an estate, which, in case of his marriage as prescribed, and having issue as anticipated, would have inured exclusively *to the benefit of such issue; we have ad- [*344 vanced far in arriving at a solution of the present question.

It will be conceded, that there are no words in this will which can be understood as indicating any actual intention on the part of the testator, to enlarge the estate originally granted to the appellant, in case he did not marry, or leave issue of such marriage; on the contrary, the express language of the will is, that the ulterior limitation was not to take effect, in case said marriage did not take place. Whatever interest or estate the

appellant now has, he took at once ; there is no enlargement in terms. The question then is, admitting that he took as trustee for his own issue, in case he should have any, and therefore, as no such issue ever came into existence, the estate designed for them, never took effect ; and that the ulterior limitation in the succeeding clause, in like manner, wholly failed—do these failures inure to the benefit of the devisee or of the heir ? Is the estate, in the hands of the devisee, discharged of the trusts ? or the trusts having become extinct, does the beneficial interest descend upon the heir, as a part of the estate not disposed of by the will ?

In *Vezey* v. *Jamson*, 1 Simons & Stu. 69, the vice-chancellor said, the testator has given the estate "to the trustees, expressly upon trust ; and they cannot, therefore, hold it for their own benefit. The necessary consequence is, that the purposes of the trust, being so general and undefined that they cannot be executed by this court, they must fail together ; and the next of kin become entitled to the property." The heir is not to be disinherited, without an express devise or necessary implication ; such implication importing, not natural necessity, but so strong a probability, that an intention to the contrary cannot be supposed. 2 Powell 5.

It is denied, that the law is, that when there is a consideration, there can be no resulting trust. 3 Bro. P. C. 454. Cited also, 1 Simons & Stu. 69; 8 Petersdorff 91 ; 1 Hovenden's Notes on Vesey 364 ; 12 Ves. 415 ; 2 Powell on Devises 41, 49, 51 ; 1 Vesey & Beames 278.

*345] *Jones*, in reply.—There might have been a period when a doubt could exist, as to the question involved in this case, but that doubt cannot now prevail. The principles contended for by the appellant have been settled in the case at law. By that decision, the estate is, under the devise, in the appellant ; and it must remain in him. The testator intended a benefit to him, and he has it. To take the enjoyment of the estate from him, and make him a mere trustee for those towards whom the whole object of the testator was, to exclude them from the enjoyment of anything but the specific bequests, would be contrary to his manifest purpose. His object was, to select a particular person to hold the estate, and not as a mere conduit to convey it to others. If the complainants below could have any estate, it would be a legal estate ; and this, on the ground, that the whole of the objects of the will, that of limiting the property to the issue of particular persons, have failed. The devise was void, or a nullity. But this court have decided differently.

The case is to be considered : 1. As it stood at the testator's death. 2. Whether subsequent events have changed its situation. It is contended by the appellees, that William King took a mere naked trust.

Did he take the estate to this intent only, and answerable over for rents and profits? If this be so, those who now claim to be *cestuis que trust*, had the same interest from the beginning ; and that cannot be, under the decision of the court, that the legal estate vested in him on the death of the testator ; and the reasoning of the court, that the whole interest in the estate was disposed of by the will. Powell on Devises 189. Suppose, this had been a condition subsequent, and there had been a marriage to a daughter of Elizabeth Mitchell, and no issue ; what would have been the condition of the estate ? Would not William King have held the estate or

himself? There is no provision made in the will for the avails of the estate; and if William King took the estate, he had his whole life to perform the condition; he had the avails of the estate, in the interval given for the performance of the condition, as his *own. It is impossible to say, at what period this beneficial interest closed. Why has it been decided, that he should take the estate? Why not hold him to the condition? It is, because it is a condition subsequent and impossible, and the will is to be construed as if it had no conditional clauses in it. 2 P. Wms. 628; Com. Dig., Condition, D. p. 4; 1 Cowp. 469; 1 Atk. 618. [*346

It is important, that the court should consider the legal consequences to be attached to one or other view of this bill; and the court will, therefore, decide, where the equity jurisdiction begins, and the law jurisdiction ends. It is argued, that the use of the term "trust," gives the appellees all the rights which equity will give to a *cestui que use*. But these are only certain trust estates which, in courts of chancery, are treated as estates held in trust for the use of others. 1 Preston on Estates 142–90; Fearne on Cont. Rem. 158–9. As to jurisdiction, in cases where courts of equity attempt to distinguish estates held in trust from absolute estates: cited, 1 Madd. Ch. 448, 450.

Looking at the form of the devise, taking the principles of law as settled in the case, can it be said, that there is an outstanding *cestui que trust*, who is to have the whole of the beneficial interest in the estate of the testator, and that William King is but a bare trustee? There is no occasion to create a trust for such a purpose. The appellees might hold the property as an executory devise, or a springing use. The court of law having given judgment in favor of the devisee, against the heirs-at-law, is equivalent to saying, no use resulted to him. It would be impossible that it could be otherwise.

At the date of the will, William King was but two and a half years old; at the period of the testator's death, he was but five years old. Could it, by any possibility, have been intended to make him a trustee? The contingency of the estate vesting, being made to depend on the marriage of William King, and not on his having issue, it is shown, beyond all doubt, that the marriage was a personal *obligation; that a personal benefit was intended to him, should he perform the marriage. [*347

The true construction of the will is, that the estate is given to William King beneficially; and on the birth of a son, or his marriage according to the will, he should hold it for such son. If no son, as if no marriage, then the estate is in him. It was a beneficial estate to him, on an executory devise over to a son of the marriage. He has the estate, under the first part of the devise, and the second has not occurred. This is a construction according to the spirit and purpose of the will. It gives to the infant devisee his full benefit of the estate, until marriage and issue; and thus provided for one who was the object of the testator's bounty.

As to the consequences of a lapsed legacy, cited: 1 P. Wms. 277; 1 Bro. C. C. 61; 4 Ves. 802; 12 Ibid. 415; 1 Ves. & Beam. 276; 16 East 283; s. c. at law, 1 Simons & Stu. 69. A *hæres factus* is entitled to the same benefit as a *hæres natus*. Prec. in Chan. 2; s. c. 2 Vern. 120; 2 Powell on Devises, 667–9; 2 Atk. 439, note. It is contended, upon authority, and upon general principles, independent of the specific intent apparent

in this will, to exclude the heirs-at-law, that every benefit resulting from the failure or lapse of any charge upon the estate, or of any condition, or of any conditional limitation (such failure of condition not going to defeat the estate itself), results to the *hæres factus* of the estate, not to the *hæres natus;* and that either the value or the quality of the estate in his hands, thus enchanced by its exoneration from any such charge or condition or limitation, is so enchanced for him and as his estate, just as if he were *hæres natus:* a principle so much the stronger in its application to this case, as he is *hæres factus* of the whole, not merely of a part of the real estate.

When it is once ascertained, that the devisee is the person intended to be benefited, he is to have all the benefits of contingencies, and to have all the benefits which arose from relieving the estate devised from all charges, &c., 3 Madd. 453. Upon the effect of conditions becoming impossible, cited, 2 Powell on Devises, 251, 255, 263; 1 Preston on Estates 476; 1 P. Wms. 626; 1 Bro. C. C. 528.

*348] *Story, Justice, delivered the opinion of the court.—This is an appeal from a decree of the district court of the United States for the western district of Virginia, in a case, where the appellant was the original defendant, and the appellees the original plaintiffs in equity.

The bill was brought by the plaintiffs, as heirs-at-law of William King, deceased, to obtain a perpetual injunction of a judgment at law, upon an ejectment, in which a recovery was had by the appellant, of certain parcels of land, which he claimed as devisee under the will of the said William King, deceased. The case in which the recovery was had, came before this court, upon a special statement of facts, agreed by the parties, at January term 1830, and will be found reported in 3 Pet. 346. In that case, all the material facts applicable to this case are set forth, and therefore, we content ourselves with a reference to it; and the real question for decision in the present suit is, whether, under the will stated in that case, the present appellant took a beneficial estate in fee in the premises, or an estate in trust only, which trust, in the events which have happened, has been frustrated, and there now remains a resulting trust for the heirs-at-law of the testator. The bill asserts, that the estate was a mere estate upon a trust, which has failed; and that there is a resulting trust for the heirs-at-law; that they are, consequently, entitled to the injunction prayed for, and to other relief, as prayed in the bill. The decree was in favor of this construction of the will, and proceeded to grant the injunction, and to decree a partition accordingly.

The main clause of the will, upon which the question arises, is in the following words: "In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King (the appellant), son of brother James King, on condition of his marrying a daughter of William Trigg and my niece Rachel, his wife, lately Rachel Finlay, in trust for the eldest son or issue of said marriage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King's, or of sister Elizabeth's, wife of John Mitchell, and to their issue." Upon the construction of the *terms of this clause, it has been already decided by this court, in 3 Pet. 346, that

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William King, the devisee, took the estate upon a condition subsequent, and that it vested in him (so far as not otherwise expressly disposed of by the will), immediately upon the death of the testator. William Trigg having died without ever having had any daughter born of his wife Rachel, the condition became impossible. All the children of William Trigg and Rachel his wife, and of James King and Elizabeth Mitchell, are married to other persons; and there has been no marriage between any of them, by which the devise over, upon the default of marriage of William King (the devisee) with a daughter of the Triggs, could take effect. So that the question, what estate William King took under the devise, whether a beneficial estate, co-extensive with the fee, or in trust, necessarily arises; for no rule of law is better settled, than that where lands are devised in trust, for objects incapable of taking, there is a resulting trust for the heirs-at-law. The only difficulty is in the application of the will to particular cases, and to ascertain, whether (as Lord ELDON expressed it, in *King* v. *Denison*, 1 Ves. & Beam. 260, 272), the devisee takes subject to a particular trust, or whether he takes it for a particular trust.

In consulting the language of this clause, it is difficult to perceive any clear intention, that William King is to take, under any circumstances, a beneficial interest in fee. He is nowhere alluded to in the will as the primary object of the testator's bounty, or as, in any peculiar sense, a favored devisee. The object of the testator seems to have been, to keep his great estate together, and to pass the inheritance to some one, who should unite in himself the blood of his own family and that of his wife, and thus become the common representative of both. He does not seem to have contemplated any improbability, much less any impossibility, in such an event, and therefore, he has made no provision for the failure of offspring from such a union. Now, looking to the state of the families, at the time when the will was made, is there anything unnatural in his expectations, or extraordinary in his omission to provide for events apparently so remote and speculative. We must construe the will, then, according to its terms, and to events within the contemplation of the *testator; and not interpose limitations by conjecture, which he might have interposed, if he could have foreseen, what is now certain, the failure of the first objects of his bounty. He gives to William King, all his real estate, on condition of his marrying a daughter of William Trigg and his niece Rachel Trigg. And if the language had stopped here, there could be no doubt, that a beneficial interest in fee could have been perfected in him, upon his compliance with the condition, or upon its becoming impossible. But the implication of such beneficial estate, is repelled by the succeeding words. It is devised to him, not absolutely, upon fulfilment of the condition, but "in trust for the eldest son or issue of said marriage." It is manifest, then, that the estate was not contemplated to vest in William King beneficially; for a trust, co-extensive with the fee, is given to his issue. And it is (as was remarked by the Chief Justice in delivering the opinion of the court in the former case, in 3 Pet. 346) quite consistent with the general intention of the testator, and his mode of thinking, as manifested in his will, to suppose an intention, that in the meantime the profits should accumulate for the benefit of the issue, for whom the estate was designed. It is as clear, that in the event that the marriage should not take effect, the beneficial estate was not intended to remain with

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William King. The will goes on to provide for that contingency, and declares, that in case such marriage shall not take effect, the estate shall go to any child, giving preference to age, of William and Rachel Trigg, that will marry a child of his brother James or his sister Elizabeth. So that, in the only alternative event contemplated by him, he strips the devisee of the beneficial estate, in favor of another branch of the families, uniting the blood of both by an intermarriage. It is no objection, that this devise over may be too remote to be valid in point of law. Upon that we give no opinion. It is sufficient for us, that no such objection was contemplated by the testator; and so far as his intention is expressed, it is coupled with a beneficial interest for others, excluding that of William King. To create such interest in the latter, we must supply an intention, and not construe the language of the testator. We must conjecture what he would have done, and not merely decide what he has done.

*351] It is said, that William King was a favorite nephew; and *therefore, an intention to vest a beneficial estate in him, ought to be implied. But how does that appear, in a form so imposing, as to justify such a conclusion? There is, it is true, no legacy given to him by the will; and therefore, it is suggested, that it could not have been the intention of the testator to clothe him with a barren trust. But a man, to whose issue, in events within the immediate contemplation of the testator, a splendid fortune was to pass, and in whom, in the meantime, the estate was to vest for the benefit of those who must necessarily be most near, as well as most dear to him, the objects of all his affections and all his anxieties, could hardly be deemed without some adequate equivalent for his labors in a trust which was to centre in him for the benefit of his offspring. And if no marriage should took place, which could bring such issue into existence, the subsequent devise over demonstrates, that William King was not even then first in the thoughts of the testator; but the future offspring of his relations, doubly connected by the blood of both families. They were second in preference only to the issue of William King by a Trigg, and certainly not to King himself. It has been asked, what would have been the result, if King had married a Trigg, and had had no issue by her? The answer is, that the will does not look to such an event; and as the estate was not beneficial to vest in King, in the case of a marriage and issue, it is quite too much to infer, that in all other events, the beneficial estate was to vest in him, simply because it is not declared to be in another. But it would be sufficient to say, that no such marriage did take effect; and upon the non-occurrence of that contingency, the estate was to pass over to other persons, by the very terms of the will; thus, repelling the notion that King was to take a beneficial estate, where there was neither marriage nor issue.

The argument on the part of the appellant is, that the immediate devise was a beneficial estate in fee to William King, with an executory devise over to the issue of his marriage with a Trigg, if there should be any; and as that event has not happened, the prior estate to him has never been divested. But we do not think, that this is the natural reading of the words; and the construction is repelled by the devise over, on the failure

*352] of that marriage. In order to arrive at such a conclusion, *we should be obliged to add words, not found in the will, nor implied in the context. William King is to take a fee, in trust for the issue; and the

trust is engrafted upon his estate, and is nowhere said, in a given event, to displace or supersede it. It is not a devise to him, for his own use, in fee, until he shall have issue, and then his use to cease, and a trust to arise for such issue.

It is also insisted, that the words "in trust," used in the devise, ought not to be considered as creating a mere fiduciary estate for the issue (if any), but as a legal use, to spring up by way of executory devise; and that if, by reason of the failure of such use, there is a resulting estate to the heirs-at-law, it is a legal use, for which their remedy is at law, and not a fiduciary estate for them, for which the present remedy lies in equity. There is no doubt, that the words "in trust," in a will, may be construed to create a use, if the intention of the testator, or the nature of the devise, requires it. But the ordinary sense of the term is descriptive of a fiduciary estate or technical trust; and this sense ought to be retained, until the other sense is clearly established to be that intended by the testator. Now, we think, that in the present case, there are strong reasons for construing the words to be a technical trust. The devise looked to the issue of a person not then in being; and of course, if such issue should come *in esse*, a long minority must follow. During this period, it was an object with the testator, to uphold the estate in the father, for the benefit of his issue; and this could be better accomplished by him, as a trustee, than as a mere guardian. If the estate to the issue were a use, it would vest the legal estate in them, as soon as they came *in esse*; and if the first-born children should be daughters, it would vest in them, subject to being divested by the subsequent birth of a son. A trust estate would far better provide for these contingencies than a legal estate. There is then no reason for deflecting the words from their ordinary meaning.

In cases of this sort, little aid can be gathered from the authorities; as there rarely are such coincidences in the language of wills, and the circumstances of the cases, as to lead unequivocally to the same conclusion. We have examined the authorities, however, and they do not seem to us in any *degree to interfere with the opinion we entertain on the present devise. Indeed, some of the cases strengthen the reasoning on which we rely. But a critical examination of them would occupy too much time. Our opinion then is, that the estate given to William King by the devise in question, is not a beneficial estate in fee, but an estate in trust for his issue; and that the trust having failed, there remains a resulting trust to the heirs-at-law of the testator, if the devise over does not take effect. [*353

The devise over has not as yet taken effect. There is no person who now answers the description contemplated in that devise. No child of the Triggs has as yet married a child of James King or of Elizabeth Mitchell; and in the present state of things, such a marriage is impossible. Whether the contingency, on which this devise over is to take effect, was or was not originally too remote to be good in point of law, because a marriage might take place between a child of the Triggs, then unborn, and a child of James King or Elizabeth Mitchell, at a period more remote than twenty-one years after their respective births, and yet fall within the terms of the devise, is a question upon which (as we have already said) the court will express no opinion. It does, however, create some embarrassment in the case. And the question is, whether, until such event as the contemplated marriage shall

happen, the heirs are not entitled to the relief they seek, as a resulting trust, which is at present vested in them, and which can only be displaced (if at all) by the actual occurrence of a marriage, which shall take place upon a future contingency.[1] We think, that they are entitled to the relief, leaving the case open for the rights of any person, who may hereafter rightfully claim title against them, under the devise over.

The decree of the district court is, therefore, affirmed, with costs, and the cause is remanded for further proceedings.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the western district of Virginia, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said district court, in this *cause be and the same is hereby affirmed, with costs. *354] And it is further ordered and decreed by this court, that this cause be and the same is hereby remanded to the said district court, with directions that further proceedings be had therein, according to law and justice, and in conformity to the opinion of this court.

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*355] *Reuben Withers, Appellant, *v.* John Withers, Appellee.

Partnership.

Construction of articles of copartnership, as they related to the expenses of the copartners.

Appeal from the Circuit Court of the district of Columbia and county of Alexandria. The case, as stated in the opinion of the court, was as follows:

This case comes up on appeal from the circuit court of the United States for the county of Alexandria, in the district of Columbia. The bill filed by the appellee in the court below, alleges, that, on or about the 7th of March 1815, the parties to this suit entered into copartnership, as merchants in trade, in the town of Alexandria, under the firm and style of J. & R. Withers. That the complainant, John Withers, was to furnish to the firm $15,000, and to receive three-fourths of the profits of the business; and the defendant, Reuben Withers, was to furnish $5000, and receive one-fourth of the profits; and in case of loss, it was to be borne in the same proportion; and that each party was to pay his own individual expenses. That the business was continued, upon the same terms and conditions, in all respects (the name and style of the firm having been changed to that of John Withers & Co.), until the 13th of December 1819, when it was dissolved by mutual consent and upon certain terms, which need not be here stated. The bill then alleges, that the complainant, never having received a satisfactory account of the disbursements and transactions of the defendant, whilst in New York, as a member of the firm, they were excepted out of the settlement of the partnership concerns, and the defendant agreed to render a true, full and just account of all his purchases and transactions in

[1] There is no limitation of time, in law, as to the possibility of the birth of issue; so held, where the *feme*, tenant for life, had attained the age of 75 years. List *v.* Rodney, 83 Penn. St. 483.

New York, as a member of the said firm, and that he should be exclusively liable for all debts and engagements which he might have contracted or made in the name of said firm, and for which they had not *received full benefit. And the bill charges, that the defendant had failed and [*356 neglected to render such account, and prays that an account may be taken of such disbursements, dealings and transactions; and that the defendant may be decreed to pay over to the complainant what, if any thing, upon the taking of such account, may be found due to him.

The defendant, in his answer admits the partnership was entered into upon the terms and conditions stated in the bill, and avers that he regularly transmitted to the house at Alexandria, invoices of all goods purchased in New York, and that the same were entered on the books of the firm, which are in the possession or under the control of the complainant. The defendant admits, that it was stipulated in the articles of copartnership, that each party was to pay his own individual expenses, which, as he alleges, was meant and intended to apply when the parties were at home, and not travelling on the business of the firm. And he expressly avers, that all the funds put into his hands were well and faithfully applied to the objects for which they were remitted and received. The defendant also admits, that upon the dissolution of the partnership, he did agree to render a full, true and just account of all his purchases and transactions in New York, as a member of, and on account of, said firm, and to be liable for all debts and engagements which he may have entered into (if any) on account of said firm, and for which the said firm may not have received full benefit and advantage. And avers that he has fully complied with his engagement to render such account, and submitted the same for examination; and that the account, when examined and corrected, was balanced, as he thinks, on the books of the company, which are in the possession or under the control of the complainant. And that there is no debt due in the city of New York, or elsewhere, from the said firm, contracted by him, the defendant; but that every such debt, contract or engagement, so far as he knows or believes, has been paid off, satisfied and discharged.

The cause afterwards being set down for hearing, was, on motion of the complainant, referred to a commissioner, to state and settle the partnership accounts between the parties. Upon the coming in of the report of the commissioner, sundry exceptions were taken, and argued by counsel; all of which *were overruled by the court, except one, which related to the [*357 defendant's charge for his expenses in New York, amounting to $1756. The exception to this charge was allowed, and the cause referred back to the commissioner, with directions to allow the defendant his reasonable travelling expenses to and from New York, and the necessary difference between the expense of living at New York and at Alexandria.

The case was argued by *Neal*, for the appellant; and by *Key*, for the appellee.

Neal claimed to reverse the decree of the circuit court, because the expenses of the appellant in New York, while engaged in the business of the firm, had not been allowed. On this point, he cited, 16 Johns. 15; 1 Atk. 7–8; 3 Atk. 176; Domat, Civil Law, 155, 158–9, art. 9, 11, 12; 1 Swanst. 465; 1 Pet. 383. The expenses were clearly chargeable to the firm, but if

they were not, there was a subsequent ratification of the charge. 9 Cranch 155, 160; 7 Ibid. 92; 2 Hen. & Munf. 544; 4 Ibid. 273. The bill and answer did not put these expenses in issue, and will not warrant the decree. 4 Munf. 273; 6 Johns. Cas. 559; 7 Pet. 130; Harr. Chan. 299.

Key, contrà:—The bill is for an account, by one partner against another. The agreement set out in the answer is the only evidence of it. He contended, that the agreement gave no claim to the expenses. The appellant would have been subject to expenses, had he remained in Alexandria, which would not have been a charge to the firm; those incurred in New York should be on the same footing.

Thompson, Justice, delivered the opinion of the court.—The question in relation to the expenses of the appellants in New York being the only one now in controversy between the parties, it is unnecessary to notice the proceedings in any other respect. *The rule laid down by the court in their direction to the commissioner, we think was entirely correct. *358]
The articles of copartnership are not in the record. But the allegation in the bill, and the admission in the answer, touching the agreement between the parties, in relation to their expenses, do not materially differ. The bill alleges that each party was to pay his own individual expenses. The answer to this allegation is, that although it was stipulated in the articles of copartnership that each party was to pay his own individual expenses, yet the same was meant and intended to apply when the parties were at home, and not travelling on the business of the concern. This was substantially the construction adopted by the court below, and which we think is the fair and reasonable interpretation of the argument, even standing alone upon the complainant's own statement. It was manifestly intended to apply to private or family expenses, not connected with the business of the partnership. But it would be an unjust and forced construction of the stipulation, to extend it to extra expenses, incurred when abroad on the business of the partnership. The stipulation in the memorandum of the 13th of December 1819, upon the dissolution of the partnership, does not embrace this item of expenses. The defendant, Reuben Withers, covenants to render a full, true and just account to the firm, of all his purchases and transactions in New York, as a member of, or for and on account of, the said firm; and to be liable for all debts or engagements which he may have entered into (if any), on account of said house, and for which the said firm may not have received full benefit and advantage. The disbursements of the defendant for his personal expenses cannot, with any propriety, be considered a debt or engagement, within the meaning of this stipulation. It was obviously intended to protect the complainant from all liability for any outstanding claims for goods purchased in New York, and for which the firm had not received the full benefit and advantage.

The cause was afterwards referred back to the commissioner, to reform his report touching these expenses, according to the rule laid down by the court, viz., to allow the defendant his reasonable travelling expenses to and from New York, and the necessary difference between the expense of living at New York and at Alexandria. Upon the coming in of the commissioner's *report, an exception was filed, but overruled by the court, and a final decree entered against the defendant. The exception taken to the *359]

report was in these words: "The defendant excepts to this report, because it is contrary to evidence, and for other reasons, to be stated more particularly at the hearing."

The record only states generally that the exception was overruled. This does not warrant the conclusion that it was overruled for defect or insufficiency in point of form. For if this had been the ground of objection, it might have been, and doubtless would have been, amended. The latter branch of the exception may be objectionable. But the exception that the report was contrary to evidence, is good in point of form; and we must presume that the court overruled it upon the merits, or, in other words, decided that the report was not contrary to the evidence; and in this we think the court erred.

The commissioner, in his first report, had allowed the defendant, for his expenses in New York, $1756, because the charges were entered in the books of the company, of which entries all the parties were considered by him as having full knowledge. This undoubtedly is the *primâ facie* presumption; and if the complainant knew of the entries, and made no objection, his assent to their allowance would fairly be presumed. But the evidence in the cause is sufficient to rebut this presumption. John Washington, who was a clerk employed by the firm, swears, that he was intimately acquainted with the concerns of the copartnership, and with their mode of transacting business. That John Withers attended mostly to what is called the out-door business, and did not attend to the books of the firm. That he has good reason to believe, and does verily believe, that he was entirely ignorant of the state of the books between himself and copartner. That he never attended to or examined the books. That on his showing him an entry of $900, on account of those expenses, he said they were incorrect, and contrary to their agreement: and before the dissolution of the partnership, he objected to all the defendant's charges for expenses. This, so far as negative evidence can go, shows that the complainant was ignorant of the entries in the books, and ought not to be concluded by them.

*The commissioner, in his last report, has estimated the defendant's expenses in New York at one dollar per day; whereas, the positive proof, by the testimony of Gordon Miller, is, not only that the customary charge for board at the house where the defendant boarded was $10.87 per week, but that the defendant actually paid that sum, exclusive of extra fire at fifty cents per day. But there is no evidence showing the time he had an extra fire, or what he paid therefor. The report, therefore, cannot be said to be against evidence as to this item. But with respect to the allowance for board, the report is clearly against the evidence. [*360

The decree of the court below must accordingly be reversed, and the cause sent back with directions to reform the report of the commissioner, so as to allow the defendant at the rate of $10.87 a week for his expenses in New York, instead of one dollar per day.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Alexandria, and was argued by counsel: On consideration whereof, it is considered, ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby

reversed, and that this cause be and the same is hereby remanded to the said circuit court, with directions to the said court to reform the report of the commissioner, so as to allow the defendant at the rate of $10.87 per week for his expenses in New York, instead of one dollar per day.

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*361] BANK OF THE UNITED STATES, Plaintiff in error, *v.* ANDREW DONNALLY, Defendant in error.

Pleading.—Statute of limitations.—Lex fori.

Action of debt, brought by the Bank of the United States, upon a promissory note, made in the state of Kentucky, dated the 25th of June 1822, whereby, sixty days after date, Campbell, Vaught & Co., as principals, and David Campbell, Steeles and Donnally, the defendant, as sureties, promised to pay, jointly and severally, to the order of the president, directors and company of the Bank of the United States, $12,877, negotiable and payable at the office of discount and deposit of the said bank, at Louisville, Kentucky, value received, with interest thereon, at the rate of six per centum per annum thereafter, if not paid at maturity. The declaration contained five counts; the fourth count stated, that the principal and sureties "made their other note in writing," &c., and thereby promised, &c. (following the language of the note), and then proceeded to aver, "that the said note in writing, so as aforesaid made, at &c., was and is, a writing without seal, stipulating for the payment of money; and that the same, by the law of Kentucky, entitled an act, &c. (reciting the title and annexing the enacting clause), is placed upon the same footing with sealed writings, containing the same stipulations, receiving the same consideration in all courts of justice, and to all intents and purposes, having the same force and effect as a writing under seal;" and then concluded with the usual assignment of the breach, by non-payment of the note. The fifth court differed from the fourth principally in alleging, "that the principals and sureties, by their certain writing obligatory, duly executed by them, without a seal, bearing date, &c., and here shown to the court, did promise, &c.;" and contained a like averment with the fourth, of the force and effect of such an instrument by the laws of Kentucky. The defendant demurred generally to the fourth and fifth counts; and the district court sustained the demurrers.

We are of opinion, that the fourth and fifth counts are, upon general demurrer, good; and that the judgment of the court below, as to them, was erroneous; they set out a good and sufficient cause of action, in due form of law; and the averment that the contract was made in Kentucky, and that, by the laws of that state, it has the force and effect of a sealed instrument, does not vitiate the general structure of those counts, founding a right of action on the note set forth thereon; at most, they are surplusage; and if they do not add to, they do not impair, the legal liability of the defendant, as asserted in the other parts of those counts.

According to the laws of Virginia, the defendant had a right to plead as many several matters, whether of law or fact, as he should deem necessary for his defence, and he pleaded *nil debet* to the three first counts of the declaration, on which issue was joined; the defendant also pleaded the statutes of limitation of Virginia to the other counts. The court held the plea
*362] of the statute of limitations a good bar to all the counts, and gave judgment in favor *of the defendant. The statute of limitations of Virginia provides, that all actions of debt, grounded upon any lending or contract, without specialty, shall be commenced and sued within five years, next after the cause of such action or such suit, and not after; the act of Kentucky, of the 4th of February 1812, provides, "that all writings hereafter executed, without a seal or seals, stipulating for the payment of money or property, or for the performance of any act, duty or duties, shall be placed upon the same footing with sealed writings, containing the like stipulations, receiving the same consideration in all courts of justice, and to all intents and purposes having the same force and effect, and upon which the same species of action may be founded, as if sealed:" *Held*, that the statute of limitations of Virginia, precluded the plaintiff's recovery in the court where the action was instituted; the statute pleaded (the statute of Kentucky) not being available in Virginia.[1]

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[1] S. P. Townsend *v.* Jemison, 9 How. 407; Nash *v.* Tupper, 1 Caines 402; Lincoln *v.* Battelle, 6 Wend. 475.

United States Bank v. Donnally.

As the contract, upon which the original suit was brought, was made in Kentucky, and was sought to be enforced in the state of Virginia, the decision of the case in favor of the defendant, upon the plea of the statute of limitations would operate as a bar to a subsequent suit in the same state; but not necessarily as an extinguishment of the contract elsewhere, and especially, in Kentucky.

The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the laws of the country where the contracts are made, or are to be performed; but the remedies are to be governed by the laws of the country where the suit is brought; or as it is compendiously expressed, by the *lex fori*. No one will pretend, that because an action of covenant will lie in Kentucky, on an unsealed contract made in that state, therefore, a like action will lie in another state, where covenant can be brought only on a contract under seal.

It is an appropriate part of the remedy which every state prescribes to its own tribunals, in the same manner in which it prescribes the times within which all suits must be brought. The nature, validity and interpretation of the contract, may be admitted to be the same in other states; but the mode by which the remedy is to be pursued, and the time within which it is to be brought, may essentially differ; the remedy, in Virginia, must be sought within the time, and in the mode, and according to the descriptive character of the instrument, known to the laws of Virginia; and not by the description and character of it, presented in another state.

An instrument may be negotiable in one state, which yet may be incapable of negotiability by the laws of another state; and the remedy must be, in the courts of the latter, on such instrument, according to its own laws.

Error to the District Court for the Western District of Virginia. The plaintiffs in error instituted an action of debt in the court below, to November term 1829, against the defendant, he being the only party to the instrument sued upon, who was found within the jurisdiction of the court. *The declaration contained five counts upon the following note, executed by the defendant and several others: [*363

$12,877. June 26th, 1832.

Sixty days after date, we, Campbell, Vaught & Co., as principals, and David Campbell, and Steele, Donnally & Steeles, as sureties, do promise to pay, jointly and severally, to the order of the president, directors and company of the Bank of the United States, without defalcation, twelve thousand, eight hundred and seventy-seven dollars, negotiable and payable at the office of discount and deposit of the said bank, at Louisville, Kentucky, value received, with interest thereon at the rate of six per centum per annum thereafter, if not paid at maturity.

Campbell, Vaught & Co.
David Campbell.
Steele, Donnally & Steeles.

The first, second and third counts in the declaration set out the note as a simple-contract debt, to which the defendant pleaded *nil debet*, and the statute of limitations of Virginia; and the plaintiff filed replications, to which the defendant demurred. Judgment in favor of the defendant was entered by the court on these three counts. The third and fourth counts were as follows:

"And whereas also, the said Andrew Donnally and Richard Steele, William Steele, Robert M. Steele and Adam Steele, partners trading under the firm of Steele, Donnally & Steeles, heretofore, to wit, on the 26th day of June 1822, and in the lifetime of said Adam Steele, Robert Steele and William Steele, since deceased, at Louisville, in the state of Kentucky, to wit, at the district aforesaid, with one David Campbell, and the firm of Camp-

bell, Vaught & Co., made their other note in writing; which said note, signed by the said firm of Steele, Donnally & Steeles, and dated the day and year aforesaid, is to the court here shown, and thereby promised, jointly and severally, the said Campbell, Vaught & Co., as principals, and the said David Campbell and the said Steele, Donnally & Steeles, as sureties, sixty days after the date thereof, to pay to the order of the president, directors and company of the Bank of the United States, without defalcation, the sum of twelve thousand, eight hundred and seventy-seven dollars, negotiable and payable at the office of discount and deposit of said bank, at
*364] *Louisville, Kentucky, value received, with interest thereon at the rate of six per centum per annum thereafter, if not paid at maturity. And plaintiffs aver, that said note in writing, so as aforesaid made at Louisville in the state of Kentucky, and payable at said place, was and is a writing without seal, stipulating for the payment of money; and that the same, by the law of Kentucky, entitled "an act to amend the law of proceedings in civil cases, approved February 4th, 1812" (an extract from which said law, duly authenticated under the seal of the said state of Kentucky, and duly certified, is to the court here shown), is placed upon the same footing with sealed writings containing the like stipulations, receiving the same consideration in all courts of justice, and to all intents and purposes, having the same force and effect, as a writing under seal. And although said sum of money, in said last-mentioned note specified, has long been due and payable, according to the terms of said note, yet the said Andrew Donnally, Richard Steele, Robert M. Steele, Adam Steele and William Steele, in the lifetime of said Robert M., Adam, and William Steele, and the said Donnally and Richard Steele, since the death of said Robert M., William and Adam Steele, have not, nor has either of them, nor has the said David Campbell, or the said firm of Campbell, Vaught & Co., or either of them, paid unto said plaintiffs said last-mentioned sum of twelve thousand, eight hundred and seventy-seven dollars, or any part thereof, but to pay the same, or any part thereof, to said plaintiff, the said firm of Steele, Donnally & Steeles, in the life of the said deceased partners, and the said David Campbell, and Campbell, Vaught & Co., refused, and the said defendant and Richard Steele, surviving partners of the late firm of Steele, Donnally & Steeles, still refuse. By reason whereof, an action hath accrued to said plaintiffs to demand and have of and from said defendant said last mentioned sum of twelve thousand, eight hundred and seventy-seven dollars, other parcel of said sum of money above demanded.

"And for that whereas, afterwards to wit, on the 26th day of June, in the year 1822, at Louisville, in the state of Kentucky, to wit, at Clarksburg, in this district, the aforesaid Campbell, Vaught & Co., as principals, and the aforesaid David Campbell and Richard Steele, Andrew Donnally, Adam
*365] Steele, *Robert M. Steele and William Steele, as sureties, the said Richard, Andrew, Adam, Robert and William, acting under the firm and style of Steele, Donnally & Steeles, by their certain writing obligatory, duly executed by them, without a seal, bearing date the same day, and here shown to the court, did promise and bind themselves, jointly and severally, to pay the plaintiffs, without defalcation, another sum of twelve thousand, eight hundred and seventy-seven dollars, negotiable and payable at the office of discount and deposit of the said plaintiffs, at the aforesaid town of

Louisville, in Kentucky, with interest thereon at the rate of six per centum per annum thereafter, if not paid at maturity. And the said plaintiffs in fact say, that though the said last-mentioned sum of money, when due and payable, according to the tenor and effect of said writing, to wit, on the 28th day of August 1822, at the office of discount and deposit aforesaid, was duly demanded, the same was not paid by the said Campbell, Vaught & Co., David Campbell, and Steele, Donnally & Steeles, or by any or either of them, nor have the said Compbell, Vaught & Co., David Campbell, and Steele, Donnally & Steeles, or any or either of them, at any time, paid the same, or any part thereof, but the same to pay, they, and each of them, though often requested, have altogether failed and refused, and still do refuse; and the said plaintiffs further in fact say, that the said writing was duly made and payable at the aforesaid town of Louisville, a place within the commonwealth of Kentucky, and subject to laws thereof; and that the same writing, executed without a seal, was, at the time of its execution, and ever has been, and is now, by the laws of the said commonwealth of Kentucky, then and still in force, upon the same footing with a sealed instrument containing like stipulations, entitled to the same consideration in all courts of justice, and having, to all intents and purposes, the same force and effect as it would if sealed. By reason thereof, the plaintiffs are entitled to demand and recover of the said Andrew Donnally, one of the said obligors in the said writing, the aforesaid sum of twelve thousand, eight hundred and seventy-seven dollars, with interest as aforesaid, other parcel of the debt above demanded."

To the fourth and fifth counts, demurrers were filed by the defendant, and there was a joinder in demurrer. The district *court gave judgment if favor of the demurrers. The defendant also pleaded to these [*366 counts, *nil debet* and the statute of limitations of Virginia. The plaintiffs demurred to the plea of the statute of limitations of Virginia, and to the plea of *nil debet* to the fourth count, and joined issue on the plea of *nil debet*.

The statute of limitations of Kentucky, referred to in the fourth and fifth counts, was passed February 4th, 1812, and is as follows:

"An act to amend the law of proceedings in civil cases. Approved, Feb. 4th, 1812.

"§ 8. Be it further enacted by the authority aforesaid, that all writings hereafter executed, without a seal or seals, stipulating for the payment of money or property, or for the performance of any act, duty or duties, shall be placed upon the same footing with sealed writings containing the like stipulations, receiving the same consideration in all courts of justice, and to all intents and purposes having the same force and effect, and upon which the same species of action may be found as if sealed."

The district court held the plea of the statute of limitations of Virginia a bar to all the counts, and gave judgment on all the demurrers, for the defendant, with the general conclusion that the plaintiffs take nothing by their bill, &c. The plaintiffs prosecuted the writ of error.

The case was argued by *Hardin* and *Sergeant*, for the plaintiff in error; and by *Ewing* and *Binney*, for the defendant.

Hardin, for the plaintiff in error, argued, that the whole of the case depended upon the question, can the statute of limitations of Virginia be pleaded to the note sued on, referred to in the fourth and fifth counts. The statute of Virginia only applies to simple-contract debts, and not to debts secured by specialty; and the only question to be decided is—is the writing a specialty or not?

To enable the court correctly to settle this point, further facts in the cause are to be considered. The note was executed at, and made payable
*367] in, Louisville, in the state of *Kentucky. The place where a note is made payable, forms a part of the contract: 4 Litt. 226. A note, not under seal, is made a specialty in Kentucky, 4 Litt. Laws 305; and also by the decisions of the court of appeals of Kentucky: 2 A. K. Marsh. 568, and 3 Ibid. 284. In those cases, it is expressly decided, that, since that statute of Kentucky, a note executed in that state, not under seal, is a specialty, to all intents and purposes. 4 Griffith's Law Register 1135, note. 1. The law of the place where the contract is made, is to form a part of the contract: 2 Bibb 208.

It is admitted, that the *lex fori* is to govern as to the remedy. That the statute of limitations of Virginia is the statute to be pleaded, and not that of Kentucky, is also admitted; but still, it is equally clear, that the statute of Virginia does not apply to a specialty; that the note sued on was a specialty in the state where it was executed and made payable, is certain, because the same is so enacted by the legislature, in 1811, which statute has remained in full force ever since, and was so expounded by the court of appeals of that state. Whatever forms a part of the contract, remains so, and cannot be altered or changed by a mere change of place as to the remedy sought. This principle is frequently illustrated by the incident of interest, which is always regulated by the place where the contract is made and made payable, and not the place where it is attempted to be enforced.

For the *defendant*, it was contended, that the demurrers will be sustained, if the instrument in the declaration is not a specialty. The note is not a specialty in its form, and whatever effect the act of Kentucky may have upon it in that state, it does not operate in the same manner elsewhere. That act does not declare the instrument a specialty; which is a writing obligatory, without a seal. But the plea of *nil debet* is itself an admission that it is not a writing obligatory. *Nil debet* cannot be pleaded to such a writing; the proper plea to a writing obligatory is *non est factum*.

The action is brought in Virginia, and the statute of limitations of that
*368] state, and not that of the state of Kentucky, applies. *In Virginia, it is a simple-contract debt, and it is even so in Kentucky; although, by the law of 1812, in the courts of justice of that state, "it has, to all intents and purposes, the same effect as sealed instruments." It is not made, by this law, a sealed instrument; and when a recovery is sought out of the jurisdiction of the court of Kentucky, the law of the remedy must be the law of the place where the suit has been instituted.

The law of Kentucky addresses itself to the courts of that state only. There, the instrument has all the effects of a specialty, importing consideration, having priority, &c. The cases cited by the counsel of the plaintiffs in error, prove no more, than that the courts of Kentucky follow the law of

that state. These cases can have no influence on the question, whether a court in Virginia is to follow the law of Virginia, or that of Kentucky. Story's Conflict of Laws 219, 222; 3 Johns. 267; 1 Ibid. 140; 2 Mass. 80; 5 Johns. 239; 14 Ibid. 340; 4 Cow. 508; 1 H. Bl. 135; 3 Price 250; 7 Cranch 481; *Jones* v. *Hook*, 2 Rand. 303; 2 Ves. 540.

Sergeant, in reply, urged upon the court the propriety of leaving to the plaintiffs in error their remedy on the note, should a suit be brought upon it in the state of Kentucky, or elsewhere. If the court should consider the limitation law of Virginia as governing the case, they would apply that law, by their judgment, to the remedy which had been sought by this suit in Virginia, and not give such a judgment as would impair the plaintiff's right elsewhere.

Upon the questions in the case, Mr. Sergeant cited, 5 Johns. 239; 3 Gill & Johns. 245; Story's Conflict of Laws 475. He contended, that the sole ground of the cases cited for the defendant, was the effect of the statute of limitations upon the remedy. They do not decide that the right to the debt is destroyed by the lapse of time.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to the district court for the western district of Virginia. The original suit was an action of debt, brought by the Bank *of the United States, upon a promissory note, dated the 26th of June 1822, whereby, sixty [*369 days after date, Campbell, Vaught & Co., as principals, and David Campbell, and Steele, Donnally (the defendant) & Steeles, as sureties, promised to pay, jointly and severally, to the order of the president, directors and company of the Bank of the United States, $12,877, negotiable and payable at the office of discount and deposit of the said bank, at Louisville, Kentucky, value received, with interest thereon, at the rate of six per centum per annum thereafter, if not paid at maturity. The declaration contained five counts, upon the first three of which it is unnecessary to say anything, as the judgment thereon is not now in controversy. The fourth count stated, that the principal and sureties "made their other note in writing," &c., and thereby promised, &c. (following the language of the note), and then proceeded to aver, "that the said note in writing, so as aforesaid made, at, &c., was, and is a writing *without seal*, stipulating for the payment of money; and that the same, by the law of Kentucky entitled an act, &c. (reciting the title and annexing the enacting clause), is placed upon the same footing with sealed writings containing the same stipulations, receiving the same consideration in all courts of justice, and to all intents and purposes having the same force and effect as a writing under seal;" and then concluded, with the usual assignment of the breach, by non-payment of the note. The fifth court differed from the fourth, principally, in alleging that "the principals and sureties, by their certain writing obligatory, duly executed by them *without a seal*, bearing date, &c., and here shown to the court, did promise, &c.;" and contained a like averment with the fourth, of the force and effect of such an instrument, by the laws of Kentucky. The defendant, having a right, according to the laws of Virginia, to plead as many several matters, whether of law or fact, as he should deem necessary for his defence, pleaded *nil debet* to the first three counts of the declaration (on which issue was joined), and the statute of limitations of Virginia to the same counts; to which there was

a special replication, and a demurrer to that replication and joinder in demurrer. To the fourth and fifth counts, the defendant demurred generally, and there was a joinder in demurrer. He *also pleaded to the same counts *370] *nil debet*, and the statute of limitations of Virginia. The plaintiffs demurred to the plea of the statute of limitations to these latter counts, and also to the plea of *nil debet* to the fourth count, and joined issue on the plea of *nil debet* to the fifth count. The court held the plea of the statute of limitations a good bar to all the counts, and accordingly gave judgment upon all the demurrers, in favor of the defendant, with the general conclusion, that the plaintiffs take nothing by their bill. The present writ of error is brought to revise this judgment.

As the contract, upon which the original suit was brought, was made in Kentucky, and is sought to be enforced in the state of Virginia, the decision of the case in favor of the defendant, upon the plea of the statute of limitations, will operate as a bar to a subsequent suit in the same state; but not necessarily as an extinguishment of the contract elsewhere, and especially in Kentucky. But a general judgment in favor of the defendant, upon his demurrer to the declaration (it is supposed) may, as a judgment upon the merits of the claim, have a very different operation, as a *res judicata* or final judgment. Hence, there arises a very important consideration, as to the correctness of the judgment upon that demurrer. It has accordingly been argued at large, by the counsel for the bank, as vital to the rights, as well as to the remedies of the bank in other states. We are of opinion, that the fourth and fifth counts are, upon general demurrer, good; and that the judgment of the court below, as to them, was erroneous. They set out a good and sufficient cause of action, in due form of law; and the averments, that the contract was made in Kentucky, and that, by the laws of that state, it has the force and effect of a sealed instrument, do not vitiate the general structure of those counts, founding a right of action on the note set forth thereon. At most, they are but surplusage; and if they do not add to, they do not impair, the legal liability of the defendant, as asserted in the other parts of those counts.

The other point, growing out of the statute of limitations, pleaded to the fourth and fifth counts (for as to the first three counts it is conceded to be a good bar), involves questions of a very different character, as to the operation and effect of a conflict of laws in cases governed by the *lex loci*. The statute of *limitations of Virginia provides, that "all actions of debt, *371] grounded upon any lending or contract without specialty," shall be commenced and sued within five years next after the cause of such action or suit, and not after. This being the language of the act, and confessedly governing the remedy in the courts of Virginia, the bar of five years must apply to all cases of contract, which are without specialty, or, in other words, are not founded on some instrument acknowledged as a specialty by the law of that state. The common law being adopted in Virginia, and the word "specialty" being a term of art of that law, we are led to the consideration, whether the present note is deemed, in the common law, to be a specialty. And certainly it is not so deemed. It is not a sealed contract, nor does it fall under any other description of instruments or contracts or acts known in the common law as specialties. The argument does not deny this conclusion; but it endeavors to escape from its force, by affirming, that

the note is a specialty according to the laws of Kentucky; and if so, that this constitutes a part of its nature and obligation; and it ought, everywhere else, upon principles of international jurisprudence, to be deemed of the like validity and effect.

The act of Kentucky of the 4th of February 1812, provides, "that all writings hereafter executed, without a seal or seals, stipulating for the payment of money or property, or for the performance of any act, duty or duties, shall be placed upon the same footing with sealed writings containing the like stipulations, receiving the same consideration in all courts of justice, and to all intents and purposes, having the same force and effect, and upon which the same species of action may be founded, as if sealed." Now, it is observable, that this statute does not, in terms, declare, that such writings shall be deemed specialties; nor does it say, that they shall be deemed sealed instruments. All that it affirms is, that they shall be put upon the same footing as sealed instruments, and have the same consideration, force, effect and remedy as sealed instruments. So that it is perfectly consistent with the whole scope and object of the act, to give them the same dignity and obligation as specialties, without intending to make them such. A state legislature may certainly provide, that the same remedy shall be had on a promissory note, as on a bond or sealed *instrument; but it will not thereby make the note a bond or sealed instrument. It may [*372 declare, that its obligation and force shall be the same as if it were sealed; but that will still leave it an unsealed contract.(a)

But whatever may be the legislation of a state, as to the obligation or remedy on contracts, its acts can have no binding authority beyond its own territorial jurisdiction. Whatever authority they have in other states, depends upon principles of international comity, and a sense of justice. The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the law of the country where the contracts are made, or are to be performed; but the remedies are to be governed by the laws of the country where the suit is brought; or, as it is compendiously expressed, by the *lex fori*. No one will pretend, that because an action of covenant will lie in Kentucky, on an unsealed contract made in that state, therefore, a like action will lie in another state, where covenant can be brought only on a contract under seal. It is an appropriate part of the remedy, which every state prescribes to its own tribunals, in the same manner in which it prescribes the times within which all suits must be brought. The nature, validity and interpretation of the contract may be admitted to be the same in both states; but the mode by which the remedy is to be pursued, and the time within which it is to be brought, may essentially differ. The remedy, in Virginia, must be sought within the time, and in the mode, and according to the descriptive character of the instrument, known to the laws of Virginia, and not by the description and character of it, prescribed in another state. An instrument may be negotiable in one state, which may be incapable of negotiability by the laws of another state; and the remedy must be in the courts of the latter, on such instrument, according to its own laws.

(a) See 4 Griffith's Law Register 1136, note; cases in Kentucky on this point, 1 A. K. Marsh. 507.

If, then, it were admitted, that the promissory note now in controversy were a specialty, by the laws of Kentucky, still it would not help the case, unless it were also a specialty, and recognized as such, by the laws of Virginia ; for the laws of the *latter must govern as to the limitation of suits in its own courts, and as to the interpretation of the meaning of the words used in its own statutes.

*373]

It may be added, that neither the fourth count, nor the fifth count of this declaration, aver the note to be a specialty ; nor does either assert it to be a sealed writing ; but the contrary. So that the court are called upon to make an intendment as to the operation of a foreign law, which, if essential to the case, should have been directly stated, and not left to mere inference.

The case, however, is not without authority, even if it were not clear upon principle. In *Warren* v. *Lynch*, 5 Johns. 239, where a promissory note was made in Virginia, payable in New York, and the maker signed it with a scroll, which, in Virginia, is deemed to be a seal ; on a suit in New York, it was held to be an unsealed instrument (the laws of New York recognising no instrument as sealed, unless such as are with a wax or wafer seal), and therefore, that the proper form of action was *assumpsit*, and not debt. In *Andrews* v. *Herriot*, 4 Cow. 508, it was held, that an action of covenant will not lie in New York, on a contract to be performed in Pennsylvania, where there was a scroll instead of a seal, in the *locus sigilli ;* although, by the law of Pennsylvania, a scroll is deemed a seal. In *Trasher* v. *Everhart*, 3 Gill & Johns. 234, it was held, that in case of a single bill made in Virginia (where it is not deemed a specialty), sued in Maryland, an action of *assumpsit* is not maintainable as upon a simple contract, but must be debt ; because, in Maryland, such single bill is deemed a specialty. The doctrine of these cases seems directly in point ; and a very close analogy may be found in the case of *Jones* v. *Hook's Administrator*, 2 Rand. 303, where the court of appeals of Virginia held, in an action of debt, upon a judgment of North Carolina, brought in Virginia, that the statute of limitations of North Carolina was no bar, but that of Virginia, if applicable, governed the remedy.

Upon the whole, our opinion is, that the judgment upon the demurrer by the defendant, to the fourth and fifth counts, ought to be reversed ; and that in all other respects, it ought to be affirmed. But as the plea of the statute of limitations is a good bar to all the counts, the judgment of the court below, that *the plaintiffs take nothing by their writ, is right, and ought to be affirmed, with costs.

*374]

This cause came on to be heard, on the transcript of the record from the district court of the United States for the western district of Virginia, and was argued by counsel : On consideration whereof, it is considered by the court here, that the judgment of the district court of the western district of Virginia is erroneous in this, that upon the demurrer of the said Donnally, to the said fourth and fifth counts in the said declaration, the judgment ought not to have been as is set forth in the record, but ought to have been, that the fourth and fifth counts aforesaid are good and sufficient in law, to have and maintain the action aforesaid, of the plaintiffs aforesaid, for the matters contained therein ; and it is further considered by the court here,

that the special pleas pleaded by the said Donnally, of the statute of limitations, to the first, second and third counts of the said declaration, are good and sufficient in law, to preclude the said plaintiffs from having and maintaining their action aforesaid thereon, notwithstanding the matters set up by the said plaintiffs, in their replication to the said special pleas; and it is further considered by the court here, that the special pleas pleaded by the said Donnally, to the said fourth and fifth counts of the declaration aforesaid, of the statute of limitations, and also of *nil debet*, to the said fifth count, are good and sufficient in law, to preclude the said plaintiffs from having and maintaining their action aforesaid, against the said Donnally. And therefore, inasmuch as it appears to the court here, that, upon the whole record, the pleas aforesaid, so as aforesaid pleaded by the said Donnally, and adjudged in his favor are, in law, a good and sufficient bar to the action aforesaid, upon all the counts contained in the declaration aforesaid, notwithstanding the fourth and fifth counts thereof are otherwise good and sufficient in law; it is, therefore, considered by the court here, that the judgment aforesaid of the district court of the western district of Virginia, that the said plaintiffs take nothing by their bill aforesaid, be and the same is hereby, for this cause, affirmed, with costs.

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*United States, Plaintiffs in error, *v.* Walter Jones, Administrator of Benjamin G. Orr. [*375

Treasury transcripts.

A treasury transcript, produced in evidence by the United States in an action on a bond for the performance of a contract for the supply of rations to the troops of the United States, contained items of charge which were not objected to by the defendant; the defendant objected to the following items, as not proved by the transcript: "February 19th, 1818, for warrant 1860, favor of Richard Smith, dated 27th December 1817, and 11th February 1818, $20,000"; and on the 11th of April of the same year, another charge was made "for warrant No. 1904, for the payment of his two drafts, favor of Alexander McCormick, dated 11th and 17th of March 1818, for $10,000;" and on the 14th of May of the same year, a charge was made "for warrant No. 2038, being in part for a bill of exchange in favor of Richard Smith for $20,000—$12,832.78;" and one other warrant was charged June 22d, "for a bill of exchange in favor of Richard Smith, dated June 22d, 1810, $4000; and also a warrant to Richard Smith, per order, for $8000." These items, the circuit court instructed the jury, were not sufficiently proved, by being charged in the account and certified under the act of congress.

The officers of the treasury may well certify facts which come under their official notice, but they cannot certify those which do not come within their own knowledge; the execution of bills of exchange and orders for money on the treasury, though they may be "connected with the settlement of an account," cannot be officially known to the accounting officers. In such cases, however, provision has been made by law, by which such instruments are made evidence, without proof of the handwriting of the drawer; the act of congress of the 3d of March 1797, makes all copies of papers relating to the settlement of accounts at the treasury, properly certified, when produced in court, annexed to the transcript, of equal validity with originals. Under this provision, had copies of the bills of exchange and orders, on which these items were paid to Smith and McCormick, been duly certified and annexed to the transcript, the same effect must have been given to them by the circuit court, as if the original had been produced and proved. Every transcript of accounts from the treasury, which contains items of payments made to others, on the authority of the person charged, should have annexed to it a duly certified copy of the instrument which authorized such payments; and so, in every case, where the government endeavors, by suit, to hold an individual liable for acts of his agent; the agency, on which the act of the government was founded, should be made to appear by a duly certified copy of the power. The defendant would be at liberty to impeach the evidence thus certified; and

under peculiar circumstances of alleged fraud, a court might require the production of the original instrument; this, however, would depend *upon the exercise of the discretion of the court, and could only be enforced by a continuance of the cause, until the original should be produced.

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The following item in the treasury transcript was not admissible in evidence: "to accounts transferred from the books of the second auditor for this sum, standing to his debit under said contract, on the books of the second auditor, transferred to his debit on those of this officer, $45,000." The act of congress, in making a "transcript from the books and proceeding of the treasury" evidence, does not mean the statement of an account in gross, but a statement of the items, both of the debits and credits, as they were acted upon by the accounting officers of the department. On the trial, the defendant shall be allowed no credit on vouchers, which have not been rejected by the treasury officers, unless it was not in his power to have produced them; and how could a proper effect be given to this provision, if the credits be charged in gross? The defendant is unquestionably entitled to a detailed statement of the items which compose his account.[1]

The defendant, in an action by the United States, where a treasury transcript is produced in evidence by the plaintiffs, is entitled to the credits given to him in the account; and in claiming those credits, he does not waive any objection to the items on the debit side of the account. He is unquestionably entitled to the evidence of the decision of the treasury officers upon his vouchers, without reference to the charges made against him; and he may avail himself of that decision, without in any degree restricting his right to object to any improper charge. The credits were allowed the defendant on the vouchers alone, and without reference to the particular items of demand which the government might have against him; and the debits, as well as the credits, must be established on distinct and legal evidence.

The defendant is entitled to a certified statement of his credits, as allowed by the accounting officers, and he has a right to claim the full benefit of them, in a suit by the government; and under no circumstances, has the government a right to withdraw credits which have been fairly allowed.

The law has prescribed the mode by which treasury accounts shall be made evidence, and whilst an individual may claim the benefit of this rule, the government can set up no exemption from its operation. In the performance of their official duty, the treasury officers act under the authority of law; their acts are public, and affect the rights of individuals as well as those of the government; in the adjustment of an account, they sometimes act judicially, and their acts are all recorded on the books and files of the treasury department; so far as they act strictly within the rules prescribed for the exercise of their powers, their decisions are, in effect, final; for if an appeal be made, they will receive judicial sanction; accounts amounting to many millions annually, come under the action of these officers; it is, therefore, of great importance to the public, and to individuals, that the rules by which they exercise their powers, should be fixed and known.

In every treasury account on which suit is brought, the law requires the credits to be stated as well as the debits; these credits the officers of the government cannot properly either suppress or withhold; they are made evidence in the case, and were designed by the law for the benefit of the defendant.

*377] *Error to the Circuit Court of the District of Columbia, and county of Washington.

In April 1821, the plaintiffs instituted an action of debt against Benjamin G. Orr, on a bond, joint and several, executed by Benjamin G. Orr, Alexander McCormick and William O'Neale, to the United States, on the 21st day of November 1816, in the penal sums of $60,000, with the condition annexed, that "if the said obligor, &c., shall in all things well and truly observe, perform, fulfil, accomplish and keep all and singular the covenants, conditions and agreements whatsoever, which on the part and behalf of the said Benjamin G. Orr, his heirs, executors or administrators, are or ought to be observed, performed, fulfilled, accomplished and kept, comprised or mentioned in certain articles of agreement or contract, bearing

[1] United States *v.* Hilliard, 3 McLean 324; United States *v.* Patterson, Gilp. 44.

date 21st day of November 1816, made between George Graham, acting secretary of war, and the said Benjamin G. Orr, concerning the supply of rations to the troops of the United States, within the Mississippi territory, the state of Louisiana, and their vicinities, north of the Gulf of Mexico, according to the true intent, meaning and purport of the said articles of agreement or contract."

The contract was dated on the 21st day of November 1821, was made by Orr with the acting secretary for the department of war, and stipulated, that Orr, his heirs, &c., "shall supply and issue all the rations, to consist of the articles hereinafter specified, that shall be required of him or them, for the use of the United States, at all and every place or places where troops are or may be stationed, marched or recruited, within the limits of the Mississippi territory, the state of Louisiana, and their vicinities, north of the Gulf of Mexico; thirty days' notice being given of the post or place where rations may be wanted, or the number of troops to be furnished on their march, from the 1st day of June 1817, until the 31st day of May 1818, both days inclusive."

The defendant, Orr, having died after the institution of the suit, it was proceeded in against Walter Jones, his administrator *de bonis non*, at May term 1829, who took defence in the action, and after *oyer* of the bond and condition, and the contract, pleaded performance, &c.

The plaintiffs replied, that Orr did not perform the contract *entered into by him, in that, although the United States advanced and furnished him with large sums of money on account of the contract, and although the accounts of the said Benjamin G. Orr, in relation to the articles of agreement aforesaid had been duly and finally settled by the accounting officers of the government of the United States; and upon the said settlement, there was found to be due to the United States, from the said Benjamin, the sum of $3654.46, of which the said Benjamin had due notice. To this replication, there was a rejoinder and issue, and on the 31st of December 1831, the cause was tried, and a verdict and judgment rendered for the defendant. [*378

The plaintiffs filed two bills of exception. The first exception set forth the evidence produced and relied upon by the plaintiffs, to be an account stated by the accounting officers of the treasury against Orr, under the contract referred to in the bond, upon which the balance of $3654.46 was claimed, and which, according to that account, was due to the United States. The plaintiffs produced no other evidence. The whole amount of debts in the account was $141,078.24. The defendant admitted some charges in the account for moneys paid to Orr, by warrants of the treasury, amounting to $28,500, but objected to the competency of the account to charge him with any other item. The charges admitted were:

1817, June 9. For warrant No. 521, received by him on account, $10,000; Sept. 18, for part 953, do. $5000; Oct. 6, for do. 1072, do. $8500; Aug. 1, for do. 2419, do. $5000—$28,500.

Among the items objected to were the following:

1818, Feb. 19. For warrant No. 1660, favor of Richard Smith, dated 27th Dec. 1817, and 11th Feb. 1818—$20,000.

1818, April 11. For warrant No. 1904, for the payment of his two drafts,

favor of Alexander McCormick, dated 11th and 17th March, 1818, for $5,000 each—$10,000

1818, May 14. For warrant No. 2038, being in part of a bill of exchange in favor of Richard Smith, for $20,000—$12,832.78.

*379] *1818, June 22. For warrant No. 2210, for a bill of exchange in favor of Richard Smith, dated 22d June 1818—$4000.

1818, June 22. For warrant No. 2420, to Richard Smith, per order—$8000.

1818, June 22. To accounts transferred from the books of the second auditor for this sum, standing to his debit under said contract, on the books of the second auditor, transferred to his debit on those of this office—$45,000.

The circuit court instructed the jury, that the accounts were not competent to charge the defendant with the items objected to, and the plaintiffs excepted to this instruction.

Second exception. The defendant then insisted, that he was entitled to credit for several sums credited to Orr in the account for supplies, in execution of the contract, and prayed the court so to instruct the jury; to which the plaintiffs objected, unless jury were also instructed that the defendant could not rely on the account and claim the credits therein, without making the items of charge therein contained also evidence before the jury. The court gave the instructions prayed for by the defendant, without adding the further instructions prayed for by the plaintiffs; to which instruction and refusal the plaintiffs excepted. The plaintiffs prosecuted this writ of error.

The case was argued by *Butler*, Attorney-General, for the United States; and by *Coxe* and *Jones*, for the defendant.

For the United States, it was insisted: 1. That the first exception was well taken, the account stated being, under the acts of congress, and the provisions of the contract, competent evidence to charge the defendant—1st. With all the items of charge therein contained; and if not, then: 2d. It was, at all events, sufficient to charge him with the moneys received on the various warrants specified in the account.

2. The second exception was well taken. 1st. The account was one entire document, and the *defendant, if he elected to rely on any part *380] thereof, was bound, by the general rules of evidence, to take the whole as evidence, so far as it was pertinent to the subject-matter of the suit. 2d. There is the more reason for adhering to the general rule in this case, because the account was stated by a public officer, to whom, by law, and by the contract of the parties, the duty of settling the accounts in question, was to be referred.

The arguments presented to the court on this case, and on the following case, are reported together, to avoid repetition. (*post*, 392–4.)

McLean, Justice, delivered the opinion of the court.—This case is brought into this court by a writ of error to the circuit court for the district of Columbia. The action was commenced against B. G. Orr, in his lifetime, to recover from him a sum of money which remained in his hands as a balance of moneys that had been advanced to him on an army contract.

issue being joined, the cause was submitted to a jury; and the exceptions taken by the plaintiffs, to the ruling of the court on the trial, present the points for consideration.

"The attorney for the United States produced and read to the jury the contract or articles of agreement between George Graham, acting secretary of war, &c., and the said B. G. Orr, dated 21st November 1816, and the bond of said Orr and his sureties, A. McCormick and W. O'Neale, of the same date, with the condition thereof, being the same contract and bond above set out, &c. The attorney of the United States then produced and read to the jury the account stated by the accounting officers of the treasury, against the said Orr; and claimed to recover in this action thn balance of $3654.46, in the said account stated." To certain items contained in this account the defendant's counsel objected; but no objections were made to four items charged for treasury warrants issued to Orr, amounting to the sum of $28,500.

The first charge excepted to, was made as follows: * "February [*381
19th, 1818, for warrant No. 1680, favor of Richard Smith, dated 27th December 1817, and 11th February 1818, $20,000." And on 11th April of the same year, another charge was made, "for warrant No. 1904, for the payment of his two drafts, favor of Alexander McCormick, dated 11th and 17th March 1818, for $10,000." And on the 14th May of the same year, a charge was made "for warrant No. 2038, being in part for a bill of exchange in favor of Richard Smith, for $20,000,—$12,832,78." And one other warrant was charged June 22d, "for a bill of exchange in favor of Richard Smith, dated June 22d, 1810, $4000; and also a warrant to Richard Smith, per order, for $8000. These items the court instructed the jury, were not sufficiently proved, by being charged in the account and certified under the act of congress.

This instruction, the attorney-general insists, was erroneous; and that these items should have been admitted as proved, on the same principle as the four items to which no objection was made. That, if the government shall be required to produce the authority on which the warrants were issued to Richard Smith and Alexander McCormick, on the same principle, the original warrants issued in the name of Orr, and on which his receipts for the moneys are indorsed, should be proved. That it is as likely that some one may have fraudulently obtained these warrants from the treasury, by personating Orr, as that the bills of exchange or orders, on which the warrants were issued to his agents, were forgeries.

The officers of the treasury may well certify facts which come under their official notice, but they cannot certify that which does not come within their own knowledge. In the case of the *United States* v. *Buford*, 3 Pet. 12, the court say, that, "an account stated at the treasury department, which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the act of congress. Such statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books." *The issuing of the warrants [*382
to Orr was an official act, "in the ordinary mode of doing business in the department," and the fact is proved by being certified as the act of the congress requires. But the execution of bills of exchange and

orders for money on the treasury, though they may be "connected with the settlement of an account," cannot be officially known to the accounting officers. In such cases, however, provision has been made by law, by which such instruments are made evidence, without proof of the handwriting of the drawer.

In the second section of the act of 3d March 1797, it is provided, that "all copies of bonds, contracts or other papers, relating to, or connected with, the settlement of any account between the United States and an individual, when certified by the register to be true copies of the original on file, and authenticated under the seal of the department, may be annexed to the transcripts, and shall have equal validity, and be entitled to the same degree of credit, which would be due to the original papers, if produced and authenticated in court." Under this provision, had copies of the bills of exchange and orders, on which the above items were paid to Smith and McCormick, been duly certified and annexed to the transcript, the same effect must have been given to them by the circuit court, as if the originals had been produced and proved. And every transcript of accounts from the treasury, which contains items of payments made to others, on the authority of the person charged, should have annexed to it, a duly certified copy of the instrument which authorized such payments. And so, in every case, where the government endeavors, by suit, to hold an individual liable for the acts of his agent; the agency on which the act of the government was founded, should be made to appear, by a duly certified copy of the power. The defendant would be at liberty to impeach the evidence thus certified, and, under peculiar circumstances of alleged fraud, a court might require the production of the original instrument. This, however, would depend upon the exercise of the discretion of the court, and could only be enforced by a continuance of the cause, until the original should be produced.

The following item was also objected to by the defendant's counsel. "To
*383] accounts transferred from the books of the second *auditor for this sum, standing to his debit, under said contract on the books of the second auditor, transferred to his debit on those of this office, $45,000." This item was properly rejected by the circuit court. The act of congress, in making a "transcript from the books and proceedings of the treasury" evidence, does not mean the statement of an account in gross, but a statement of the items, both of the debits and credits, as they were acted upon by the accounting officers of the department. On the trial, the defendant shall be allowed no credit on vouchers, which have not been rejected by the treasury officers, unless it was not in his power to have produced them; and how could a proper effect be given to this provision, if the credits be charged in gross? The defendant is unquestionably entitled to a detailed statement of the items which compose his account.

Several other items charged against Orr, were rejected by the circuit court, and which are embraced by the bill of exceptions, but they present no point which has not been already considered.

The second bill of exceptions was taken to the instruction of the court, that the defendant was entitled to the credits given to him in the treasury account; and that in claiming these credits, he did not waive any objection to the items on the debit side of the account. On the part of the government, it is contended, that this instruction is erroneous. That if the defend-

ant relied for his defence on any part of the treasury account, he was bound to take the whole account as stated, and 1 W. C. C. 344, and 3 Ibid. 28, are referred to as sustaining this doctrine. There can be no doubt, that if the defendant be called upon to render an account on which the plaintiff seeks to charge him, the account cannot be garbled, but must be taken entire. And so, where a plaintiff renders an account, at the instance of the defendant, to be used in his defence; the account thus rendered is considered as the admission of the party, and its parts cannot be separated.

But the treasury account does not seem to rest upon the same principle. The accounting officers of the treasury act upon the accounts *and give to the credits, as entered, their official sanction. The vouchers [*384 of an individual are all submitted to these officers, and their decision has always been considered as conclusive upon the government, but not so as against the individual. The law expressly provides, that rejected items may be allowed by the court. The law makes the treasury account, when properly certified, evidence; and every item correctly charged in the account, is *primâ facie* established by the transcript. If, as in the present suit, certain items are charged to an individual, which the treasury officers cannot know officially to be correct, and no other evidence in support of them be adduced, they should be rejected, as was done by the circuit court in this cause; but no such objection can be made to the credits entered on the account against Orr. They are all founded upon supplies which he furnished to the troops of the United States, under his contract. These credits have been all examined and allowed by the accounting officers of the treasury department, and all the vouchers on which this action of the treasury took place, remain in that department. The defendant is entitled to a certified statement of his credits, as allowed by the accounting officers, and he has a right to claim the full benefit of them, in a suit by the government; and under no circumstances has the government a right to withdraw credits which have been fairly allowed.

In the present case, the government, to sustain its action against the defendant, gives in evidence a treasury account, duly certified. This account, so far as it represents the official action of the treasury, is made evidence by law; but it contains several items of debits, which, unsupported by other evidence, are not proved by the transcript. Now, must these items be admitted by the defendant, if he claim the credits which have been allowed him in the same account? The credits have been duly examined and sanctioned, and the law makes them evidence for the defendant as well as the plaintiffs; but the items objected to, though charged in the same account, are not thereby made evidence, and, without further proof, they must be rejected by the court. Would not the rule be as novel as unjust, which should require the defendant, in a case like this, to admit debits against him, unsupported by proof, if he claims credits in the same account, properly entered and legally proved.

*The law has prescribed the mode by which treasury accounts [*385 shall be made evidence, and whilst an individual may claim the benefit of this rule, the government can set up no exemption from its operation. In the performance of their official duty, the treasury officers act under the authority of law; their acts are public, and affect the rights of

individuals as well as those of the government. In the adjustment of an account, they sometimes act judicially, and their acts are all recorded on the books and files of the treasury department. So far as they act strictly within the rules prescribed for the exercise of their powers, their decisions are, in effect, final; for if an appeal be made, they will receive judicial sanction. Accounts, amounting to many millions annually, come under the action of these officers. It is, therefore, of great importance to the public and to individuals, that the rules by which they exercise their powers should be fixed and known.

Could anything be more unjust, than for the government to withhold from an individual credits, which its own officers had decided and certified to be just and legal, until he should admit certain charges made against him, but which are unsupported by evidence? On what must the defendant rely to establish his credits in this case? The transcript of the treasury? His vouchers are in the treasury, and having been allowed, must remain on file; and he can only ask the accounting officers for the evidence of this allowance. Had his vouchers been rejected, he might have obtained them from the department, and submitted them to the jury which tried his cause in the circuit court. And may the evidence of this allowance be withheld unless the defendant shall admit certain items as debits which are unsupported by proof? But still more than this, when the evidence is before the jury, introduced by the plaintiffs and relied on by them, may they withdraw the credit side of the account, because the defendant will not consent to be charged with certain items, illegally. The defendant is unquestionably entitled to the evidence of the decision of the treasury officers upon his vouchers, without reference to the charges made against him. And in this suit, he may avail himself of that decision, without in any degree restricting his right to object against any improper charges. The credits
*386] were allowed to the defendant on the vouchers alone, *and without reference to the particular items of demand which the government might have against him. And the debits as well as the credits, must be established upon distinct and legal evidence.

It is clear, that the government had no right to garble the treasury statement which was offered in evidence in the circuit court, nor to impose any condition on the defendant, in claiming the credits which had been allowed him. In every treasury account, on which suit is brought, the law requires the credits to be stated as well as the debits. These credits the officers of the government cannot properly either suppress or withhold. They are made evidence in the case, and were designed by the law for the benefit of the defendant.

In neither of the bills of exception, does it appear to this court, that the circuit court erred in their instructions to the jury: their judgment must, therefore, be affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgof the said circuit court in this cause be and the same is hereby affirmed.

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Treasury transcripts.

O. made a contract with the government to supply the troops of the United States with rations within a certain district, and executed a bond and contract, agreeable to the usages of the war department; the United States brought an action against O. on the bond, and gave in evidence the contract annexed to the bond, and a treasury statement, which showed a balance against O.; the United States also gave in evidence another transcript, to prove that O., under a previous account, had been paid a balance of $19,149.01, stated to be due to him, which was paid to his agent, under a power of attorney, and the receipt for the same indorsed on the back of the account. The circuit court instructed the jury, that the second transcript was not evidence, *per se*, to establish the items charged to O.: *Held*, that there was no error in this instruction.

The counsel for the United States also gave in evidence the power of attorney to R. Smith, and his receipt, proved by Smith, that the money received by him, under the said power of attorney, was applied to the credit of O., in the Bank of the United States, at Washington; which payment the witness supposed was made known to O., though he could not speak positively on the subject, as he did not communicate the information to him; and the counsel who offered this evidence stated, that he offered it to show that the accounts between O. and the government, under the contract of 15th of January 1817, had been settled up to that time, and that the balance of $19,149.01 had been paid to Smith, as the agent of O., and that he offered the evidence for no other purpose. The counsel for the United States then gave in evidence to the jury, a subsequent account between O. and the government, under the contract; and on the prayer of the defendant, the circuit court instructed the jury, "that the said accounts were not competent *per se*, upon which to charge the defendant, or his intestate, for any sums therein contained, further than the mere payment of money from the treasury to the said intestate, or to his authorized agent."

The items embraced by this instruction were charges made against O., for the acts of certain persons, alleged to be his agents, without annexing to the transcript copies of any papers showing their agency, or offering any proof that they acted under the authority of O. The circuit court, therefore, properly instructed the jury, that the transcript, *per se*, did not prove these items.

The plaintiffs then proved by R. S., that he received, as the agent of O., $6350.99, on warrant No. 5471, under the contract, and that the same was applied to the credit of O., in the Bank of the United States, at Washington, of which payment the witness believed O. had notice; the counsel for the plaintiffs stated, that they confined their claim to the above item, which was the first one charged *in the treasury account exhibited. The counsel for the defendant then moved the court to instruct the jury, that this account as also the preceding one [*388 offered in evidence by the plaintiffs, was evidence for the defendant, for the items of credits contained in either; and that in claiming them, he did not admit the debits; which instruction was given by the court, and to which an exception was taken. This instruction involves the same question which has already been decided, between the same parties, at the present term; there was no error, in giving the instruction.

In the further progress of the trial, the plaintiffs offered to withdraw from the jury the said two accounts mentioned in the preceding exception, and all the evidence connected with said accounts, to which the defendant's counsel objected, and the court refused the motion. A treasury account which contains credits as well as debits, is evidence for the defendant as well as the government; and unless there be an abandonment of the suit by the counsel for the government, it has no right to withdraw from the jury, any part of the credits relied on by the defendant.

The circuit court, on the prayer of the defendant, instructed the jury, that the transcript from the books and proceedings of the treasury, can only be regarded as establishing such of the items of debit, in the account stated in the said transcript, as are for moneys disbursed through the ordinary channels of the treasury department, where the transactions are as shown by its books, and where the officers of the department must have had official knowledge of the facts stated; but that the transcript is evidence for the defendant of the full amount of the credits therein stated; and that, by relying on the said transcript, as evidence of such credits, the defendant does not admit the correctness of any of the debits in the said account, of which

the transcript is not, *per se*, evidence; and that the said transcript is not, *per se*, evidence of any of the items of debit therein stated, except the first. The correctness of the principle laid down by the circuit court in this instruction, has been recognised by this court, in a case between the same parties, at the present term.

ERROR to the Circuit Court of the District of Columbia and county of Washington.

This was an action of debt, instituted by the plaintiffs in error against the defendant's intestate, Benjamin J. Orr, and two others, on a joint and several bond to the United States, dated 15th January 1817, in the penalty of $40,000, conditioned that the intestate, Orr, should fulfil certain articles of agreement of the same date, made between the acting secretary of war and the intestate, by which the intestate agreed to supply the rations required for the use of the United States troops, within the limits of the states of South Carolina and Georgia, from the 1st of June 1817, to the 31st of May 1818, inclusive.

*389] *The defendant, after *oyer* of the bond and condition and of the articles of agreement, pleaded performance, according to the true intent and meaning of the condition of the bond. The plaintiffs replied, that the said Benjamin G. Orr did not well and truly perform and fulfill the covenants and agreements comprised and mentioned in the articles of agreement referred to in the said condition of the said writing obligatory, but broke the said covenants and agreements in the following instances, to wit:

That although the said United States did advance and furnish to the said Benjamin G. Orr divers large sums of money, at divers times, on account of, and to enable him, the said Benjamin, to carry into effect the said articles of agreement, which said several sums of money amounted altogether to the sum of $109,500; and although the accounts of the said Benjamin G. Orr, in relation to the articles of agreement aforesaid, have been duly and finally settled by the accounting officers of the government of the United States; and, upon the said settlement, there was found to be due to the United States, from the said Benjamin, the sum of $2012.33, of which the said Benjamin had due notice; yet the said Benjamin altogether failed to pay to the United States the said sum of money, or any part thereof, and the same remains still due and unpaid to the United States.

The defendant rejoined, that the said Orr did not break the condition in manner or form; and upon these pleadings issue was joined. In December 1831, the case was tried, and a verdict, under the charge of the court, was rendered for the plaintiff, upon which judgment was entered.

On the trial of the cause, the counsel for the United States gave in evidence the bond executed by the said Orr, with the condition thereto annexed, dated 15th of January 1817; a contract between the said Orr and George Graham, acting secretary of war, for the supply and issue of all the rations for the use of the troops of the United States, within the limits of the states of South Carolina and Georgia, including that part of the Creek lands lying within the territorial limits of Georgia, thirty days' notice being given of the post or place where rations may be wanted, or the number of troops to

*390] be furnished on *their march, from the 1st day of June 1817, until the 31st day of May 1828, inclusive, for prices fixed in the contract; and an account-current stated and settled by the accounting officers of the treasury, between the United States and the defendant's intestate, on

the 18th of August 1820, upon which a balance was due, amounting to $2012.30.

The plaintiffs' counsel also gave in evidence a previous account, dated May 11th, 1819, stated by the proper accounting officers of the treasury, for the purpose of proving that the balance of $19,149.01, which appeared to be due to him, had been paid to him or his agent; and produced the power of attorney, and the receipt on the back of the said account. Annexed to the transcript from the treasury containing the account, was the following letter:

Washington, 6th May 1819.

Sir:—I will thank ——— to pay to R. Smith, Esq., any sum which may be found due me on my late Georgia contract, to the amount of, or within the limit of twenty-five thousand dollars, which will cover the interest which has accrued upon the drafts heretofore conditionally accepted of, as well as the principal, and oblige, Yours, &c. BENJAMIN G. ORR.

To the Honorable the Secretary of War,
or person acting for him.

On the back of the transcript was the following receipt. Received, May 11, 1849, warrant numbered 3944, for $19,149.01, in full of the within account.

Among other debits in the account were the following:

1817. To account transferred from the books of the second auditor, for this sum, standing to his debit on those of this office—$15,000.

1817, Sept. 19. For warrant No. 972, for payment of his draft, favor R. Smith, dated 22d July 1817, on account of do.—$20,000.

1817, Nov. 6. For warrant No. 1219, for payment of his draft, favor R. Smith, dated 20th September 1817, on account of do.—$12,000.

*1819, May 14. To warrant of the treasurer, No. 3944, for this sum, paid R. Smith, per order of B. G. Orr—$19,149.01. [*391

And the defendant thereupon prayed the court that the said account last mentioned, was not evidence *per se* that certain charges in said account were correctly chargeable to the said contractor; which opinion the court gave; to which opinion the counsel for the plaintiffs excepted.

The court charged the jury that the accounts produced in evidence by the United States were evidence for the defendant of all the items of credit therein contained; and that the defendant, by referring to and relying on them as evidence for that purpose, did not admit the correctness of any of the debits therein of which the account was not *per se* evidence, nor make the same evidence before the jury. To these instructions the plaintiffs excepted. The plaintiffs prosecuted this writ of error.

The case was argued by *Butler*, Attorney-General, for the United States; and by *Coxe* and *Jones*, for the defendant.

For the United States, it was contended, that the judgment of the circuit court ought to be reversed for the following reasons:

1. The account stated was, under the acts of congress, and the provisions of the contract, competent evidence to charge the defendant—1st. With all the items of charge therein contained; and if not, then: 2d. It was, at

all events, sufficient to charge him with the moneys received on the various warrants specified in the account.

2. The court erred in its decision on the second point above stated—1st. The account was one entire document, and the defendant, if he elected to rely on any part thereof, was bound, by the general rules of evidence, to take the whole as evidence, so far as it was pertinent to the subject-matter of the suit. 2d. There is the more reason for adhering to the general rule *392] *in this case, because the account was stated by a public officer, to whom, by law, and by the contract of the parties, the duty of settling the accounts in question was to be referred.

The *Attorney-General* argued, that the treasury statement exhibited and read in evidence on the trial of the cause, ought to have been admitted as *primâ facie* evidence of the balance due to the United States. Large sums were admitted to have been received by Orr; and this was sufficient to authorize the admission of other items in the accounts, not included in those sums. These items were charges, in some instances, for sums paid on warrants drawn in favor of the contractor, and in others, for sums paid also on warrants, in favor of other persons, under his authority. He cited the acts of congress relative to the settlement of public accounts. Act of 1792 (1 U. S. Stat. 281); Act of 1797 (Ibid. 513); Act of 1795 (Ibid. 441); Act of July 16th 1798 (Ibid. 610); Act of March 3d, 1817 (3 Ibid. 366).

By the act of 1817, all accounts for army supplies are to be settled at the treasury department, and the third auditor is particularly charged with the settlement of army accounts. This act refers to the law of 1797, and adopts it as applying to accounts to be settled by the third auditor; and the law of 1797 makes the books and proceedings of the treasury evidence.

The auditor had a right to charge the defendant's intestate for warrants drawn in favor of other persons on his contract. He was bound, and had authority to inquire, whether the advances were made on the contract, and by his order. He must have had evidence of the money having been drawn by such order. The transcript was certainly evidence, and was so admitted; and the whole question in the court below was, as to the effect of that evidence. If it was evidence of money paid to Orr himself, it must be evidence of money paid to others by his order. The vouchers for the payment to Richard Smith, of $19,149.01, must have been left in the office, and have been the authority on which the payment is made. The warrant for the *393] account *must have shown the authority by which the money was paid, and this was apparent upon it, viz., the orders in favor of Richard Smith and others. It could not have been the exclusive object of the act of congress making the transcript evidence, to supersede the necessity of producing the original books. The whole sums charged in the account growing out of the warrants, stand on the same ground, and come within the ordinary official action of the auditor; and the whole account, thus entered, should have been admitted as proved, *primâ facie*.

The attorney-general referred to the case of the *United States* v. *Buford*, 3 Pet. 12, and contended, that the principles laid down by the court in that case had no application to the present question.

Upon the second exception, it was argued, that the permission to use a part of the account in his favor, by the defendant, and yet to deny that the

other parts of the same account were evidence against him, was contrary to the established rules of evidence. 1 W. C. C. 344; *Bell* v. *Davidson*, 3 Ibid. 328. The whole transcript was one paper, and all its contents should have been taken together.

Coxe and *Jones*, contrà:—The principles involved in this case are of general importance. In the cases of the *United States* v. *Fillebrown*, 7 Pet. 28; *United States* v. *McDaniel*, Ibid. 1, and *United States* v. *Ripley*, Ibid. 18, the same questions were under examination. The decisions of the court in these cases are decisive upon the matters now presented for their consideration.

The transcript was admitted as competent evidence, but the question was, as to the effect of the evidence: what did it prove? The act of congress of 1797 makes the treasury transcripts evidence; but this was for the purpose only of substituting the transcripts for the original books and accounts of the treasury. The books, if produced, would only be evidence of the money paid on the warrant, which is very special; and the receipt is given on the warrant, which receipt authorizes the *charge against [*394
the party to whom the money was paid. But it furnishes no evidence to charge any other person. The authority given by Orr to some person to receive money, is not a proceeding at the treasury, or to be proved by a transcript. *United States* v. *Buford*, 3 Pet. 29; 6 Ibid. 172, 201; also, the case of *Randolph*, decided by Mr. Chief Justice MARSHALL and Judge BARBOUR, in Virginia, in 1833. The balance of the account transferred from the books of the second auditor, cannot be proved by its entry in the transcript. The transcript of the account should have been produced, and it could be seen from it, which part of the sum claimed as the balance, was proved by it. Its introduction in this form as an item of debit can have no effect.

As to the second exception. The general rule of evidence which obliges a party who introduces a piece of evidence, to take the whole together, is distinguishable from the rule which sanctions the claim of the defendant to the credits in the account, without admitting the debits. In this case, the plaintiff introduced the account. It contained the admissions of the United States, that the defendant was entitled to certain credits. They had been established by vouchers, which were retained by the treasury department. The defendant had a right to call upon the treasury department for a list of these credits, without their being connected with an account containing charges against him. They are not conditional credits, or such as the United States allowed in the event of the debits being admitted. They are independent and absolute charges against the United States, and have no other connection with the debits against the defendant, than that they arose out of the same transaction. The exception allowed by Judge WASHINGTON, in the circuit court of Pennsylvania (*Bell* v. *Davidson*, 3 W. C. C. 328), was the principle claimed for the defendant.

McLEAN, Justice, delivered the opinion of the court.—This suit was originally brought by the plaintiffs, against Benjamin G. Orr, who has since deceased, in the circuit court of the United States for the district of Columbia, to recover the balance of treasury settlement, charged against him on the

books of the treasury department. At the trial, several exceptions *were taken to the instruction of the court to the jury, and those exceptions are brought before this court, for their decision, by a writ of error.

On the 15th of January, 1817, Orr made a contract with the government, to supply the troops of the United States with rations, &c., within a certain district, and executed a bond and contract, agreeable to the usages of the was department, in such cases. The action was brought upon the bond, and at the trial, the plaintiffs gave in evidence the contract annexed to the bond, and a treasury statement, which showed a balance against Orr of $2012.32. And the plaintiffs also gave in evidence another transcript, in order to prove that Orr, under a previous account with the United States, had been paid a balance of $19,149.01, stated to be due to him, which was paid to his agent, under a power of attorney, and the receipt for the same was indorsed on the back of the account. And the court, on the prayer of the defendant, instructed the jury, that this second transcript was not evidence, *per se*, to establish all the items charged to the defendant; to which instructions the plaintiff excepted.

The item principally objected to, was paid to Richard Smith, as the agent of Orr. In proof of this agency, the following letter was relied on, and which was annexed to the transcript. "Washington, 6th May, 1819. Sir:—I will thank——to pay to R. Smith, Esquire, any sum which may be found due me on my late Georgia contract, to the amount of, or within the limit of twenty-five thousand five hundred dollars, which will cover the interest which has accrued upon the drafts heretofore conditionally accepted of, as well as the principal; and oblige yours, &c." (Signed) "Benjamin G. Orr," and directed to the secretary of war. On the back of the transcript was indorsed the following receipt: "Received, May 4th, 1819, warrant numbered 3944, for nineteen thousand, one hundred and forty-nine dollars and one cent, in full of the within account. (Signed,) Richard Smith." Orr's contract commenced on the 1st day of June 1817, and terminated on the 31st day of May 1818.

*396] *It appears, therefore, that at the time the above order was given to Smith, the contract of Orr had expired nearly a year. The order requested the secretary of war to pay any sum that might be due on the contract, not exceeding a specified amount. Under this authority, the government could not pay to Smith, so as to charge Orr, a larger sum than was due on his contract. It was neither the expectation of Smith to receive, nor the intention of Orr to pay a greater amount than was due on his contract; and for any payment beyond this, the government must look to the agent, and not to Orr, for repayment. It, therefore, appears, that the circuit court did not err in their instruction, above stated, to the jury.

The counsel for the United States, in addition to the above transcript, the power of attorney to Smith, and his receipt, proved, by Smith, that the money received by him under the said power of attorney, was applied to the credit of Orr, in the Bank of the United States, at Washington; which payment, the witness supposed was made known to Orr, though he could not speak positively on the subject, as he did not communicate the information to him. And the counsel who offered this evidence stated, that he offered it to show that the accounts between Orr and the government, under the contract of the 15th of January 1817, had been settled up to that time, and

that the balance of $19,149.01 had been paid to Smith as the agent of Orr, and that he offered the evidence for no other purpose.

The counsel for the United States then gave in evidence to the jury, a subsequent account between Orr and the government, under the above contract. And on the prayer of the defendant, the court instructed the jury, "that the said accounts were not competent, *per se*, upon which to charge the defendant, or his intestate, for any sums therein contained, further than the mere payment of money from the treasury to the said intestate, or to his authorized agent." The items embraced by this instruction were charges made against Orr for the acts of certain persons alleged to be his agents, without annexing to the transcript copies of any papers showing their agency, or offering any proof that they acted under the authority of Orr; the circuit court, therefore, properly *instructed the jury, that the [*397
transcript, *per se*, did not prove these items.

The plaintiffs then proved, by Richard Smith, that he received, as the agent of Orr, $6350.99, on warrant No. 5471, under the contract, and that the same was applied to the credit of Orr, in the Bank of the United States at Washington, of which payment the witness believed Orr had notice. The counsel for the plaintiffs stated, that they confined their claim to the above item, which was the first one charged in the treasury account marked A. And the counsel for the defendant then moved the court to instruct the jury, that this account, as also the preceding one offered in evidence by the plaintiffs, was evidence for the defendant, for the items of credits contained in either, and that in claiming them, he did not admit the debits; which instruction was given by the court, and to which an exception was taken. This instruction involves the same question which has already been decided, between the same parties, at the present term. There was no error in giving the instruction.

In the further progress of the trial, the plaintiffs offered to withdraw from the jury the said two accounts mentioned in the preceding exception, and all the evidence connected with said accounts; to which the defendant's counsel objected; and the court refused the motion. A treasury account which contains credits as well as debits, is evidence for the defendant as well as the government; and unless there be an abandonment of the suit by the counsel for the government, it has no right to withdraw from the jury any part of the credits relied on by the defendant.

The next and last instruction given by the court, on the prayer of the defendant, and to which the plaintiffs excepted, was, "that the said transcript A, from the books and proceedings of the treasury, can only by regarded as establishing such of the items of debit, in the account stated in the said transcript, as are for moneys disbursed through the ordinary channels of the treasury department, where the transactions are shown by its books, and where the officers of the department must have had official knowledge of the facts stated; but that the transcript is evidence for the defendant of the full amount *of the credits therein stated; and that, by relying on the [*398
said transcript, as evidence of such credits, the defendant does not admit the correctness of any of the debits in the said account, of which the transcript is not, *per se*, evidence; and that the said transcript is not, *per se*, evidence of any of the items of debit therein stated, except the first." The correctness of the principle laid down by the court, in this instruction, has

been recognised by this court, in a case between the same parties, at the present term, as above referred to.

As this court sanctions all the instructions of the circuit court given to the jury, in this case, at the prayer of the defendant, and also in refusing to instruct on the prayer of the plaintiffs, the judgment of the circuit court is, as a matter of course, affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed.

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*399] *United States, Plaintiffs in error, *v.* Walter Jones, Administrator *de bonis non* of Benjamin G. Orr.

The Same *v.* The Same.

Public contracts.—Sureties.

A contract was made for the delivery of rations for the use of the troops of the United States, "thirty days' notice being given of the post or place where the rations may be wanted; in an action on a bond, with sureties, for a balance claimed to be due to the United States by the contractor, the United States introduced the testimony of a Mr. Abbott, and proved by him, that at the time when contracts were made for the supply of the United States troops, the contractors (as he believed) were then informed of the fixed posts within the limits of the contract, and the number of troops there stationed; and that rations were to be regularly supplied by such contractor, according to the number of troops so stationed at such places; and that the contractor was informed he was to continue so to do, without any other notice; and that special requisitions and notices of thirty days would be made and given, for all other supplies at other places or posts, and for any change in the quantity of supplies which might become necessary at the fixed posts, from a change in the number of troops stationed at such fixed posts; and that such was the understanding at the war department, in settling the accounts of contractors; but he did not know of any verbal explanation between the secretary of war and Orr on this subject, specifying anything more or less than what the contract specified; and he did not know that there had been any submission or agreement of contractors, to such a construction of their contracts, but that such was the rule adopted by the accounting officers, in settling the accounts of contractors. The defendant, among other things, introduced evidence to show, that the contractor always insisted on the necessity of requisitions and notices, according to the terms of the contract, for supplies at all posts, before he could be charged with a failure; and also to show the custom of making requisitions, and giving such notices for supplies at all posts where provisions were required, and without regard to their being old established posts, or new ones established after the contract. After the whole evidence was closed, the attorney for the United States prayed the court to instruct the jury, "that it was competent for them to infer from the said evidence, that the contractor, in supplying the fixed posts as he had before done under his former contract, and knowing thereby the number of rations there required, dispensed with any special requisition and notice, in relation to such supplies to said posts; and in case of failure to supply such posts, according to usage and knowledge, is liable, under the bond and contract upon which this action is founded." The circuit court refused to give this instruction, and the question was, whether it ought to have been given: *Held*, that there was no error in the refusal of the circuit court to give the instructions.

*400] The sureties in the bond of a contractor, given to secure the performance of *a contract for the supply of the rations for the troops of the United States, are not responsible for any balance in the hands of the contractor, at the expiration of the contract, of advances made to him, not on account of that particular contract exclusively, but on account of that and other contracts, as a common fund for supplies, where accounts of the supplies, the expenditures and the funds, had all been throughout blended indiscriminately by

both parties, and no separate portion had been designated, or set apart for the contract of 1818.

To say, that the sureties in the bond should be liable for the whole balance, would be to say, that they should be liable for advances made under any other contracts; and if not liable for the whole, the very case supposed in the instruction precludes the possibility of any legal separation of the items of the balance; each and all of them are blended, *per my et per tout*, as a common fund. The case, indeed, in the principles which must govern it, ranges itself under that large class of cases, where a party bound for the fidelity of a clerk or other agent of A., as keeper of his money or accounts, is held not liable for acts done as the keeper of the money of A. and B. And in the present suit, there is no difference in point of law between the liability of the principal and that of the sureties upon the bond; it is the same contract, as to both; and binds both or neither. The United States are not, however, without remedy; for there can be no doubt, that an action in another form would lie against the contractor for any balance, however received, which remained unexpended in his hands, after the termination of the service for which the advances were made.

The receipts of the contractor, for moneys paid to him by the United States, are *primâ facie* evidence that the money was received by him on account of the contract, and it is incumbent, in action on the bond, given with sureties, for the performance of the contract, for the parties to show that the money was not paid on account of the contract as stated in the receipts; but they are not bound to show that it was so stated by mistake or design on the part of the government and the contractor, and intended to be applicable to some other contract.

ERROR to the Circuit Court of the District of Columbia, and county of Washington.

The United States instituted actions of debt, upon two joint and several bonds, dated 9th February 1818, in the penal sum of $35,000, conditioned that Benjamin G. Orr, his heirs, executors or administrators, or any of them, shall and do, in all things, well and truly observe, fulfil, accomplish and keep all and singular the covenants, conditions and agreements whatsoever, which, on the part and behalf of the said Benjamin G. Orr, his heirs, executors or administrators, are or ought to be observed, performed, fulfilled, accomplished and kept, comprised or mentioned in certain articles of agreement or contract, bearing date the 9th day of February 1818, *made between John C. Calhoun, secretary of war, and the said Benjamin G. Orr, concerning the supply of rations to the troops of the [*401
United States, within the state of Georgia, including that part of the Creeks' land, lying within the territorial limits of said state, according to the true intent, meaning and purport of the said articles of agreement or contract.

The defendant pleaded performance in all things to be done and performed, according to the tenor and effect of the condition of the bond. The replication stated, that the said Benjamin G. Orr, in the said condition mentioned, did not well and truly perform and fulfil the covenants and agreements comprised and mentioned in the articles of agreement referred to in the said condition of the said writing obligatory; but broke the said covenants and agreements in the following instances, to wit:

That although the said United States did advance and furnish to the Benjamin G. Orr divers large sums of money, at divers times, on account of and to enable him, the said Benjamin, to carry into effect the said articles of agreement, which said several sums of money amounted altogether to the sum of ———— dollars: And although the accounts of the said Benjamin G. Orr, in relation to the articles of agreement aforesaid had been duly and finally settled by the accounting officers of the government of the United

States; and upon the said settlement, there was found to be due to the United States, from the said Benjamin, the sum of ——— dollars.

Upon this replication, issue was joined, and a verdict and judgment rendered in favor of the defendant; and in May 1831, the plaintiffs prosecuted this writ of error.

The provisions in this contract, made by Benjamin G. Orr and the plaintiffs, upon which the breaches were assigned on the part of the United States, were the following:

1st. That the said Benjamin G. Orr, his heirs, executors or administrators, shall supply and issue all the rations, to consist of the articles hereinafter specified, that shall be required of him or them, for the use of the United States, at all and every place or places where troops are or may be stationed, marched or recruited, within the limits of the state of Georgia, including that part of the Creeks' land lying within the territorial
*402] *limits of said state, thirty days' notice being given of the post or place where rations may be wanted, or the number of troops to be furnished on their march, from the 1st day of May 1818, until the 31st day of May 1819, inclusive.

3d. That supplies shall be furnished by the said Benjamin G. Orr, his heirs, executors or administrators, at the fortified places and military posts that are or may be established in the limits aforesaid, 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 the space of three months, in advance, in good wholesome provisions, consisting of due proportions of all the articles forming the ration.

5th. That the commanding general, or person appointed 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 account of the said Benjamin G. Orr, his heirs, executors or administrators.

The breaches assigned were: that, although the United States had advanced to Benjamin G. Orr, at several times after the execution of the contract, several sums of money amounting to $80,000, on account of the contract and agreement entered into by him, yet he had failed to furnish and to supply to the said United States the rations which were required to be furnished by him under the articles of agreement aforesaid, or in any manner to account with the said United States for the said sums of money so advanced and furnished to him as aforesaid. And by reason of the said failure, the United States were exposed to great inconvenience, and to great and heavy losses, and were compelled to advance large sums of money for the supply of the troops of the United States, stating the several amounts advanced, and the places at which the provisions were supplied. The United States further alleged and charged, that the accounts of the said Orr, in relation to the contract aforesaid, have been duly settled by the accounting officers of the government of the United States; and upon the said settlement, there was found to be due from the said Orr to the said United
*403] States, the sum of $48,308.48; *and that the said Orr had notice thereof.

Four bills of exception were tendered on the trial, by the plaintiffs, to the opinion of the court given in charge to the jury, and were respectively

sealed by the court. The first exception set out the evidence given on the part of the United States, consisting of the bond and condition, the contract entered into by Orr, the accounts stated and settled in the proper departments of the goverment, showing the advances and payments of the sums of money to him, and vouchers, and documents in support of the same; and also, evidence to show non-performances of the agreement to deliver the provisions to the troops of the United States, at the several posts within the district designated in the contract. The account-current stated by the accounting officers of the United States, charged the contractor, with three several sums, amounting to $80,000, as follows:

1818, Feb. 19. For part of warrant No. 1660, for the payment of his drafts in favor of Richard Smith, dated 11th Feb. 1818, $55,000; March 6, for warrant No. 1733, received by him on account, $15,000; July 2, for warrant No. 2262, received by him on account, $10,000—$80,000.

The account also contained other items of debit for the costs and expenses of supplies furnished in consequence of the asserted failure of the contractor, amounting, with the advances stated, to $106,957.19. Credits were allowed in the account amounting to $58,648.71. Leaving a balance alleged to be due to the United States of $48,308.48.

No proof was offered of any requisition or notice to the contractor for the supplies at the post where the failures were alleged to have occurred. The plaintiffs showed, however, that on the 15th of January 1817, Benjamin G. Orr contracted to supply all rations required for the use of the United States troops, within the limits of South Carolina and Georgia, from the 1st day of June 1817, to the 31st day of May 1818, inclusive; and that in the execution of that contract, he had become acquainted with the number of rations required at the fixed posts; and evidence was also offered to the jury, which was intended to prove to their satisfaction on the one side, that the contractor *had dispensed with any special requisition or notice, under the last contract, and on the other, that he had always insisted [*404 on the necessity of notice.

Upon the evidence so given, the counsel for the United States prayed the court to instruct the jury, that it was competent for them to infer from the evidence, that the said Orr, in supplying the fixed posts as he had before done, under his former contract, and knowing thereby the number of rations there required, dispensed with any special requisition and notice in relation to such supplies to said posts, and in case of failure to supply such posts according to usage and knowledge, was liable, under the bond and contract upon which this action was founded. Which last instruction the court refused to give in relation to any of the charges for failure, as aforesaid, being of opinion, that the United States were not entitled, under the said contract, to charge the said Orr for the amount paid by them for provisions, upon any supposed case of absolute failure or deficiency in the quantity of provisions contracted to be delivered and issued by the said Orr, unless such failure or deficiency took place after a requisition upon the said Orr (or his agent, duly authorized by him to receive such requisition), made by the commandant of the army or a post, in case the provisions were wanted for a forfeited place or a military post; and in no case, unless such failure or deficiency took place after thirty days' notice had been given to him, or his said agent, of the post or place where the rations were wanted,

or of the number of troops to be furnished, in case the rations were wanted for marching troops. To this refusal, the counsel of the United States excepted.

The defendant, after giving in evidence the documents and vouchers in support of such of the additional credits claimed by him as had been rejected and remarked upon by the third auditor, contended (upon the grounds stated in the foregoing exception, and upon the authority of the court's said decision), that all the items of charges against said Orr, in said official accounts, under the contract of February 9th, 1818, stated, except the three advances from the treasury of $55,000, $15,000, and $10,000, first charged, and insisted upon the rejection of the same, and then claimed to
*405] have set off against the said $80,000, *and to be allowed in this suit the several sums of money admitted to the credit of said Orr, under said contracts, for provisions furnished, and expenditures, upon abstracts and vouchers, by him and his administrator exhibited to the third auditor, and claimed as credited in said official accounts, disclaiming and deducting from said credits all such as appeared to be mere counter-credits or cross-entries dependent upon the corresponding and contested charges in said accounts; and also claimed the allowance of such of the said additional credits as had been rejected and remarked on by the third auditor as aforesaid. Whereupon, the plaintiffs, by their counsel, made the following prayer to the court: That as the defendant has used the account exhibited by the plaintiffs, and have claimed the credits therein stated as allowed to the contractor, from the jury, without offering any other evidence of their claim to such credits, then the whole of said account is to go the jury, as well the charges as the credits in the said account; and if the defendant shall offer no evidence to impeach the items charged in the account, they are to be taken as correct; and that the defendant cannot rely on the account for his credits, without being bound by such entries of charge as he may be unable to impeach. Which instruction and opinion, the court refused to give; to which refusal the attorney of the United States excepted.

The defendant prayed the court to instruct the jury as follows: That if the jury find and believe from the evidence aforesaid, that the three several advances from the war department to said Orr, in the said first account above charged, to the amount of $80,000, though appearing in the receipts for the same, as made on account of this contract, were nevertheless advanced under an arrangement and understanding between the government and said Orr, to which the sureties in the bond now in suit were in no manner party or privy, that the said sums of money were to be held by the said contractor as a common fund of supplies, as well for the forts and military posts in Florida, including the subsistence of Indian prisoners there, as of the posts within the state of Georgia, and the Creek lands within the territorial limits of that state, and to be indiscriminately applied to all or any
*406] of both Georgia and Florida forts and military posts, upon the *terms and conditions of this contract, as if extended to the Florida posts; and that the said contractor was accordingly called on and required, in the execution of this contract, and out of the general fund so advanced nominally under this contract, to furnish subsistence as well for the Florida posts, including Indian prisoners there, as for the posts within the proper

territorial limits of the contract, indiscriminately; and that both branches of supply were blended in debits for alleged failures, &c., and credits for supplies in the same official account of advances and expenditures under this contract, as kept at the proper accounting departments of the treasury and war departments, without there having been any specific part or portion of the said advances designated and set apart for the two branches of supply and subsistence, in Georgia and Florida respectively; then the obligors in the bond now in suit, or any of them, are not responsible in this action, under the tenth article of said contract, for the accounting and paying by said Orr of any balance or surplus of the said advances, remaining in his hands unexpended, at the time of the expiration of the term of said contract, in the execution of the said contract, and in the supplies of subsistence therein stipulated for; which opinion the court gave as prayed; to which the United States excepted.

The attorney for the United States prayed the following instruction. That the receipts of Orr, offered in evidence, are *primâ facie* evidence that he received the $80,000 under the contract on which this suit is brought, and that it is incumbent on the defendant to satisfy the jury, by evidence, that the said advances were not made under the said contract, as stated in the said receipts, but that it was so stated by mistake or design on the part of the government and said Orr, and intended to be applicable to some other contract. Which the court refused to give as prayed, but instructed the jury, that the receipts of Orr aforesaid, were *primâ facie* evidence that he received the $80,000 under the contract on which this suit is brought, and that it is incumbent on the defendant to satisfy the jury, by evidence, that the said advances were not made under the said contract as stated in said receipts. To which refusal, the United States excepted.

*The case was argued by *Butler*, Attorney-General, for the United States; and by *Coxe* and *Jones*, for the defendant. [*407

For the United States, it was contended, that the judgment of the court below is erroneous, and ought to be reversed for the following, among other reasons:

I. The first exception was well taken. 1. It was competent for the contractor to dispense with notice—certainly so far as his own liability, which is the only question in the present suit, was concerned—and there was some evidence before the jury, from which such a waiver might have been inferred. 2. The rule laid down by the court, and their refusal to instruct as prayed, entirely withdrew that evidence from the consideration of the jury.

II. The second exception was well taken. 1. The account was one entire document, and the defendant, if he elected to rely on any part thereof, was bound, by the general rules of evidence, to take the whole as evidence, so far as it was pertinent to the subject-matter of the suit. 2. There is the more reason for adhering to the general rule in this case, because the account was stated by a public officer, to whom, by law, and by the contract of the parties, the duty of settling the accounts in question, was to be referred.

III. Admitting the premises on which the instruction stated in the third exception was given, to have been found by the jury, still the conclusion adopted by the court does not legally follow; but the principal and his

representatives may be held accountable in this action, for any balance remaining unexpended of moneys advanced in the manner suggested in said exception.

IV. The whole instruction mentioned in the fourth exception, ought to have been given as prayed.

The *Attorney-General* stated, that the first question to be examined was, whether the contractor could dispense with the notice required to be given to him, of the place where the rations were to be delivered to him, under the first part of the contract. *And secondly, whether there was evi- *408]
dence to show that he had done so.

The sureties of the contractor have nothing to do with this inquiry. There is a distinction between the rights of the principal and the sureties, in such a case as this. While the sureties might claim not to be affected by any waiver of the notice, and therefore, object to evidence of such a waiver in a suit against them, the principal can have no such right. This suit is on a joint and several bond ; and a recovery might be had against the principal, although it could not, on the same evidence, be sustained against the sureties. The suit is against the contractor Orr, and the rights of the sureties are not at all involved in it. No suit has been instituted against the sureties. The principal in a bond may be liable for the payment of the sum due upon it, and yet the surety may not be responsible. As, where the surety is an infant, a judgment against the principal would not affect him. Although a judgment in *favor* of the principal in a bond, may be evidence for a surety, it does not follow, that a judgment *against* the principal is evidence against a surety. Norris' Peake 73. The undertaking of the surety is collateral ; and if the principal is acquitted of his responsibility, that of the surety is at an end for ever. While it is admitted, that the construction to be given to the bond, is the same in an action against the principal as against the surety, yet the evidence which is admissible, when the remedy is sought against the principal, may be different.

It will not be denied, that so far as Orr was interested in the consequences of a waiver of the notice, he could waive it. The notice required in the contract, was a condition precedent ; it was for the benefit of Orr, to prevent his being subjected to the consequences of a unexpected demand for provisions, and at a place where he had not prepared to deliver them, and did not know beforehand they would be required at a particular period. But when, from circumstances previously within his knowledge, from his having, under a previous contract, become perfectly informed of the wants of the army, and the extent of those at "the fixed posts," all the inform- *409]
ation which *notice could give him was already in his posssession, no notice was then necessary. The alleged waiver did not vary the construction. Suppose, a memorandum had been indorsed on the contract by Orr, dispensing with the thirty days' notice ; this would not have been a new contract.

It is admitted, the inquiry must be confined to the issue made in the replication, where the breaches are assigned ; but the matter relied upon to show a waiver is embraced in the assignment of the breaches. The replication refers to the contract, and it covers all advances made to the contractor.

No opinion upon the weight of the evidence was asked. The evidence was given, from which, it was claimed, that the jury might infer the waiver, and the court was requested to charge the jury, that they might decide, if notice had been waived; but the court, instead of this, decided, and did instruct the jury, that Orr could not waive notice. The instruction asked for should have been given; which was, that it should be left to the jury to infer, whether there was any evidence, express or implied, by which a waiver of notice could be inferred.

The attorney-general then went into an examination of the evidence; from which, if they had been permitted so to do by the court, a waiver of notice might be inferred. He said, the weight of the evidence might have been against the waiver, but this should have been left to the jury. But the court said, in no case can there be a recovery, without proof of previous notice of the quantity of provisions wanted. 3 Munf. 352.

As to the second exception. The general rule is, that one party cannot take advantage of a portion of the contents of a paper produced by the other party, without admitting the whole of the contents. The whole is made evidence, so far as it is applicable to the matters in controversy. It is immaterial, who introduces the evidence. The rule grows out of the fact, that the paper is one entire account. The introduction of it, is the introduction of one single document; and the rule rests on the general principle, that a confession must be taken together. The United States have never admitted the credits separated from the debits.

*Upon the third exception, it was contended for the United States, that the three payments, amounting to $80,000, were made on the [*410 contracts of Orr with the government, promiscuously; and the instruction asked was, that the jury might find what was advanced for the Florida, and what for the Georgia posts (there were fixed posts in both); and thus discriminate between the contracts. This was a proper subject for the jury, and the court ought not to have excluded the examination. 3 Johns. 528.

The fourth exception was properly taken. Why should not the whole instruction have been given? The defendant ought to have shown by evidence, that the advances of $80,000 were not made under the contract. The receipts of Orr were *primâ facie* evidence, and if there was mistake or design on the part of the government, or of Orr, in stating them; then, that they were applicable to some other contract should have been shown.

Jones and *Coxe*, for the defendant, denied, that on a joint and several bond, a recovery can be had against the principal, when the surety is not liable. There is no distinction between the principal and the surety in such an obligation. The obligation and contract are one although there may be several remedies. 4 Bac. Abr., tit. Obligation, D, 4, 165, 167, note. A judgment in a several suit against the principal, will conclude the sureties; and an acquittal of the principal, it is admitted, will discharge the sureties. A judgment against the principal, would be evidence against the sureties, in a separate action against them. 2 Stark. 196. If any distinction ever exists, it must grow out of something *dehors* the bond, either before or after its execution, and relate to the remedy.

This case is to be looked at, as if Orr had given the bond alone; and it must be admitted, that each party to a joint and several bond can act only

for himself; he may waive any claims he has under it, for himself, but for no other party to it. The waiver dispenses with the proof of performance of a condition precedent, and as founded on the principle, that the condition had been performed. But it is denied, that the condition in the contract *411] was precedent. It was a substantial independent *agreement, to supply such provisions as should be required from Orr, on thirty days' notice. Strike this out, and the contract would be without sense.

But the court was not called upon to decide upon the operation of the alleged waiver. It was asked to decide, that it was competent for the jury to infer, that the notice was waived. This was asking the jury to infer a legal consequence. A military "post," where rations were to be delivered, affords no evidence of the quantity of provisions wanted there. Changes in the number of the garrison may occur, so as to augment or diminish the number of rations wanted; and the deliveries of 1817, would furnish no evidence of what would be required in 1818. The same provision as to notice, was contained in both contracts; and no evidence was offered to show, that deliveries under the contract of 1817, were made without notice.

The second exception presents the question, whether the defendant, by using the account as to the credits contained in it, made the debits in the same account, evidence against him. The distinction is, whether the evidence is offered by the party claiming the benefit of the admission, or by the opposite party. The evidence was introduced by the United States. This gave the defendant the right claimed. It is but justice to a party against whom a treasury account is exhibited, such as that relied upon by the plaintiffs, that the credits contained in it should be used by him as evidence, without prejudice to his right to object to the debits. On the examination of the account by the officer who has to adjust his account at the treasury, all the original vouchers exhibited by him are surrendered, and remain there. When the credit has been admitted, the party cannot be deprived of it.

The third instruction claimed by the plaintiffs, and which is the subject of the third exception, assumes, that there was to be a common fund for the posts in Florida and Georgia. The advances were not, therefore, made upon the contract now in question, and they are not covered by the bond on which this suit is brought. The contract does not extend to supplies in Florida, and no account was exhibited, as settled for advances made upon this contract exclusively. Such an account would have been proper, and *412] was necessary to enable the jury to *decide upon the extent of the defendant's responsibility. There was no error in the action of the circuit court in this matter.

The instructions given to the jury, and which are complained of in the fourth exception, are more favorable to the United States, than was warranted by the facts. The jury have by their verdict found the fact, that there was a blending of the advances, and that the advances were not made under the Georgia contract only.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Columbia for the county of Washington. The original suit was brought on a bond given by Orr, and certain persons as his sureties, to the United States, on the 9th of February

1818, for the penal sum of $35,000, upon condition, well and truly to perform, &c., certain articles of agreement, dated the same day &c., "made between John C. Calhoun, secretary of war, and the said Orr, concerning the supply of rations to the troops of the United States within the state of Georgia, including that part of the Creeks' lands within the territorial limits of said state, according to the true intent and purport" thereof. The defendant Orr died pending the suit, and it being revived against his administrator, the latter, after *oyer* of the bond and condition, and articles of agreement, pleaded a general performance of the condition by Orr; and the replication assigned for breach, that although the United States did advance and furnish to Orr, divers large sums of money at divers times, on account of, and to enable him to carry into effect, the articles of agreement; and although the accounts of Orr, in relation to the articles of agreement, had been finally settled by the accounting officers of the government and upon the settlement, there was found due to the United States the sum, &c.; yet he had not paid the same, &c. Upon this replication, issue was joined; and the cause being tried, a verdict was found for the administrator, upon which judgment was afterwards given by the court in his favor. At the trial, several bills of exception were taken on behalf of the United States; and the validity of these exceptions constitutes the matter now in controversy before this court.

*The first article of the articles of agreement above referred to, is to this effect: "That the said Orr, his heirs, &c., shall supply and issue all the rations, to consist of the articles hereinafter specified, that shall be required of him or them, for the use of the United States, at all and every place or places, where troops are or may be stationed, marched or recruited, within the limits of the state of Georgia, including that part of the Creeks' land lying within the territorial limits of said state, thirty days' notice being given of the post or place where rations may be wanted, or the number of troops to be furnished on their march, from the 1st day of June 1818, until the 31st day of May 1819, inclusive, at the following prices, &c." The tenth article provides, "that all such advances of money, as shall be made to the said Orr, &c., for or on account of the supplies to be furnished, pursuant to this contract, and all such sums of money that the commanding officer of the troops or recruits, &c., may cause to be disbursed, in order to procure supplies, in consequence of any failure on the part of the said Orr, &c., in complying with the requisitions herein contained, shall be accounted for by him or them, by way of off-set against the amount of such supplies; and the surplus, if any, repaid to the United States, immediately after the expiration of the terms of this contract, together with interest, &c.; and, that if any balance shall, on any settlement of the accounts of Orr, &c., be found due by him or them, &c., the same shall be immediately paid. [*413

At the trial, the United States, in support of their suit, introduced certain official accounts and statements of the third auditor, duly certified from the treasury department, which were read in evidence, saving to the defendant all exceptions to the competency of these accounts to charge him, otherwise than as the items of charges in the same should be supported by proof. The United States also read in evidence a contract made by Orr, in January 1817, for army supplies for the state of South Carolina and Georgia for one year, from the 31st day of May 1817; the terms of which contract are the

same as those of the contract of 1818. Besides evidence to other points, not now material to be stated, the United States introduced the testimony of a Mr. Abbott, and proved by him, that at the time when contracts were made for the supply of the United States troops, the contractors (as he believed)
*414] were then informed of *the fixed posts within the limits of the contract, and the number of troops there stationed, and that rations were to be regularly supplied by such contractor, according to the number of troops so stationed at such places; and that the contractor was informed he was to continue so to do, without any other notice; and that special requisitions and notice of thirty days would be made and given for all other supplies, at other places or posts, and for any change in the quantity of supplies which might become necessary at the fixed posts, from a change in the number of troops stationed at such fixed posts; and that such was the understanding at the war department, in settling the accounts of contractors. But he did not know of any verbal explanation between the secretary of war and Orr on this subject, specifying anything, more or less, than what the contract specified; and he did not know that there had been any submission or agreement of contractors to such a construction of their contracts; but that such was the rule adopted by the accounting officers in settling the accounts of contractors.

The defendant, among other things, introduced evidence to show, that Orr always insisted on the necessity of requisitions and notices, according to the terms of the contract, for supplies at all posts, before he could be charged with a failure; and also to show the custom of making requisitions, and giving such notices for supplies at all posts, where provisions were required, and without regard to their being old established posts, or new ones established after the contract.

After the whole evidence was closed, the attorney for the United States prayed the court to instruct the jury, "that it was competent for them to infer from the said evidence, that the said Orr, in supplying the fixed posts, as he had before done under his former contract, and knowing thereby the number of rations there required, dispensed with any special requisition and notice, in relation to such supplies to said posts; and in case of failure to supply such posts, according to usage and knowledge, is liable, under the bond and contract upon which this action is founded." The circuit court refused to give this instruction, and the question now is, whether it ought to have been given?

To the terms in which this instruction is couched, there is certainly a
*415] well-founded objection. The language used is *equivocal, and admits of various interpretations; and it is certainly the duty of the party asking an instruction, to express it with such certainty as may not mislead either the court or the jury. The court were asked to instruct the jury, "that it was *competent* for them to infer from the said evidence, &c." Now, if by "competent," as here used, it was intended, that there was sufficient evidence from which the jury might infer a waiver or dispensation, &c., the instruction was manifestly wrong, for it required the court to decide upon the weight of evidence, and to take from the jury the right to ascertain that which is peculiarly within their province, for themselves. But if it was only intended to express, that there was evidence conducing to prove a waiver, the language was ill adapted to the purpose; for it does not ask,

whether the evidence introduced on the part of the United States, if believed, conduced to such a purpose, but whether the evidence on both sides conduced to such a purpose, which would require the court to ascertain, in like manner, the weight of the evidence; for it could not be correctly affirmed, that the evidence conduced to such a purpose, where there was conflicting evidence, unless there was a decided preponderance on that side.

But without dwelling more on the phraseology of this instruction, we are of opinion, that the court were correct in refusing it, upon the substance of the doctrine asserted in it. The court were required to instruct the jury, that it was competent for them to infer, that Orr had dispensed with any special requisition and notice, in relation to supplies at fixed posts, not from the evidence generally, but from two special circumstances in the case; first, from having supplied the fixed posts, as he had done, under his former contract (that is the contract of the preceding year, 1817), and secondly, from thus knowing the number of rations there required. Now, the contract of 1817 entitled him to have requisitions and notices of thirty days, precisely in the same manner as the contract of 1818 did, and it was neither proved nor admitted in the case, that such requisitions and notices had not been given under the former contract. If they had been given, then, certainly, there could be no legal inference, that they were not to be continued to be given under the contract of 1818. And if they were not given, then the circumstance *that they had been dispensed with, under a former [*416
contract, had no legal tendency to establish that they were dispensed with under a new and independent contract. Indeed, the very circumstance, that in some new and independent contract they were stipulated for, would furnish proof, that they were not intended to be dispensed with. Why otherwise should they be again inserted in the contract? Certainly, not for the purpose of showing, that they were not to be insisted on, but were to be dispensed with.

Besides, the fact of having supplied the fixed posts under a former contract, and knowing thereby the number of rations then required for them, could have no legal tendency to establish the right or duty of the contractor to supply the same posts with the same number of rations in future years. The number of troops might be varied; the importance of those posts might be diminished or increased; and from the nature of the military service, many other circumstances might occur, to render a fixed quantity of supply at those posts, incompatible with the public interests or public necessities. The very language of the contract demonstrates, that no such fixed quantities could have been contemplated by the parties. The contractor is to supply and issue all rations, which shall be required of him "at all, and every place or places where troops are or may be stationed, &c., thirty days' notice being given of the post or place where the rations may be wanted, or the number of troops to be furnished on their march." So that the contract not only does not look to any fixed posts in particular, but it carries on its face an implication, that the supply required might or would be varied in all posts and places.

Upon these grounds, we are of opinion, that the circuit court were right in refusing the instruction prayed for. We give no opinion upon the point, whether a parol waiver of the notice stipulated for in the contract would, if proved, have entitled the United States to recover in this suit, it being a suit for a forfeiture for non-fulfilment of the terms of the contract. Even

supposing a waiver by parol may discharge the party, so as to save a forfeiture of a bond, it does not follow, that a waiver by parol is to be admitted, to create a forfeiture of a bond. On neither point, do we mean to express any opinion.

*417] The next exception involves the same point relative to the *right of the defendant to have the credits allowed him on the treasury accounts, notwithstanding a rejection of some of the debits which was involved in another case between the same parties, in which my brother McLean has already delivered the opinion of the court.

The next exception is to an instruction of the circuit court, given upon the prayer of the defendant. It is as follows: "That if the jury find and believe from the evidence aforesaid, that the three several advances from the war department to the said Orr, in the said first account above charged, to the amount of $80,000, though appearing in the receipts for the same as made on account of this contract, were, nevertheless, advanced under an arrangement and understanding with the government and said Orr, to which the sureties in the bond now in suit, were in no manner party or privy; that the said sums of money were to be held by the said contractor as a common fund of supplies, as well for the forts and military posts in Florida, including the subsistence of the Indian prisoners there, as of the posts within the state of Georgia, and the Creek lands within the territorial limits of that state, and to be indiscriminately applied to all or any of both the Georgia and Florida forts and military posts, upon the terms ond conditions of this contract, as if extended to the Florida posts; and that the said contractor was accordingly called on and required, in the execution of that contract, and out of the general fund so advanced, nominally, under this contract, to furnish subsistence as well for the Florida posts, including Indian prisoners there, as for the posts within the proper territorial limits of the contract, indiscriminately; and that both branches of supply was blended in debits for alleged failures, &c., and credits for supplies in the same official account of advances and expenditures under this contract, as kept at the proper accounting departments of the treasury and war departments, without there being any specific part or portion of the said advances designated and set apart for the two branches of supply and subsistence in Georgia and Florida respectively; then the obligors in the bond now in suit, nor any of them, are not responsible in this action, under the tenth article of said contract, for the accounting and paying by said Orr of any

*418] balance or surplus of the said advances, remaining *in his hands, unexpended, at the time of the expiration of the term of said contract, in the execution of the said contract, and in the supplies of subsistence therein stipulated for."

Stripped of the complicated circumstances in which this instruction is involved, it presents the simple question, whether, under the tenth article of the contract of 1818, the parties to the bond are, in the present action, responsible for any balance in the hands of Orr, at the expiration of the same contract, of advances made to him, not on account of that particular contract exclusively, but on account of that and other contracts, as a common fund for supplies, where accounts of the supplies, the expenditures and the funds had all been throughout blended indiscriminately by both parties, and no separate portion had been designated or set apart for the contract of

1818. We are of opinion, that the question ought to answered in the negative; and that, therefore, the instruction given by the circuit court was correct. The tenth article of the contract of 1818 declares, that all advances made "for and on account of the supplies to be furnished, pursuant to this contract," shall be duly accounted for. Now, advances made as a common fund for supplies under that and other contracts, without any discrimination or apportionment for either in particular, can, in no just sense, be said to be advances made for supplies "pursuant to the contract" of 1818. The whole fund might, if necessary, be rightfully applied for any purpose within the scope of either contract. The unexpended balance is not the balance of any appropriation or advances under any particular contract, but constitutes a common fund for all remaining purposes under any contract. If it were wanted for supplies for the Florida posts, there would be no pretence to say, that it was a balance, for which the parties were responsible in the present suit. And if not wanted for such a purpose, still, to fix responsibility upon them, according to the terms of their engagement, it must be shown, that the balance was a balance, remaining unexpended, of advances under the contract of 1818. But how is that to be shown, when no distinct advances were made, no distinct expenditures required, and no distinct accounts kept under that contract? To say, that the parties to the present bond should be liable for the whole balance, would be to say, that they should be liable for advances *made under any other contracts; and if not liable for the whole, the very case supposed in the instruction precludes the possibility of any legal separation of the items of the balance. Each and all of them are blended, *per my et per tout*, as a common fund. The case, indeed, in the principles which must govern it, ranges itself under that large class of cases, where a party, bound for the fidelity of a clerk or other agent of A., as keeper of his money or accounts, is held not liable for acts done as the keeper of the money or accounts of A. and B. And in the present suit, there is no difference in point of law, between the liability of the principal, and that of the sureties upon the bond. It is the same contract as to both; and binds both or neither. The United States are not, however, without remedy; for there can be no doubt, that an action, in another form, would lie against Orr, for any balance, however received, which remained unexpended in his hands, after the termination of the service for which the advances were made. [*419

The next exception is, to the refusal of the circuit court to instruct the jury, "that the receipts of Benjamin G. Orr, offered in evidence, are *primâ facie* evidence that he received the $80,000 under the contract on which this suit is brought; and that it is incumbent on the defendants to satisfy the jury, by evidence, that the said advances were not made under the said contract, as stated in the said receipts; *but that it was so stated by mistake or design on the part of the government and said Orr, and intended to be applicable to some other contract.*" The court gave the instruction as prayed, omitting only the last clause as to the mistake or design of the parties. And we are of opinion, that the instruction, as given, was all that the United States had a legal right to require. If the advances were not made under the contract, as stated in the receipts, the parties to the bond were not responsible therefor, and it was wholly immaterial to them, how it occurred; whether it was by mistake or design, or otherwise. The receipts were *primâ facie*

evidence that the money was received under the contract; and it was incumbent on the defendants to establish the contrary by competent proofs.

Upon the whole, the opinion of the court is, that the judgment of the circuit court ought to be affirmed.

Judgment affirmed.

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*420] *William C. Holt and wife, Appellants, *v.* Thomas and Edmund Rogers.

Specific performance.

Construction of a contract for the sale of a tract of land. R. executed a bond to D. conditioned that he would make him a fair and indisputable title to a certain tract of land, on or before the 1st of January 1795; and if no conveyance was then made, that R. would stand indebted to D., in a certain sum of money, being the sum acknowledged to be paid to R. at the time of the contract. No other just interpretation can, under the circumstances, be put upon this language, than that the parties intended, that R. should perfect his title to the land by a patent, and should make a conveyance of an indisputable title to D., on or before the 1st of January 1795; and if not then made, the contract of sale was to be deemed rescinded, and the forty-five pounds purchase-money was to be repaid to D.

In 1799, the heir of the vendor, he having died, obtained a complete title to the land by patent, and the vendee did not die until seven years afterwards; after his death, in 1806, no step was taken by his heirs or devisees, for the purpose of asserting any claim to a performance of the contract for the sale of the land, until 1819; and no suit was commenced until 1823; in the meantime, the property had materially risen in value, from the general improvement and settlement of the country. The objection from the lapse of time, is decisive; courts of equity are not in the habit of entertaining bills for a specific performance, after a considerable lapse of time, unless upon very special circumstances; even where time is not of the essence of the contract, they will not interfere, where there have been long delay and *laches* on the part of the party seeking a specific performance; and especially, will they not interfere, where there has, in the meantime, been a great change of circumstances, and new interests have intervened. In the present case, the bill is brought after a lapse of twenty-nine years.[1]

Appeal from the Circuit Court of Tennessee. The case, as stated in the opinion of the court, was as follows:

The suit was brought in February 1823, for a specific performance of a contract, made in January 1794, for the sale of land, under the following circumstances. On the 6th of January 1794, John Rogers, of Virginia, executed his bond to James Dickinson, of the same state, in the penal sum of 2000*l.* upon condition, after reciting that Rogers had, on that day, sold
*421] to Dickinson, a tract of land, lying in Kentucky, *containing about 1200 acres, for 120*l.* that if Rogers, his heirs or assigns, shall make, or cause to be made, to Dickinson, or his assigns, a good and lawful deed for the land, when required, then the obligation to be void. On the same day, Dickinson executed to Rogers a counter-bond, in the penal sum of 240*l.*, upon condition, after reciting the sale of the same land to Dickinson, and the receipt by Rogers of 45*l.*, part of the consideration money, "that if Rogers shall, on or before the 1st day of January 1795, make a fair and indisputable title in fee-simple to Dickinson, &c., of the said tract or parcel of land, and Dickinson, after that conveyance being made, shall pay to Rogers the further sum of 75*l.* lawful money; but if no such conveyance of said land shall be made, then the said Rogers stands indebted to the said

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[1] Dorsey *v.* Packwood, 12 How. 126; Harkness *v.* Underhill, 1 Black 316; McNeil *v.* Magee, 5 Mason 244; Bronson *v.* Cahill, 4 McLean 19; Mason *v.* Wallace, Id 77.

Dickinson in the sum of 45*l.* already advanced as mentioned aforesaid, then this obligation to be void, or else to remain in full force and virtue." At the time of this contract of sale, Rogers had no patent for the land; but only a plat and certificate of survey of it, upon a military warrant. Rogers died in April 1794, without children, unmarried and intestate, leaving his father, George Rogers, his heir-at-law, who then lived in Virginia, and afterwards died there, in March 1802, having, by his last will, devised the land in controversy, of which he had obtained a patent in 1799, to his two sons, Edmund Rogers and Thomas Rogers (the defendants), and to his four daughters, to each of them one-sixth part; and constituted his said sons trustees for his four daughters, during their lives, and afterwards for their children, respectively, in fee, with power to sell the same, &c. He also appointed his two sons executors of his will. Dickinson continued to reside in Virginia, until his death, in 1806; and by his last will, he devised his estate to his wife, Mary Dickinson, under whom the plaintiff, Ann Holt claimed, as her daughter and sole heiress at law, the land in controversy.

The suit was brought against the defendants, Edmund and Thomas Rogers, without making the four daughters, or any of them or their representatives, parties. The circuit court dismissed the bill of the complainants, and they prosecuted this appeal.

*The case was submitted to the court on printed arguments, by *Bibb*, for the appellants; and by *Tompkins*, for the appellees. [*422

The arguments for the *appellants* stated, that the defendants, by their answers, exhibit the obligation from Dickinson to Rogers, above recited, and rely on two defences: 1st. "That the obligation from Rogers to Dickinson, and from Dickinson to Rogers, taken together, leaves it entirely optional with said Rogers whether he would convey the land or not; and if he did not convey it, he was then bound to pay 45*l.*" 2d. Length of time. Upon hearing, the circuit court dismissed the bill.

1. As to the first defence set up by the defendants, the counsel for complainant believes it is not tenable. Rogers bound himself, absolutely and unconditionally, to convey the land to Dickinson, at no fixed day, but "when required." The bond of Rogers to Dickinson recites the transaction as a sale, not as a security for money lent. The penalty is 2000*l.*, evidently intended to enforce a conveyance. The bond from Dickinson to Rogers is in the penalty of 240*l.*; the condition recites the transaction as a sale of the land for 120*l.*, and the payment of 45*l.* thereof. It is an obligation upon Dickinson to pay the residue of the purchase-money, on or before the 1st day of January 1795; and there is annexed thereto, as a precedent condition to be performed by Rogers, "the conveyance of a fair and indisputable title in fee-simple." "After that conveyance being made," Dickinson was to pay the residue of the price. If the conveyance was made before the 1st January 1796, yet Dickinson was not bound to pay the balance until that day. Dickinson held Rogers' obligation to convey "when required." But Dickinson had paid part only of the price. And the residue, 75*l.*, was not to be paid until the 1st of January 1795; and not then, unless the conveyance of the land should be then completed; Dickinson was to be secure by a conveyance, before he was bound to pay the balance of the purchase-money. Accordingly, Dickinson executed his

*bond to pay the residue of the purchase-money on the 1st January 1795, subject, however, to the condition that a conveyance of the land to Dickinson should precede the payment of the 75*l.* to Rogers. Rogers could not demand the 75*l.*, before the first of January 1795, nor then, unless he conveyed the land. And although he might not be able then to give a fair and indisputable title, yet, "after that conveyance being made," Dickinson was bound to pay the further sum of 75*l.* to save the penalty of his obligation to Rogers. This seems to be the fair meaning of the condition of Dickinson's bond to Rogers.

Dickinson's evidence of the contract obliged Rogers to convey the land, but no time was limited; Rogers had his whole life, unless hastened by request. But the bond held by Rogers on Dickinson, concurred with the bond held by Dickinson, in reciting a sale of the land; and assisted to hasten Rogers to convey, because he was not entitled to receive the residue of the purchase-money until he did convey. But, according to the defence set up, Dickinson had no right to demand the conveyance; Rogers was not bound to convey; and Dickinson was at his mercy. Rogers might refuse a conveyance, and Dickinson, having paid 45*l.* for the land, had no evidence in his possession, of his right to recover back that sum so paid. Rogers held the evidence of his right to refuse a conveyance, as well as the evidence of Dickinson's right to 45*l.*, in his own possession, in a bond upon which Rogers could maintain a suit, but upon which Dickinson could not. According to this construction, Dickinson held a bond on Rogers for $2000*l.* with condition, reciting the sale of a tract of land, and obliging him to convey; and upon such conveyance made then, this obligation to be void; but Rogers held a paper which likewise recited the sale of the land, and his obligation to convey, but superadded this farther condition to this same bond, "but if no such conveyance of said land shall be made," "then this obligation to be void."

A bond for 100*l.*, with condition that if the obligor did not pay 50*l.* by a given day, the bond to be void, was adjudged to be a repugnant condition, and that the bond was obligatory. *Wells* v. *Tregusan*, 2 Salk. 463.

*424] *The court will not construe two deeds, both of which recite a sale of land, and a contract for a conveyance, in such manner as to make the one repugnant to the other, and avoid the obligation to convey; when both may well stand together, without contradiction, and each have its appropriate effect and use, in affirmance of the sale, and enforcing the stipulations of each party.

On its face, the obligation to Dickinson is plain and unequivocal. It is an obligation for the conveyance, according to the recited sale, of a tract of land. It is free from doubt, and needs no construction. Shall this unequivocal obligation be destroyed by construction of another obligation which recites the same sale, the obligation to convey, the receipt of 45*l.* in part payment for the land, and by an obligation upon the purchaser to pay the residue of the purchase-money to the vendor, after conveyance made in pursuance of this sale? Both obligations can well stand together, and each have its appropriate use. The first to oblige the vendor to convey; the second to oblige the purchaser, after such conveyance, to pay the residue of the purchase-money, part thereof having been paid.

It seems, that Rogers had no option to refuse to convey, after he or his

heirs should obtain a fair title, which the purchaser was willing to accept. But if Rogers could not have obtained a fair title, clear of dispute, whereby Dickinson refused to accept the title, then Rogers would have been liable to refund the money which he had received. Inability for want of title, and wilful refusal to convey with a title, are very different breaches in their nature and their consequences.

2. As to the length of time. It is to be remembered, that this is not a case of adverse hostile possession. It is a suit by the obligee against the heirs and executors of the obligor. The obligor and his heirs and executors, as soon as the title was perfected, held the land in trust, to be conveyed in satisfaction of the contract with the ancestor. There is no statute of limitation to suits on bonds, to operate as a legal bar. But the defence at law, from length of time, is founded on presumption of payment. After twenty years, where no demand has been made, and no interest has been paid during that time, a jury may presume payment or *satisfaction; but the rule as to twenty years is not, in itself, a legal bar. It is a circumstance for the jury to found a presumption upon. The lapse of a shorter time, aided by other circumstances, as that the parties lived near to each other, frequently saw each other, settled other accounts, &c., may be the foundation of a presumption of payment. So, circumstances may repel the presumption. See *Oswell's Executors* v. *Legh*, 1 T. R. 271. [*425

Presumption of payment from lapse of time is a reasonable rule, and may be rebutted by any facts which destroy the reason of the rule. *Dunlop* v. *Ball*, 2 Cranch 184. In that case, the bond was executed in 1783, not sued upon until 1802, after a lapse of twenty-nine years. Yet the presumption of payment was repelled. The breaking out of the war in 1775; its continuance until September 1783; the exceptions of certain periods of time from the statute of limitations, by the laws of Virginia; the obstructions to recovery of the British debts until 1793; were the circumstances relied on to repel the presumption of payment, notwithstanding the lapse of twenty-nine years, without demand or payment of interest. The rule adopted by the supreme court of the United States was, that twenty years must have elapsed, exclusive of the plaintiff's disability; and therefore, reversed the opinion of the circuit court, which did not recognise the circumstances in this case which oppose the presumption, which would have arisen from the length of time which had elapsed since the date of the bond. In *Boltz* v. *Bullman*, 1 Yeates 585, the presumption from length of time was repelled, because, "where the limitation act does not apply, that period shall not be computed in jndging of the legal presumption of payment;" also, that "the bond was in possession of the widow, soon after the death of her first husband, until the death of her second husband," was a consideration to repel the presumption. In *Newman* v. *Newman* (1 Stark. 81), the presumption was rebutted by absence abroad. In *Goldhawk* v. *Duane*, 2 W. C. C. 324, the court adjudged that the residence of the parties in different countries, was a circumstance to repel presumption of payment.

*The rule in chancery is the same as at law; after twenty years, and no interest paid during that time, payment is presumed, "unless something appears to answer that length of time." *Humphreys* v. *Humphreys*, 3 P. Wms. 397. In *Giles* v. *Baremore*, 5 Johns. Ch. 545, the chancellor declares, presumption, from length of time, prevails in equity as at law. [*426

A court of equity makes the presumption on the facts before it, as a jury would be authorized to do, if the evidence was submitted to them.

Having sufficiently established that the rule in equity and at law is the same; that the presumption from length of time is a reasonable rule, and may be rebutted by circumstances; and having cited examples of rebutting circumstances; the attention of the court is called to the rebutting circumstances which in this case appear fully sufficient to answer and repel the presumption from lapse of time. This bond bears date 6th January 1794. The obligor, John Rogers, died in April 1794, in less than four months after the date of the contract. The obligor, Dickinson, lived in Richmond; the heir of Rogers lived in Caroline, fifty miles off; George Rogers, the heir of John, the obligor, died in Caroline county in 1802, and devised his lands to his two sons, Edmund and Thomas, his executors; his death was in about eight years after the date of the contract. At the time of, and before, and ever after, the death of George Rogers, the father and heir of the obligor John, one of his devisees, Edmund, was a citizen of Kentucky, continually residing there. The devise of the Kentucky lands was to these two sons, and to the survivor; so that Dickinson must have gone to Kentucky to obtain the title. The patent did not issue until the 7th March 1799. The land was in Kentucky; the patent issued in Kentucky to the heir of John Rogers; that heir died in March 1802, in three years after the issuing of the grant from the state. But this patent, although for the same tract sold and described in John Rogers's bond, yet issued to William Marshall for one hundred acres, and to George Rogers for the residue, jointly. But this interest of Marshall was not partitioned until the year 1815. At that time, the defendants were both residents of Kentucky. Dickinson had died in Norfolk, Virginia. Edmund, as before stated, had resided there since 1783.

*427] *In 1819, only four years after the defendants had ability to convey the land, the complainants pursued their claim, and again in May 1829; again in August 1820; and finally, by suit, in February 1823. But between the date of the bond in 1794, and the removal of Thomas Rogers to Kentucky, in 1811, a period short of eighteen years had elapsed; and both parties then lived in different states—the legal representative of Dickinson in Norfolk, Virginia; the legal representatives of John Rogers, in Barren county, Kentucky. No presumption of payment or satisfaction had then arisen, and the removal to Kentucky was by the defendant; the period after 1811, till suit, must be excepted from the twenty years, according to the cases before cited of *Dunlop* v. *Ball*, 2 Cranch 184; *Goldhawk* v. *Duane*, 2 W. C. C. 324; *Newman* v. *Newman*, 1 Stark. 81. When Thomas Rogers, the defendant, devisee and executor, was about to remove in 1811, from Caroline county, Virginia, to Kentucky, he, for safety, as he says, then caused the bond of Dickinson to Rogers to be recorded in Caroline county court. This shows that when this defendant was departing for Kentucky, he was sensible that this transaction was not settled, satisfied or extinguished.

As the obligor, John Rogers, died in less than four months after the date of the obligation, no presumption of payment or satisfaction can arise as having been made by John Rogers; none is pretended. The defendants are possessed of the papers of John Rogers, and exhibit a receipted account, paid by him to Dickinson, the day before the bond for conveyance of the land bears date. And also produce Dickinson's bond for the balance of purchase-

money. No loss of papers is pretended. The contract was on the 6th January 1794, touching the conveyance of a tract of land in Kentucky, then unpatented. John Rogers undertook for himself, and his heirs and executors and administrators, to obtain the patent and make the conveyance to Dickinson, his heirs or assigns. The patent was never obtained until 1799, and then William Marshall was a tenant of one hundred acres of the survey; by the act of Edmund Rogers, the surveyor, brother, and finally one of the executors, devisees and claimants, under the said obligor, and that interest not separated until 1815.

During all this time, George Rogers, the heir of John, and *the executors and devisees of the heir, were in possession of the contract, [*428 fully apprised of it—bound to do the first acts, by procuring the title and tendering a conveyance; and yet never did do the first act towards fulfilling the contract. No satisfaction is pretended. The heirs-at-law of John Rogers, and his representatives, never lived in the neighborhood of Dickinson, or his representatives; never, at any time, did they live nearer than fifty miles, and for a great part of the time, much farther apart; and before twenty years had run, and before the defendants were ready to convey, they were in the state of Kentucky, in Barren county, and the representatives of Dickinson, in Norfolk, Virginia.

These circumstances are fully sufficient, at law and in equity, to rebut the presumption from lapse of time. It is manifest, that no satisfaction, in land or money, has ever been made to Dickinson, or his representatives, by the obligor or his representatives.

Rogers was bound to do the first acts—to acquire the patent and a fair title, and to tender a conveyance. They took until 1815 to place themselves in a posture to convey a fair and undisputed title. Within due time thereafter, the complainants pursued their rights. The defendants now would take advantage of their own *laches* to defeat the complainants!

The counsel for the appellants insists, that the decree of dismissal was erroneous, in this—1st. That the complainants were entitled to a conveyance of so much of the land as had not been alienated by the defendants, before suit brought; and for satisfaction in money for the part conveyed away. 2d. If the court would not decree the land, yet they ought to have decreed that the sum of 45*l.*, with interest, should be refunded. 3d. That the decree of absolute dismissal was erroneous: it should have been without prejudice to a suit at law upon the bond.

Tompkins, for the appellees.—On the 6th day of January 1794, John Rogers executed his bond in the penalty of 2000*l.*, with condition, to convey to James Dickinson a survey of 1200 acres of land on Drake's Creek, *in Kentucky, when required, for the consideration of 120*l.*; part of [*429 which (45*l.*) is stated in the condition of the obligation to have been paid. At the same time, James Dickinson executed his bond to John Rogers in the penalty of 240*l.*, with a condition annexed, reciting his purchase of the land and the stipulated consideration, and that 45*l.*, part thereof, had been paid, and binding himself to pay 75*l.*, the residue of the price, on the making of the conveyance; but providing, that if the title should not be made on or before the 1st day of January 1795, the obligation should be void, and Rogers should stand indebted to Dickinson in the sum

of 45*l.*, the money advanced. Both these instruments bear the same date, and are attested by the same witnesses.

John Rogers afterwards died at the Eagle tavern, then kept by Dickinson, in Richmond, in April 1794, without children, unmarried and intestate. George Rogers, the father and heir-at-law of John Rogers, had many years resided, and still continued to reside in Caroline country, Virginia, until some time in March 1802; when he departed this life, having first duly made his last will and testament, whereby, among other property, he devised the land in contest to the defendants, Thomas and Edmund Rogers, and his four daughters, to each one equal sixth part; but Thomas and Edmund Rogers are constituted trustees for the four daughters during their lives, and afterwards for their children, respectively, in fee, with power to sell, &c. They are also appointed executors by the testator. James Dickinson removed from Richmond to Norfolk, where he continued to reside until his death, in 1806. Edmund Rogers removed from Virginia to Kentucky in 1783, and never qualified as executor to his father's will. Thomas Rogers removed to the same state in 1811, having resided in Caroline county, Virginia, up to that time.

This suit is prosecuted by William C. Holt and Ann his wife (the said Ann claiming to be heir-at-law of Mary Dickinson, who is alleged to be the devisee of James Dickinson), against Edmund Rogers and Thomas Rogers only, as the devisees of George Rogers, the father and heir-at-law of John Rogers, deceased. *The complainants pray for a decree, compelling *430] Thomas and Edmund Rogers to convey to them the tract of land described in the instruments of writing executed by John Rogers and James Dickinson. This statement comprises the material facts of the case.

Waiving, for the present, all objections for the want of parties, it is, on the part of the defendants, contended, that the complainants have shown no right to relief. The two instruments of writing, simultaneously executed, and forming but one entire contract, should be construed together; and thus considered, the plain meaning of the parties is, that the transaction was to be considered a sale of the land, in case a conveyance of the title should be made by the time stipulated, but not otherwise. In the event of a failure to convey within that time, Rogers was to repay the money received, or rather to discharge the debt which had previously accrued, and Dickinson's bond for the residue of the sum of 120*l.* was to be void. Such are the express terms of that part of the contract which was subscribed by Dickinson. The lapse of time is relied on by the defendants in bar of the complainants' demand, if they ever had any. Dickinson resided in the neighborhood of John Rogers, and his legal representatives, about twelve years after the execution of the contract; during all which time, he seems to have made no complaint of its violation. Thomas Rogers, the only acting executor of his father's will, did not remove to Kentucky, until five years after the death of Dickinson; and still there was no demand made on him, either for the conveyance of the land, or the payment of the money. It was not until the latter part of the year 1819, that any claim whatever was even suggested against the devisees of George Rogers, deceased; and almost thirty years had elapsed between the time of the alleged violation of the contract and the commencement of this suit. It is presumable, that Dickinson himself understood the contract according to the construction now contended for;

or it does not appear, that he ever made any provision for paying taxes on the the land after, as he had done before, the time of making the deed had expired. Rogers having been unable to convey the title, within the prescribed time, Dickinson was not bound to pay him the additional sum *of 75*l.* His obligation to do this had, in the event provided for, become void, and Rogers was only bound to repay the sum of 45*l.* which he had received—and after the unreasonable delay of the complainants and their ancestor in asserting this claim, without any excuse whatever, for that which is alleged in the bill has been disproved, the legal presumption is, that the debt has been paid. [*431

But if this presumption cannot be maintained, and although the foregoing construction of the contract should be considered incorrect; still, the relief prayed for, ought not to be granted, after such extraordinary delay and negligence on the part of the complainants, and those under whom they claim. They have waited until it would be unreasonable to expect the testimony of living witnesses as to the adjustment of the claim. The land, in the meantime, has increased in value sevenfold, and may have passed into the hands of innocent purchasers; such is alleged to be the fact, as to the share of Edmund Rogers. Under such circumstances, a court of chancery will not interfere, but leave the parties to their remedy at law.

It is further insisted, that the complainants have failed to bring the necessary parties before the court. All persons having an interest in the suit ought to be made parties, either as complainants or defendants. In this case, the four daughters of the testator are each entitled to one-sixth part of the land, during their lives, with remainder to their children respectively in fee; and they cannot be divested of their interest, without giving them an opportunity of asserting their rights. Any decree in this case against Thomas and Edmund Rogers would not, of course, conclude the other devisees who are not defendants; and the court will not entertain a suit, when it is apparent, that, for the want of proper parties, the decree can be of no avail in finally settling the controversy. And although the daughters of George Rogers may have an equitable interest only, it is not the less necessary that they should be made defendants. The *cestui que trust* is a necessary party to a suit in chancery, brought agaist the trustee, concerning the trust property. *Calverley* v. *Phelp*, 6 Madd. Ch. 144. The complainants' bill has, therefore, been properly dismissed by the circuit court, and the decree ought to be affirmed.

*Story, Justice, delivered the opinion of the court. After stating the case, he proceeded:—This is an appeal from a decree of the circuit court of Kentucky district, dismissing the bill in equity, brought by the appellants against the appellees. Three points have been made at the argument by the appellees, either of which, if established, would be fatal to the bill in its present shape; and two of them would be fatal in any shape. The first is, that the contract of sale was not absolute, but terminated by the non-fulfilment of the conditions at the end of the stipulated period: the second is, that the lapse of time is a bar to all equity in the plaintiffs: and the third is, that the proper parties for a decree are not before the court. [*432

In the first place then, was the contract such as it is represented to be

by the appellees? We are of opinion, that taking into view the whole transaction, its proper interpretation is such as their argument supposes. It is true, that the bond of Rogers to Dickinson, taken alone, presents only the common case of a contract for a sale of land, at a specific price, with an undertaking to make a good and lawful deed of the land, when required by the vendee. But the other bond, executed contemporaneously by Dickinson to Rogers, is to be taken into consideration in ascertaining the true nature of the transaction. That bond, however inaccurate in its phraseology, shows, that the real contract between the parties was, that Rogers should make a fair and indisputable title to Dickinson, of the land, on or before the 1st of January 1795; and if no conveyance was then made, then Rogers was to stand indebted to Dickinson in the said sum of 45*l.* Now, we think, that no other just interpretation can, under the circumstance, be put upon this language, than that the parties intended, that Rogers should perfect his title to the land by a patent, and should make a conveyance of an indisputable title to Dickinson, on or before the 1st of January 1795; and if not then made, the contract of sale was to be deemed rescinded, and the 45*l.* purchase-money, was to be repaid to Dickinson. What strengthens this interpretation is, that the 45*l.* was not at the time actually paid, but was merely the amount of an antecedent debt due from Rogers to Dickinson; and the bond of the latter contains no stipulation on his part, to pay *433] *the balance of the purchase-money, except upon a conveyance made within the prescribed period. If the parties had intended the sale to be absolute, the bond of Dickinson would have contained an absolute agreement to pay that balance, as the other bond did an absolute agreement to make a conveyance, when required. We think, too, that the total omission of Dickinson, in his lifetime, to take any step to enforce the sale, furnishes a strong corroboration that he so understood the matter.

But in the next place, if this difficulty could be (as we think it cannot be) surmounted, the objection from the lapse of time is equally decisive. Courts of equity are not in the habit of entertaining bills for a specific performance, after a considerable lapse of time, unless upon very special circumstances. Even where time is not of the essence of the contract, they will not interfere, where there has been long delay and *laches* on the part of the party seeking a specific performance. And especially, will they not interfere, where there has, in the meantime, been a great change of circumstances, and new interests have intervened. In the present case, the bill is brought after a lapse of 29 years. It is true, that the vendor died within the year, and that he had not, at the time of the contract, a complete title to the land; but a complete title was afterwards obtained by his father, who was his heir, in the year 1799; and Dickinson did not die until seven years afterwards. During the period of eleven years after Dickinson had a perfect right (if ever) to demand a strict performance of the contract, he never took a single step to assert his right, or to compel performance. After his death in 1806, no step was taken by his heirs or devisees, for the purpose of asserting any claim, until 1819; and no suit was commenced until 1823. The manner in which this delay is accounted for in the bill, is wholly unsatisfactory. The grounds stated are, the distance of the parties from each other, their intervening deaths, the difficulty of ascertaining who were the heirs, and the residence of the latter in a different state. But any

reasonable diligence would have enabled Dickinson and his legal representatives to have ascertained who the heirs of Rogers were. His father and heir resided in the same state with Dickinson, for many years; and the acting executor under the will of the father did not remove into Kentucky until several years after the probate of the *will. There is, therefore, no ground, upon which the gross *laches* or indifference of the parties [*434 can be reasonably excused. And such a long silence does, as we have already intimated, justly lead to the conclusion of a consciousness, that the right, if any, was exceedingly doubtful. In the meantime, the property has materially risen in value, from the general improvement and settlement of the country, and this furnishes an additional reason for not disturbing the existing rights of property. This view of the case renders it unnecessary to consider the other point, as to the non-joinder of proper parties.

The bill contains no alternative prayer for a return of the 45*l.*, if specific performance should not be decreed; and, under the circumstances, we are of opinion, that it ought not to be decreed, under this bill, upon the prayer for general relief, it not being a case specially made by the bill. The decree of the court below will, therefore, be affirmed. As the general dismissal of the bill will not, in our judgment, under the circumstances, operate as a bar to future proceedings at law, to recover the 45*l.*, if an action be otherwise maintainable, we do not think it necessary to dismiss the bill, without prejudice, thereby throwing the burden of the costs of the reversal upon the defendant. The plaintiff may, therefore, well be left to his legal remedy, such as it is, for any indemnification under the contract. Decree affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*Eliza Brown, Appellant, *v.* Frances Swann and others. [*435

Practice.

An appeal was taken at the December term 1832 of the circuit court for the district of Columbia, to the January term 1833 of this court; but the appeal was not entered to that term, but was entered to January term 1834. The case being called for argument, the defendant asked for a continuance, which was granted.

In this case, the appeal was taken at the December term 1832 of the circuit court of the district of Columbia to the supreme court. The appeal was not entered to the next term of the court, but was entered at January term 1834. The cause being called on for argument, the defendant asked for a continuance, which was resisted by the appellant.

Marshall, Ch. J., said:—Though the case is not within any rule of this court, yet the court are of opinion, that as the appellant did not enter the appeal at the proper term, the other side ought not to be compelled peremptorily to go on with the cause at this term.

*United States, Appellants, *v.* George J. F. Clarke.

Florida treaty.—Jurisdiction.

Construction of the articles of the treaty between the United States and Spain, ceding Florida, relating to the confirmation of grants of lands made by the Spanish authorities, prior to the treaty.

An examination of the authority of the governors of Florida, and of other Spanish officers under the crown of Spain, to grant lands within the territory, and of the manner in which that authority was exercised.

An examination of the legislation of the United States, on the subject of the examination and confirmation of Spanish grants of land in the territory of Florida, made before the cession of the same to the United States.

As the United States are not suable of common right, the party who institutes a suit against them must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction.

In courts of a special limited jurisdiction, which the superior court of East Florida unquestionably is in this case, the pleadings must contain averments which bring the cause within the jurisdiction of the court, or the whole proceedings will be erroneous.

It was obviously the intention of congress, to extend the jurisdiction of the court to all existing claims, and to have them finally settled; the purpose for which the act was made could not be otherwise accomplished. Any claim which the court was unable to decide, on the petition of the claimant, would remain the subject of litigation; this would defeat the obvious intention of congress, which ought to be kept in view, in construing the act.

The words in the law which confer jurisdiction, and describe the cases on which it may be exercised are, "all the remaining cases which have been presented according to law, and not finally acted upon;" the subsequent words, "shall be adjudicated," &c., prescribe the rule by which the jurisdiction previously given shall be exercised.

Appeal from the Superior Court of East Florida. On the 4th of April 1829, the following petition was filed by the appellee in the superior court of Florida.

To the Honorable the Judge of the Superior Court for the district and territory aforesaid, in chancery sitting: The petition of George J. F. Clarke, a native and inhabitant of the aforesaid territory, respectfully showeth—

That upon the 6th day of April, in the year of our Lord 1816, Don Jose Coppinger, then acting governor of the province of East Florida (by virtue of authority derived from the Spanish government), actually made to your petitioner, an absolute title in fee, of five miles square of land, which your petitioner avers, amounts to the number of sixteen thousand acres, on the *437] *west side of St. John's river, near and at Black creek, and at a place called White Spring, for and in consideration of your petitioner having actually (before the day of the date of said grant), constructed a saw-mill, to be impelled by animal power, which sufficiently appeared by proof to the said governor, as is fully evidenced by the tenor of the grant aforesaid, and as a reward for the industry and ingenuity of your petitioner in the constructing of the aforesaid saw-mill, and for other causes and considerations in said grant set forth, all of which will more fully appear, by reference to said grant, a certified translation whereof will in due time be filed herewith, and exhibited to this honorable court, and prayed to be made a part hereof. Your petitioner further showeth, that finding there was not vacant land at the place aforesaid, suiting his wishes, sufficient to make the amount or number of acres aforesaid granted to him, he did, on the 25th day of January 1819, file a memorial before the aforesaid Governor Coppinger,

praying to be allowed to survey eight thousand acres of said grant on other vacant lands; and that, by a decree or grant of the aforesaid governor, Don Jose Coppinger, bearing date on the 25th day of January 1819, the prayer of your petitioner was accorded to him, as will fully and at large appear, by reference to a translation of a document herewith filed.

Your petitioner further states, that in pursuance of, and in accordance with, the grant first before referred to, and the subsequent grant amendatory thereto, the said lands were surveyed to him in three surveys. One of 8000 acres, at a place in the original grant named, on the west shore of St. John's river, beginning at a stake at Picolata ferry landing, and running south 82° west, 110 chains, to a pine; second line, north 15° west, 123 chains, to a pine; third line, north 5° east, 123 chains, to a pine; fourth line, north 35° west, 175 chains, to a pine; fifth line, north 82° west, 154 chains, to a pine; sixth line, north 60° west, 174 chains, to a pine; seventh line, north 25° east, 112 chains, to a stake on the south side of *Buckley creek at the mouth, and thence with the meanders of St. John's river to the beginning. [*438 One other survey of 3000 acres, situated in and about Cone's hammock, to the south of Mizzell's or Orange lake, beginning at a stake, and running thence, south 70° east, 163 chains 92 links, to a pine; second line, south 20° west, 122 chains 50 links, to a hickory; third line, north 70° west, 122 chains 50 links, to a red bay; fourth line, north 58° west, 144 chains, to a pine; fifth line, north 20° east, 90 chains 71 links, to the beginning. And one other survey of 5000 acres, situated in Lang's hammock, on the south side of Mizzell's or Orange lake. Plats and certificates of all which surveys will in due time be filed and exhibited herein; the lands herein designated all being and lying within the jurisdiction of this court.

Your petitioner further states, that his aforesaid claim was filed before the board of commissioners appointed to ascertain claims and titles to lands in East Florida, who, as he is informed and believes, have refused to recommend the same to the favorable notice of the United States government; and have rejected the same, but have not reported it forged or ante-dated. But your petitioner is advised and believes, and alleges and avers, that, by and under the usages, customs, laws and ordinances of the King of Spain, he is entitled to, and invested with, a complete and full title in fee-simple, to the lands so as aforesaid granted to him; and that, by the treaty between Spain and the United States, of the 22d February 1819, the United States are bound to recognise and confirm to him his aforesaid title, in as full and ample a manner as he had or held the same under the Spanish government. Without this, so far as your petitioner is advised, the United States are the rightful claimants to said lands.

And your petitioner prays, in consideration of the premises, this honorable court will take jurisdiction of this his petition, and that a copy hereof, and a citation to show cause, &c., may be served on Thomas Douglass, Esquire, United States district-attorney for this district, pursuant to the provisions of *the statute in such cases made and provided; and finally, that your honor will decree to your petitioner a confirmation of his [*439 title to the lands in this his petition claimed, and all such further and other relief as in equity he is entitled to; and your petitioner, as in duty, &c.

On the 25th January 1819, the claimant presented a petition to the gov-

ernor of the province, setting forth that the land in the neighborhood of White Spring, which had been granted to him, did not answer his expectation, and praying that the surveyor appointed to survey the land granted to him, might be directed to alter the survey, so as to reduce the square of five miles to the depth of about two and a half miles, by its original length of five miles; and that the surveyor might be further instructed to survey the residue of the quantity granted to the petitioner, "in the hammock, called Lang's and Cone's, situated on the south of Mizzell's lake." On the same day, the 25th day of January 1819, the governor granted the request of the petitioner. On the 24th of February 1819, the surveyor gave a certificate, that he had surveyed to the petitioner, eight thousand acres of land, west of the river St. John's, beginning at the mouth of Berkley creek, below White Spring, and following upwards the margin of said river, &c. On the 10th of March 1819, the said surveyor gave another certificate, that he had surveyed for the petitioner, five thousand acres of land, in the place called Lang's hammock, situated south of Mizzell Lagoon, west of the river St. John's, in part of a greater quantity granted to the said petitioner, on the 6th of April 1816. On the 12th of March 1819, the said surveyor gave another certificate, in which he stated, that he had surveyed to the petitioner, three thousand acres of land, in the place called Cone's hammock, being the complement of a greater quantity which was granted to him on the 6th of April 1316.

The following copies of the petition, decree and grant were annexed to the petition.

(Translation.) MEMORIAL.

To the Governor:—Don George Clarke, a native of this province, with due respect, presents himself to your honor, and says, that, having noticed the constant scarcity of sawed lumber in this province, and particularly at
*440] this town, which, in consequence of the scantiness of this indispensable material, has but half of the population that it ought to have; and induced by the general advantages that may result from mills worked by animals, over those worked by water, wind or fire, because they are less expensive, more secure, and adapted to any station, he has accomplished one at this town, of his own invention and workmanship, which with four horses, saws eight lines at a time, at the rate of two thousand superficial feet per day. Therefore, he prays that your honor will be pleased to grant him a title of property to the quantity of land your honor had thought proper to assign to the water-mills for their continual supply, forming a quantity equivalent to a five mile square; which lands he solicits on the western part of the St. John's river, above Black creek, at a place entirely vacant, known by the name of White Spring. He hopes to receive this grant from your honor's kindness, because, by this proof of his industry and labor, he has given to the public an invention that, by its expediency, simplicity and cheapness, offers, from this source of lumber, the most considerable advantages, not only to the royal revenue, but to the public also, by the labor of cutting, use and commerce.

Fernandina, March 16, 1816.

P. D. For proof of what I have stated to your honor, I herewith present a certificate of the civil and militiary commander of this town, *ut supra*.

GEORGE J. F. CLARKE.

United States v. Clarke.

Grant to Clarke for sixteen thousand acres. Decree.

St. Augustine, April 3, 1816. This government have granted lands to other individuals, inhabitants of this province, who have solicited them for the cutting of timber and the use of the same for the saw-mills or machines that they intend to establish, but with the condition of being without effect until these establishments be made. And whereas, Don George Clarke proves, by certificate of the commander of the town of Fernandina, that he has constructed a mill of great utility, that offers advantages to that settlement, which it is the duty and interest of the government to promote, in compliance with royal orders dispatched for that purpose, rewarding the industrious and laborious, as an example to encourage other inhabitants, and procure the increase of invention : it is granted to the aforesaid *Don George Clarke, the five miles square of land that he solicits, of which [*441 a title shall be issued comprehending the place, and under the boundaries set forth in this petition, without injury to a third person.

COPPINGER.

(Translation.) Title of property of five miles square of land to Don George Clarke.

Don Jose Coppinger, lieutenant-colonel of the royal army, civil and military governor *pro tempore*, and chief of the royal domain of this city and its province, &c. :

Whereas, by a royal order communicated to this government, on the 29th October 1790, by the captain-general of the island of Cuba and the two Floridas, it is provided, among other things, that, to foreigners who, of their free will, present themselves to swear allegiance to our sovereign, there be granted to them lands *gratis*, in proportion to the workers that each family may have ; and whereas, Don George Clarke, inhabitant of the town of Fernandina, has presented himself, manifesting that he has constructed, from his own ingenuity, a machine that, with four horses, saws eight lines at one time, cutting two thousand superficial feet of timber in a day, and soliciting, in virtue thereof, a grant in absolute property of five miles square of land, for a stock and supply of timber, which is the portion that has been granted for water saw-mills ; and having pointed out a competent tract of the west side of St. John's river, above Black creek, at a place called White Spring, that is vacant; which establishment of said machine has been proved by a certificate of the civil and military commandant of the town of Fernandina : Therefore, and in consideration of the advantages arising from such improvements in this said province, and in order that, by rewarding the industrious and ingenious, it may serve as an example and stimulus to other inhabitants, I have found proper, by my decree of the third of the present month, to order the issue of a competent title of property of said five miles square of land, as will appear more fully by the proceedings had on the occasion, and existing in the archives of the present notary. Therefore, I have resolved to grant, as in the name of his majesty I do grant, to the said George Clarke, the afore-mentioned five miles square of land for himself, his heirs and successors, in absolute property ; and I do issue, by these presents, a competent title, whereby I *separate the royal domain [*442 from the right and dominion it had to said lands, and I cede and transfer the same to the said George Clarke, his heirs and successors, to

possess them as their own, and to use and enjoy them, without any incumbrance or tribute whatever, with all their inlets, outlets, uses, customs, rights and services, which they have had, have, and by custom or law may have, or in any wise may appertain to them; and at their will, to sell, cede, transfer and dispose of them at their pleasure. To all which I interpose my authority, as I can, and *and* of right ought to do, by virtue of these presents and the sovereign will. Given under my signature, and countersigned by the notary of government and royal domain, in this city of St. Augustine, of Florida, on the 6th April 1816. JOSE COPPINGER.

By order of his excellency.

JUAN DE ENTRALGO, Notary *pro tem.* of Gov. and Royal Domain.

The answer of the United States district-attorney expressly denied that by and under the usages, customs, laws and ordinances of the King of Spain, the petitioner was entitled to, and vested with a full and complete title in fee-simple, or any other title whatever to the said land, and that the supposed grant to the said petitioner was entirely null and void. The answer further denied, that Governor Coppinger had any power or authority whatever to make such a grant; and that if such a grant was ever made to the petitioner, it was made in violation of the laws, ordinances and royal regulations of the Spanish government.

The decree of the court below confirmed the claim of the petitioner not only to the land described, and which, if any, was vested in the said petitioner by the grant of Governor Coppinger, dated the 6th of April 1816, but other lands described by the surveyor in his several certificates, dated the 24th of February, and 10th and 12th of March 1819.

The case was argued by *Call*, for the United States; and by *Berrien* and *Wilde*, for the appellee.

The counsel for the *United States* presented the following grounds for the consideration of the court, and on which they contended, the decree of the court below should be reversed.

*443] 1. *The petitioner has not described on the record such a case as is embraced by the jurisdiction expressly conferred by statute on the superior court of East Florida.

2. The petitioner cannot show that he has such a claim to land in Florida, as gives him a right to prosecute his suit for its confirmation against the government, under the provisions of the acts of congress of 1824 and 1828, conferring jurisdiction in certain cases on the superior courts of Florida.

3. The governor of the province of East Florida had no power or authority, under the laws, ordinances and royal regulations of Spain, to make the grant in question.

4. If the governor possessed the power of making the said grant, on the 6th day April 1816, the eighth article of the treaty having barred all grants made subsequent to the 24th of January 1818, he had no power on the 25th of January 1819, to substitute other lands, of a superior quality, at a remote distance for those which were granted to the petitioner on the 6th of April 1816.

5. The change of location on the 25th of January 1819, was equivalent

to the power of making a new grant, and the act is void under the provisions of the treaty. The lands claimed by the petitioner, and embraced in the second and third surveys, were vacant lands on the 24th of January 1818, and were, by the second article of the treaty of 1819, transferred to the United States.[1]

The counsel for the *appellee* considered that the several points arising in this case had been already decided by this court in the cases of the *United States* v. *Arredondo*, 6 Pet. 691, and the *United States* v. *Percheman*, 7 Ibid. 51, and contended :

1. That the grant of Governor Coppinger vested in the claimant a full and absolute title in fee to the premises in controversy.

2. That the authority to grant land to *foreigners* was in addition to, and did not exclude, the right to grant for good cause to the subjects of Spain.

*3. That the general authority of the governor being ascertained, he alone was competent to decide upon the sufficiency of the considerations on which this grant was founded. [*444

Marshall, Ch. J., delivered the opinion of the court.—In April 1829, George J. F. Clarke, the defendant in error, filed his petition in the court of the United States for the eastern district of Florida, praying that court to decree a confirmation of his title to 16,000 acres of land, granted to him, on the 6th day of April 1816, by Don Jose Coppinger, then acting governor of the province of East Florida. The attorney for the district appeared, and by his answer denied all the material allegations of the petition. Several exhibits were filed, and several depositions were taken ; and in May term 1832, the court adjudged the claim of the petitioner to be valid ; from which judgment, the district-attorney, on behalf of the United States, prayed an appeal to this court.

As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it. The counsel for the United States contends, that George J. F. Clarke has not, by his petition, made a case in which the United States have consented to be sued ; and, consequently, that the court of the district had no jurisdiction. To maintain this objection, he has stated several principles, and cited several decisions of this court in support of them. The proposition, that in case of a special limited jurisdiction, which that of East Florida unquestionably is in this case, the pleadings must contain averments which bring the cause within the jurisdiction of the court, or the whole proceeding will be erroneous, is admitted. The inquiry is, does the petition of George J. F. Clarke contain these averments.

Florida contained an immense quantity of vacant land, which the United States desired to sell. Numerous tracts, in various parts of this territory, to an amount not ascertained, had been granted by its former sovereigns, and confirmed by treaty. To avoid any conflict between these titles and

[1] Mr, Call, counsel for the United States, afterwards laid before the court a printed argument, applicable to this and the subsequent cases ; which will be found in the appendix.

those which might be acquired under the United States, it was necessary to
*445] ascertain *their validity, and the location of the lands. For this purpose, boards of commissioners were appointed, with extensive powers, and great progress was made in the adjustment of claims. But neither the law of nations, nor the faith of the United States, would justify the legislature in authorizing these boards to annul pre-existing titles, which might, consequently, be asserted in the ordinary courts of the country, against any grantee of the American government. The powers of the commissioners, therefore, were principally directed to the attainment of information, on which they might report to congress, who generally confirmed all claims on which they reported favorably. After considerable progress had been thus made in the adjustment of titles, congress, on the 26th of May 1830, passed an act for the final settlement of land-claims in Florida. This act, after confirming titles to a considerable extent, which are described in the first, second and third sections, enacts, that all the remaining claims which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled, upon the same conditions, restrictions and limitations, in every respect, as are preseribed by the act of congress, approved 23d of May 1828, entitled, "An act," &c.

It was obviously the intention of congress, to extend the jurisdiction of the court to all existing claims, and to have them finally settled. The purpose for which the act was made could not be otherwise accomplished. Any claim which the court was unable to decide, on the petition of the claimant, would remain the subject of litigation. This would defeat the obvious intention of congress, which ought to be kept in view, in construing the act. The words which confer jurisdiction, and describe the cases on which it may be exercised, are "all the remaining cases which have been presented according to law, and not finally acted upon." The subsequent words "shall be adjudicated," &c., prescribe the rule by which the jurisdiction previously given shall be exercised.

The petition of Clarke, after showing his title under the government of Spain, adds, "your petitioner farther states, that his aforesaid claim was filed before the board of commissioners, appointed to ascertain claims and titles to lands in East Florida, who, as he is informed and believes, refused
*446] to *recommend the same to the favorable notice of the United States government; and have rejected the same, but have not reported it forged or ante-dated." Do these averments satisfy the requisities of the statute? The act requires that it shall "have been presented according to law, and not finally acted upon." The petition states, "that it was filed before the board of commissioners," which is presenting it "according to law;" and then proceeds to state the action of the board upon it. That action is not by law made final, consequently, the case is one of those which the court is directed to adjudicate and finally settle, on the principles contained in the act of 1828. Any defect in the title as exhibited, will be considered in deciding on the right, but does not constitute an objection to jurisdiction.

The title, as set out in the petition and exhibits filed with it, is as follows: On the 16th of March 1816, George J. F. Clarke, styling himself a native of the province, presented a memorial to the governor of East Florida, in which he states the service he has rendered the public, by inventing and

constructing a saw-mill of great execution, and prays, in consideration thereof, a grant of the quantity of land which his honor had thought proper to assign to the water-mills, equivalent to five miles square; which land he solicits on the western part of St. John's River, above Black Creek, at a place entirely vacant, known by the name of White Spring. On the 3d of April, the governor made a decree, in which, after reciting that he had granted lands to other individuals, on account of saw-mills or machines to be erected, but with condition of being without effect, until the establishments be made, and that Clarke had exhibited proof of the actual erection of a mill of great utility, grants to the said George Clarke the five miles square of land that he solicits, "of which a title shall be issued, comprehending the place, and under the boundaries set forth in this petition, without injury to a third person." The title was issued on the 6th of the same month. It recites, that "whereas, by a royal order communicated to the government on the 29th of October 1790, by the captain-general of the island of Cuba and the two Floridas, it is provided, among other things, that to foreigners who, of their free will, *present themselves to swear allegiance to our sovereign, there be granted to them lands *gratis*, in proportion to the [*447 workers that each family may have; and whereas, Don George Clarke, inhabitant of the town of Fernandina, has presented himself, manifesting that he has constructed, from his own ingenuity, a machine that, with four horses, saws eight lines at one time, cutting two thousand superficial feet of timber in a day, and soliciting in virtue thereof a grant in absolute property of five miles square of land," &c. "Therefore, and in consideration of the advantages arising from such improvements in this said province, and in order that, by rewarding the industrious and ingenious, it may serve as an example and stimulus to other inhabitants, I have found proper, by my decree of the third of the present month, to order the issue of a competent title of property, of said five miles square of land, as will more fully appear," &c. "Therefore, I have resolved to grant, as in the name of his majesty I do grant," &c. An order to survey the land contained in this grant was given by the governor on the 29th of December 1818.

Afterwards, on the 25th of January 1819, Clarke presented a memorial to the governor, stating that the quantity of land required for his purpose could not be obtained at the place designated, and praying that the depth back might be contracted to about one and a half miles, and the residue be surveyed at a different place described in the memorial. This prayer was granted, and surveys were executed and returned, placing 8000 acres on the ground described in the decree and grant, and the remaining 8000 acres, in two surveys, on the ground designated in the memorial of the 25th of January 1819.

The counsel for the United States contend, that the grant made to the petitioner, by the governor of East Florida, is void, because he had no power to make it. The royal order of the 29th of October 1790, which is recited in the grant of the 6th of April 1816, most certainly does not authorize that grant. It was avowedly made for the purpose of inviting foreigners into the province, and Clarke was an inhabitant. It limited the quantity of land to be granted to a fixed number of acres for the workers that each family may have; and it is not doubted, that the quantity actually contained *in the grant far exceeded the quantity authorized by that order. It [*448

is too plain for argument, that, if the validity of the grant depends on its being in conformity with the royal order of 1790, it cannot be supported. But we do not think it does depend on that order. Although the order is recited, the grant does not profess to be bounded on it. That it is not, is most apparent. The grant immediately proceeds to recite that Clarke is an inhabitant of Fernandina, which would of itself defeat his application, if depending on the order in favor of "foreigners who, of their free will, present themselves to swear allegiance to the sovereign" of the grantor. It then proceeds to state the real motive for which it is made. It is, that he has constructed a machine of great value. It is for this, and not for his being willing to swear allegiance to the king of Spain, that he solicits the grant. "Therefore," proceeds the grant, "and in consideration of the advantages arising from such improvements in this said province, and in order that, by rewarding the industrious and ingenious, it may serve as an example and stimulus to other inhabitants, I have found proper, by my decree of the third of the present month, to order the issue of a competent title," &c. "Therefore," that is, in execution of the decree of the third, "I have resolved to grant," &c. The grant, then, of the 6th of April, is avowedly made in execution of the decree of the 3d. That decree contains no allusion to the royal order of October 1790, but professes to be founded entirely on the motives afterwards expressed in the grant itself, in addition to that order.

We cannot think, that the recital of a fact entirely immaterial, on which fact the grant does not profess to be founded, can vitiate an instrument reciting other considerations on which it does profess to be founded, if the matter, as recited, be sufficient to authorize it. Without attempting to assign motives for the recital of that order, we are of opinion, that, in this case, the recital is quite immaterial, and does not affect the instrument. The real inquiry is, whether Governor Coppinger had power to make it?

By the second article of the treaty of the 22d of February 1819, between the United States of America and Spain, his Catholic Majesty cedes to the
*449] United States, in full property *and sovereignty, all the territories which belong to him, situated on the eastward of the Mississippi, known by the name of East and West Florida. This article undoubtedly transfers to the United States, all the political power which our government could acquire, and all the royal domain held by the crown of Spain; but has never been supposed, so far as is now understood, to operate on the property of individuals. This court has uniformly expressed the opinion that it does not. The eighth article was not intended to enlarge the cession. Its principal object is to secure certain rights existing at the time, but not complete. It stipulates that all the grants of land (in Spanish, "concessions of land"), made before the 24th of January 1818, by his Catholic Majesty, or by his lawful authorities in the said territories, ceded by his majesty to the United States. shall be ratified and confirmed (in Spanish, shall remain ratified and confirmed) to the persons in possession of the lands (in the Spanish, in possession of them, that is, of the concessions), in the same extent that the same grants (in Spanish, they) would be valid, if the territories had remained under the dominion of his Catholic Majesty. It may be worth observing, that the language of the article is not "all grants made by his Catholic Majesty, or by his lawful authority," which might perhaps involve

an inquiry into the precise authority or instructions given by the crown to the person making the grant, and might impose on the claimant the necessity of showing that authority in each case, but "by his Catholic Majesty, or his lawful authorities in the said territories ceded by his majesty to the United States." That is, by those persons who exercised the granting power, by authority of the crown. This is the generally received meaning of the words. They are equivalent to the words, competent authorities, used in their place by the King of Spain in his ratification of the treaty. It may be also not entirely unworthy of remark, that this article expressly recognises the existence of those "lawful authorities" in the ceded territories.

It is not unreasonable to suppose, that his Catholic Majesty might be unwilling to expose the acts of his public and confidential officers, and the titles of his subjects acquired under *those acts, to that strict and jealous scrutiny which a foreign government, interested against their [*450 validity, would apply to them, if his private instructions or particular authority were to be required in every case, and that he might, therefore, stipulate for that full evidence to the instrument itself which is usually allowed to instruments issued by the proper officer. The subject-matter of the article, therefore, furnishes no reason for construing its words in a more restricted sense than that in which they are uniformly used and understood. In that sense, they mean persons authorized by the crown to grant lands.

The subsequent part of the sentence may, in some degree, qualify their meaning. The added words are, "to the same extent that the same grant (they) would be valid, if the territories had remained under the dominion of his Catholic Majesty." If this part of the sentence was intended as a limitation of the general provision which precedes it, the subject-matter of the article may serve in some measure to explain it. The general word "grant" may comprehend both the incipient and the complete title. The greater number of those in Florida appear to have been of the first description. Many of these contained conditions, on the performance of which the right to demand a complete title depended. Without this qualification, the article might have been understood to make these conditional concessions absolute. Therefore, they are declared to "be ratified and confirmed," to the same extent that the same grants (they) would be valid, if the territories had remained under the dominion of his Catholic Majesty." The parties add (continuing the idea), "but the owners in possession of such lands (the proprietors) who, by reason of the recent circumstances of the Spanish nation, and the revolutions in Europe, have been prevented from fulfilling all the conditions of their grants (concessions) shall complete them within the terms limited in the same, respectively, from the date of this treaty; in default of which, the said grants (they) shall be null and void." But whether the intention of that part of the article which declares the extent to which the titles it contemplates shall be valid, is limited to the conditions inserted in them, or qualifies the general preceding words, it cannot vary the sense of *the term "lawful authorities," nor warrant the construction [*451 that a title derived from "a lawful authority" creates no presumption of right, and leaves the holder under the necessity of proving every circumstance which would be required to support it, had it proceeded from a per-

son not holding an office on which the power of granting lands had been conferred.

These titles are to be valid to the same extent as if the territories had not been ceded. What is that extent? A grant made by a governor, if authorized to grant lands in his province, is *primâ facie* evidence that his power is not exceeded. The connection between the crown and the governor, justifies the presumption that he acts according to his orders. Should he disobey them, his hopes are blasted, and he exposes himself to punishment. His orders are known to himself and to those from whom they proceed, but may not be known to the world. Such a grant, under a general power, would be considered as valid, even if the power to disavow it existed, until actually disavowed. It can scarcely be doubted, so far as we may reason on general principles, that in a Spanish tribunal, a grant having all the forms and sanctions required by law, not actually annulled by superior authority, would be received as evidence of title.

We proceed then to inquire into the power of the governor of East Florida. It will not be material, to ascertain the rules by which lands were granted to the first settlers of America, or the officers from whom titles emanated. So early as the year 1735, an ordinance was passed, by which the king reserved to himself the right of completing the titles given by his provincial officers. The inconvenience resulting from this regulation was so seriously felt, that the ordinance was repealed in 1754, and the whole power of confirming, as well as originating titles, was transferred to officers in the colonies. The power of appointing sub-delegate judges, to sell and compromise for the lands and uncultivated parts of the dominions of the Spanish crown in the Indies, was declared to belong to the viceroys and presidents of the royal audiences of those kingdoms; and *the same royal order directed, that "in the distant provinces of the *audiencias*, or where sea intervenes, as Caraccas, Havana, Carthagena, Buenos Ayres, Panama, Yucatan, Cumana, Margarita, Puerto Rico, and in others of like situation, confirmations shall be issued by their governors, with the advice of the *officiales reales* (the king's fiscal ministers) and of the lieutenant-general, *hateado*, where he may be stationed. In 1768, this power of granting and confirming titles to lands was vested in the intendants. In 1774, it was revested in the civil and military governors (see White's Compilation 218). In October 1798, this power was again conferred on the intendant, so far as respected Louisiana and West Florida; but this order did not extend to East Florida. In that province, it remained in the governor.

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The regulations of the governors O'Reilly and Gayoza, and the proceedings of the governors Quisada, Estrada, White, Kindelan and Coppinger, of East Florida, and all the grants which have been brought to the view of this court, together with the reports of the commissioners appointed to adjust land-titles in the territories ceded by Spain, show, that from the year 1774, the power of granting lands was vested in the governors, both of Louisiana and the Floridas. The ordinance of 1798, which transferred it to the intendant of Louisiana and West Florida, did not extend to East Florida; consequently, it remained with the governor of that province. This is admitted by the counsel for the United States.

So far then as respects East Florida, the term "lawful authorities" designates the governor, as certainly as if he had been expressly named in

the eighth article of the treaty. He is the officer who was empowered by by his sovereign to make grants of lands in that provinee, and in ceding the province to the United States, his sovereign has stipulated that grants made by him shall be as valid as if the province had remained under his dominion.

It has been already stated, that the acts of an officer, to whom a public duty is assigned by his king, within the sphere of that duty, are, *primâ facie*, taken to be within his power. This point was fully considered and clearly stated by this court, in the case of *Arredondo*, and the principles on which the opinion rests are believed to be too deeply founded in law *and reason, ever to be successfully assailed. He who would contro- [*453
vert a grant executed by the lawful authority, with all the solemnities required by law, takes upon himself the burden of showing that the officer has transcended the powers conferred upon him, or that the transaction is tainted with fraud. This the counsel for the United States undertakes to do. He insists, that Governor Coppinger has transcended his powers, in making the title now under consideration, for a larger quantity of land than he was empowered to grant, and on a consideration not warranted by law.

The object of Spain, as of all the European powers who made settlements in America, was to derive strength and revenue from her colonies. To accomplish this, grants of lands to individuals became indispensable. History informs us, that this measure was adopted by all. The immense territories held by Spain, affording an almost inexhaustible fund of lands claimed by the crown, could scarcely fail to produce large grants to favorites, as well as a regular system for inviting population into her colonies. The viceroys in New Spain and Peru, who were also governors, possessed almost unlimited powers on this and other subjects ; but in distant provinces, or where sea intervenes, the right of giving title to lands was vested in their governors, with the advice of the king's fiscal ministers and of the lieutenant-general, where he may be stationed. No public restraint appears to have been imposed on the exercise of this power. The officer and his conduct were, of course, under the supervision and control of the king and his ministers, and especially of his council of the Indies.

In 1735, this power was withdrawn from the provincial officers, but was restored to them in 1754. White's Comp. 49 ; Clarke's Land Laws 973. The royal order of the 15th October 1754, confers this power, in general terms, without any limitation on the quantity or on the consideration which may move to the grant. It would excite surprise if, in a monarchy like that of Spain, no rewards in land could be granted for extra services, and no favors could be bestowed. Among the earliest laws for the government of America (White's Comp. 30) is an order that the viceroys of Peru and Mexico "grant such rewards, favors and compensation as to them may seem fit." A subsequent *order (White's Comp. 41), after directing extensive disposi- [*454
tions of territory, adds, "all the remaining land may be reserved to us, clear of any incumbrance, for the purpose of being given as rewards, or disposed of according to our pleasure." In White's Comp. 29, we find the following law : "it is our pleasure that services be remunerated where they shall have been performed, and in no other place or province of the Indies." It would seem, that these remunerations, if in land, would be made by the

governor, when empowered to grant them, provided no other officer was designated.

Two letters of the 3d of April 1800, from an officer authorized to grant lands, are published in Clarke's Land Laws, 989, which would seem to countenance the opinion, that they did not consider their powers as limited to small quantities, but that they might exercise discretion in this respect. They are written by the attorney-general under Morales. The first, addressed to Don Henry Peyroux, is in these words: "I have to reply to your communication No. 9, that I cannot at this time consent to the sale of lands in the manner and under the circumstances requested; and I have to make the same reply to that of the 6th of February last, No. 8, in which you ask for one hundred thousand arpens." The language of this letter is rather that of a man who has exercised his discretion on a subject to which his power extends, than of one who might at once repel the application, by referring to the orders of his sovereign. The second letter is of the same character.

A royal order was issued on the 4th of January 1813, which recites that the General Cortes have decreed as follows: "Considering that the conversion of public lands into private property is one of the measures which the welfare of the people, as well as the advancement of agriculture and industry, most imperiously demands; and desiring, at the same time, that this class of lands should serve as an aid to the public necessities, a reward to the deserving defenders of the country, and a support to the citizens who are not proprietors, the general and extraordinary Cortes do decree: All the uncultivated or public lands, and those of the corporation of cities, with
*455] the timber thereon or without it, both *in the peninsular and adjacent islands, as well as in the ultra-marine provinces, except the commons necessary for the towns, shall be made private property." "In whatever manner these lands be distributed, it shall be in full property." This order was transmitted to the captain-general of the Island of Cuba; but seems to have been repealed on the 22d of August 1814.

We do not find any limitation in the royal orders, restricting the power of the governors to a league square in their grant. The counsel for the United States searches for them in the regulations by colonial officers, prescribing the rules to be observed in the offices established for the purpose of carrying these orders into execution, and in special orders of the crown for specified objects. The first to which reference has been made, were issued by Don Alexander O'Reilly, governor of Louisiana. He recites, among other things, the complaints and petitions which had been presented to him by the inhabitants, together with the knowledge he had acquired of their local concerns, by a visit lately made to the Cote des Allemands, &c., and from an examination made of the report of the inhabitants assembled by his order in each district, states his conviction, that the tranquility of the inhabitants and the progress of culture required, which shall fix the extent of the grants of lands which shall hereafter be made, &c., and adds, "for these causes and having nothing in view but the public good and the happiness of every inhabitant, after having advised with persons well informed in these matters, we have regulated all these objects in the following articles: "1st. There shall be granted to each newly-arrived family," &c.

This is most obviously the language of a man who supposes himself to possess full power over the subject. The rules he prescribes for himself,

do not purport to be limits imposed by a master, but to be marked out by his own discretion, and to be alterable at will. He makes no allusion to orders emanating from his sovereign, marking out the narrow path he is bound to tread; but gives the law himself, in the character of a man invested with full powers.

*The eighth article declares, that "no grant in the Opelousas, Attacapas and Nachitoches, shall exceed one league in front, by one league in depth; but when the land granted shall not have that depth, a league and a half in front, by half a league in depth, may be granted." Had the limitation on the quantity to be granted been five miles square, instead of a league square, is there anything in the information we possess, which would enable us to say, that the one, more than the other, would be an excess of power. [*456

The instructions of Governor Gayoso are dated in September 1797, till which time it may be presumed, that those of O'Reilly remained in force. His instructions are for the government of the commandants of posts, who appear to have been intrusted with the power of making concessions. His regulations, so far as they varied those which pre-existed, constituted, it may be presumed, a new law for the commandants, but do not prove the existence of restrictions on his own power. Like those of O'Reilly, they give every indication of proceeding from an officer possessing general and very extensive powers.

The same observation applies to the regulations of Morales, who was intendant of Louisiana and West Florida. They are dated in July 1799, soon after receiving the order of the king, of October 1798, which directed, "that the intendancy of these provinces be put in possession of the privilege to divide and grant all kind of land belonging to his crown; which right, after his order of the 24th of August 1770, belonged to the civil and military government: Wishing to perform this important charge, &c. "After having examined, with the greatest attention, the regulation made by his excellency, Count O'Reilly, the 18th of February 1770, as well as that circulated by his excellency, the present governor, Don Manuel Gayoso de Lernos, the 1st of January 1788, and with the counsel which has been given me on this subject by Don Manuel Senaro, assessor of the intendancy, and other persons of skill in these matters, that all persons who wish to obtain lands, may know in what manner they ought to ask for them, and on what condition land can be granted and sold, &c., I have resolved that the following regulations shall be observed." He then proceeds to regulate with great exactness, *the course to be observed by those who seek to obtain concessions, the conditions on which they shall be granted, and the conduct to be observed before a complete title will be made. These regulations do not measure his power, but give the law to those who are to execute his orders. [*457

These are the proceedings of the officers who were intrusted with the power to divide and grant the crown lands in Louisiana and West Florida. It is not to be presumed, that different powers were conferred on the officers to whom the same duties were confided in East Florida.

Internal regulations of police were issued by Governor Quesada, on the 2d of September 1790. They commence with saying, "Whereas, I am commanded by royal orders, agreeable to the public wants, to apply the most

reasonable and quick remedies thereto : for the purpose, therefore, of accomplishing this, in the edict commonly called 'internal regulation of police,' I have taken the most conducive steps, notwithstanding, much to my sorrow, there has been so much to amend and establish, that a voluminous code would scarcely be sufficient for me to comprise all, in proportion to the ardent desire which animates me for the prosperity of the province and the service of the sovereign ; wherefore, merely for the present, and reserving hereafter, when permitted by my other duties, the right of attending particularly to this important subject, I therefore make known and order the following : 1st. I grant to all the inhabitants, permanently settled, and subjects of his majesty, in his royal name, for their use, the quantity of land they may require, in proportion to their force, in any part of the desert province, without any exception. To this end, those desirous of obtaining the same, will present themselves to me, within twenty days, stating their circumstances, by memorial ; what lands they have obtained to the present period, and to what quantity, and in what place they are desirous of locating them now ; under the precise condition that it will be without injury to a third person, I will attend to their solicitude, according to the examination I may make thereof; and although the laws of the Indies authorize me to make no absolute distribution of the same, and being in the case of tit. 12th, book 4th, I abstain
*458] therefrom, from powerful motives. *But for the greater security of those interested, I will forward my ideas of representation on the subject to the king, persuaded, that, in consequence thereof, those obtaining grants from me now will be confirmed in the possession of the same."

The law of the Indies to which the governor refers, is inserted in Clarke's Land Laws, p. 967, and is in these words : "That our subjects may apply themselves to the exploration and settlement of the Indies, and that they may live with comfort and convenience, which we desire, it is therefore our will, that houses, grounds, lands, *cavallerias* and *peonias*, be granted to all those who shall settle new lands, in the villages and places that the governor of the new settlement shall mark out for them. There shall be a distinction made between gentlemen and laborers (*peones*), and those who shall be of less grade and merit ; and in proportion to their services, the land shall be increased and ameliorated for prosecuting agriculture, and the tending of cattle." It is not easy to comprehend precisely the influence which this law ought to have on the governors of the Spanish colonies. It was, undoubtedly, the same in them all.

We collect from the extracts from the laws of the Indies which are given us in Clarke's Land Laws, and White's Compilation, that they apply chiefly to the general purposes of population and settlement. For the attainment of these objects, general rules were framed, which contained affirmative instructions to the officers, to be observed in the formation of new settlements, in donations to emigrants, and in the sale and distribution of crown lands. How far a discretion in the execution of these laws, or whether any discretion, was placed in those distant officers to whom they were directed, we have not the means of ascertaining. So far as we are informed, they contain no negative or prohibitory words, and the regular reports of governors must have kept their superiors informed of their proceedings. Mr. White says, p. 9, "I sought assiduously, but have been unable to discover a record or notice of the proceedings upon some grant or concession which

had been made by a captain-general, intendant or governor, and disproved of by the king. I have been unable to ascertain whether any such exist."

The regulations of Governor Quesada, which have been cited, and in which he appears to have deviated, in some *respects, from the law to which he refers, apply to the general objects of cultivation, population and settlement, and ought to conform to the laws which had been framed for those subjects. He seems to grant a general privilege to every individual to acquire lands at will. He retains to himself no discretion, exercises no judgment in the case. "I grant," he says, "to all the inhabitants, permanently settled, and subjects of his majesty, in his royal name, for their use, the quantity of land they may require, in proportion to their force, in any part of the desert province, without exception." Yet he is persuaded that these grants will be confirmed. These extraordinary regulations were in the exercise of that ordinary power to which general laws had been adapted. The right to bestow rewards on those individuals who had rendered any particular service, constituted a distinct branch of power, to which those general laws could not apply. White's Compilation abounds with extracts showing the disposition of the king, that they should be given liberally. [*459

Governor White succeeded Governor Quesada. In conformity with usage, he proclaimed, in October 1803, the rules by which it was his purpose to be governed in the concessions and divisions of lands to the new settlers. He adopts a more rigid practice than had been observed by his predecessors; but these rules appear to emanate from his own judgment, and to be intended to apply only to new settlers, who come to establish themselves in the province.

Don Nicholas Ganido, the agent of the Duke of Alagon, to whom all or nearly all the uncultivated land of East Florida had been granted by the king, addressed a letter to the governor, in February 1819, soliciting official information respecting the validity of titles which had emanated from him or his predecessors. It is not supposed, that this letter, or the answer to it, can be received as authority; but when it is considered, that the Duke of Alagon believed himself to be the lawful proprietor of all the lands not regularly vested in others, and was of course anxious to defeat the titles of others; and that the questions were asked by, and addressed to, those who were best acquainted with the authority of the governor, and the principles on which he acted, we may, on a subject on which so little light can be shed, look at the letter, and the answer to it.

*7th. "In what manner are those concessions considered, which were made to foreigners or natives, of large portions of land, who have disappeared, carrying with them their documents, without having cultivated or even seen the lands granted to them?" [*460

8th. "Can those persons, to whom assignments of large portions of territory have been made for the establishment of factories, such as water or steam mills, who did not then comply, nor have not since presented themselves to establish their machinery (allowing that none exists in the province which is known), be considered now, of in future, with any right? If, in a space of time, such as has elapsed until now, they have not established their works, will there be any reason why said lands should not be declared open, and revert to the class of public lands?"

These questions are asked by the agent of the Duke of Alagon, a favorite of the king. They relate exclusively to those large grants which are now said to have exceeded the power of the governor. They were of course known to the Duke of Alagon, and, we must presume, to his master. Yet an excess of authority is not even suggested. No doubt seems to be entertained of the validity of those which had been completed, by the grant of a full title, or of those still incomplete, the conditions of which have been performed. The inquiry respects those persons only, who had totally neglected the conditions contained in their grants. Their titles alone seem to be doubted even by the Duke of Alagon.

This letter appears to have been referred by the governor to Ruperto Saavedra, who answers all the inquiries made by Ganido. He says, "those who have titles of proprietorship, who have complied with the conditions pointed out to entitle them to them, or have obtained them as a remuneration for services, or other considerations deemed by the government sufficient for the purpose; in these cases, there is a precise obligation to respect said titles, especially, as the said conditions have been established at the will of the governors, and that the royal order of 1790, on the subject, impairs none, but expressly states,that lands shall be granted and surveyed *gratis*, to those foreigners who, of their own free will, present themselves to swear allegiance. *After observing that the donation to the Duke of Alagon is limited "to uncultivated lands which have not been granted," Saavedra says, "yet it is proper to explain, in this particular, that the concessions made to foreigners or natives, of large or small portions of land, carrying their documents with them (which shall be certificates issued by the secretary), without having cultivated or even seen the lands granted to them, such concessions are of no value or effect, and should be considered as not made, because the abandonment has been voluntary, and that they have failed in complying with the conditions prescribed for the encouragement of population. The assignments of extensive portions of territory, which have been made for the establishment of factories, to persons who did not then comply nor have not since presented themselves to establish their mechanical works, ought also to be considered, without any right or value, and said lands declared perfectly free, that they may revert into the class of public lands," &c. This opinion was laid before Governor Coppinger, and approved by him. It recognises the right to grant as "a remuneration for services, or other considerations deemed by the government sufficient for the purpose;" and speaks of concessions to foreigners or natives, for large or small portions of land, as equally valid. The right they give to a complete title, depends on the conduct of the proprietor, on his compliance or non-compliance with the conditions, not on the quantity conceded. The same principle applies "to assignments of extensive portions of territory, which had been made for the establishment of factories," which have not been erected. The extensiveness of the territory assigned, is not made an objection; but the failure to perform the condition on which the concession was made. It is apparent, that both the agent of the duke, and Saavedra, considered these large concessions as within the power of the governor.

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The counsel for the United States relies confidently on the letter of Governor Kindelan, of the 4th of June 1803, addressed to the captain-gen-

eral of Cuba, in which he recommends the militia who had served during the late insurrection, and third battalion of Cuba, as worthy the gifts to which the supreme governor may think them entitled. He suggests granting "to *the soldiers a certain quantity of land, as established by regulations in this province, agreeably to the number of persons in each family." On the part of the United States, it is insisted, that this application could not have been made, had the governor been authorized by the existing laws to reward their services still more liberally. [*462

The argument has, undoubtedly, great weight, but we do not think it conclusive. Grants to a whole class of individuals, a distribution of lands among the body of the colonial militia, and a battalion of a different province, might be expected to belong rather to the general system of distribution than to that branch of it which authorizes rewards to individuals for particular special services, and might be expected to proceed directly from the crown, or to have its express sanction. If not all the extracts from the laws of the Indies, at least, by far the greater part of them, which we find in White's Compilation, relating to rewards, contemplate services peculiar to the individual, not those which are of a general character. We do not think, therefore, that an application to superior authority for a distribution of lands among the militia who have served during a period of dangerous insurrection, is necessarily to be ascribed to the consciousness of wanting power to give a reward in lands to an individual whose invention is deemed meritorious. The favor of granting rewards is expressed in terms indicating the expectation that it is to be exercised by those governors who are also viceroys; but there are no prohibitory words, and the general power of granting lands, extended to the governors of distant provinces, or where sea intervenes, may comprehend granting as a reward for individual merit. The facts that this power was exercised, certainly as early as 1813, by the governor of East Florida, that the condition of the province and the exhausted state of the kingdom seemed to require and justify it, and that the king never disapproved the proceedings of the governor, existed when the treaty was formed. Such was the state of things to which the treaty applied.

It is stated, that the practice of making large concessions commenced *with the intention of ceding the Floridas, and these grants have been treated as frauds on the United States. The increased motives for making them have been stated in argument, and their influence cannot be denied. But admitting the charge to be well founded, admitting that the Spanish government was more liberal in its concessions, after contemplating the cession, than before, ought this circumstance to affect *bonâ fide* titles to which the United States made no objection? While Florida remained a province of Spain, the right of his Catholic Majesty, acting in person or by his officers, to distribute lands according to his pleasure, was unquestioned. That he was in the constant exercise of this power, was well known. If the United States were not content to receive the territory, charged with titles thus created, they ought to have made, and they would have made, such exceptions as they deemed necessary. They have made these exceptions. They have stipulated that all grants made since the 24th of January 1818, shall be null and void. It is understood, that this stipulation was intended to embrace three large grants made by the king, which [*463

comprehended nearly all the crown lands in East Florida. However this may be, it shows, that the subject was in the mind of the negotiators, and that the apprehended mischief was guarded against, so far as the parties could agree. The American government was content with the security which this stipulation afforded, and cannot now demand further and additional grounds. The acquisition of the Floridas was an object of immense importance to the United States. It was urged by other considerations of a still more powerful operation, in addition to vacant lands. It will be regarded, while our Union lasts, as the highest praise of the administration which made it, and of the negotiator who accomplished it. It cannot be doubted, that the terms were highly advantageous, and that they were so considered by all. The United States were satisfied, and had reason to be satisfied, with the provision excluding grants made subsequent to the 24th of January 1818, when the fraud on that provision was prevented by the terms of the ratification of the treaty. All other concessions made by his
*464] Catholic Majesty, or his lawful authorities in the ceded *territories (in the ratification by the king of Spain, "competent authorities"), are as valid as if the cession had not been made. If it be shown by the person holding the concession, that it was made by the officer authorized to grant lands, that it was the duty of this officer to give a regular account of his official transactions, that no grant ever made by the person thus intrusted, had ever been disapproved; courts ought to require very full proof that he had transcended his powers, before they so determine. We do not think this full proof has been given in the present case. The considerations then recited in the grant, in addition to the royal order of October 1790, are, we think, sufficient to maintain it.

It will be proper to take a concise review of the legislation of congress on this subject. The first act passed on the 8th of May 1822, entitled "an fact for ascertaining claims and titles to land within the territory of Florida" (3 U. S. Stat. 709), directs, that commissioners be appointed "for the purpose of ascertaining the claims and titles to lands within the territory of Florida, as acquired by the treaty of the 22d of February 1819." The sixth section enacts, "that every person, or the heirs or representatives of such persons, claiming titles to lands under any patent, grant, concession or order of survey, dated previous to the 24th day of January 1818, which were valid under the Spanish government, or by the law of nations, and which are not rejected by the treaty ceding the territory of East and West Florida to the United States, shall file before the commissioners his, her or their claim, setting forth particularly its situation and boundaries, if to be ascertained, with the deraignment of title, when they are not the grantees or original claimants," &c. "And said commissioners shall proceed to examine and determine on the validity of said patents, grants, concessions and orders of survey, agreeably to the laws and ordinances heretofore existing, of the governments making the grants, respectively, having due regard, in all Spanish claims, to the conditions and stipulations contained in the eighth article of a treaty concluded at Washington, between his Catholic Majesty and the United States, on the 22d of February 1819; but any claim not filed previous to the 31st
*465] day of May 1823, shall be deemed and *held to be void and of none effect." They were directed to examine all these claims; and, if satisfied that they were correct and valid, to confirm them; "provided, that

they shall not have power to confirm any claim, or part thereof, where the amount claimed is undefined in quantity, or shall exceed one thousand acres; but in all such cases shall report the testimony, with their opinions, to the secretary of the treasury, to be laid before congress for their determination." The object of this law cannot be doubted. It was to separate private property from the public domain, for the double purpose of doing justice to individuals, and enabling congress safely to sell the vacant lands in their newly-acquired territories. To accomplish this object, it was necessary, that all claims, of every description, should be brought before the commissioners, and that their powers of inquiry should extend to all. Not only has this been done, but further to stimulate the claimants, the act declares "that any claim not filed previous to the 31st of May 1823, shall be deemed and held to be void and of none effect." This primary intention of congress is best promoted by determining causes finally, where their substantial merits can be discerned. The subsequent acts of congress, respecting the board of commissioners, have no material influence on the question before the court.

On the 23d of May 1828, congress passed "an act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida." This act confirms all claims contained in the reports of the commissioners of East Florida, and in the reports of the receiver and register acting as such, "to the extent of the quantity contained in one league square," and continues the powers of the register and receiver, till the first Monday in the following December. The sixth section enacts, "that all claims to land within the territory of Florida, embraced by the treaty between Spain and the United States, of the 22d of February 1819, which shall not be decided and finally settled, under the foregoing provisions of this act, containing a greater quantity of land than the commissioners were authorized to decide, and above the amount confirmed by this act, and which have not been *reported as ante-dated or forged, by said commissioners, or register and receiver acting as such, shall be received [*466 and adjudicated by the judge of the superior court of the district in which the land lies, upon the petition of the claimant," &c.

The report of the register and receiver being made, congress, on the 26th of May 1830, passed "an act for the final settlement of land-claims in Florida." This act, after confirming the claims it recites, declares, that all the remaining claims which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled upon the same conditions, restrictions and limitations, in every respect, as are prescribed by the act of congress, approved the 23d of May 1828, entitled "an act supplementary to the several acts for the settlement and confirmation of private land-claims in Florida." That act refers to the act approved May the 26th, 1824, entitled "an act enabling the claimants to land within the limits of the state of Missouri, and territory of Arkansas, to institute proceedings to try the validity of their claims."

This last-recited act provides for the trial of claims "protected or secured" by the treaty which ceded Louisiana to the United States. After describing those claims, in terms supposed to comprehend them all, the act proceeds, "in each and every such case, it shall and may be lawful for such person or persons, or their legal representatives, to present a petition to the

district court of the state of Missouri, setting forth, fully, plainly and substantially, the nature of his, her or their claim to the lands, tenements or hereditaments, and particularly stating the date of the grant, concession, warrant or order of survey under which they claim, the name or names of any person or persons claiming the same, or any part thereof, by a different title from that of the petitioner, or holding possession of any part thereof, otherwise than by the leave or permission of the petitioner; and also, if the United States be interested, an account of the lands within the limits of such claim, not claimed by any other person than the petitioner; also the quantity claimed, and the boundaries thereof, when the same may have been designated by boundaries; by whom issued, and whether the said claim has been submitted to the examination of either of the tribunals *467] which have been constituted *by law for the adjustment of land titles, in the present limits of the state of Missouri, and by them reported on unfavorably, or recommended for confirmation."

It has been already stated, that this act does not define the jurisdiction conferred on the court of East Florida, by the act of 1830, but directs the mode of proceeding and the rules of decision. Consequently, those technical averments which are required in the pleadings to show the jurisdiction of a court of limited jurisdiction are not indispensable, and it will be sufficient, if the petition state a case substantially within the law. The court is satisfied, that the petition of George J. F. Clarke is in this respect unexceptionable. It complies, we think, with all the requisites of the law.

The grant which constitutes the foundation of the petitioner's claim, is a complete title, subject to no condition whatever, emanating from the governor of East Florida, who was the lawful authority of his Catholic Majesty, for making grants and concessions of land in that province. The decree of the district court, so far as it affirms the validity of this grant, is, we think, correct. But it appears to us, to confirm the title of the petitioner to lands not comprehended within it.

In his original application to Governor Coppinger, the petitioner describes with precision the land he solicits. The decree conforms to the petition, and the full title, to both. That instrument, after stating the prayer of Clarke, adds, "and having pointed out a competent tract on the west side of St. John's river, above Black creek, at a place called White Spring, that is vacant, &c., therefore, I have resolved to grant, as in the name of his majesty, I do grant, to the said George Clarke, the aforementioned five miles square of land, for himself, his heirs and successors, in absolute property, and I do issue, by these presents, a competent title, whereby I separate the royal domain from the right and dominion it had to said lands," &c.

Afterwards, on the 25th of January 1819, he again presented a petition to the governor, stating, that having examined the lands in the neighborhood of White Spring, he finds that their extension back is in no wise adequate to the expectation and intentions he had formed, nor the purposes for which they were granted to him by the government; and furthermore, *468] *he fears that they will interfere with the lands appertaining to the house of John Forbes & Co., therefore, he prays "that the survey made in pursuance of an order granted by the governor, should be verified,

with this only difference, that the depth back will be contracted to about one and a half miles, and that the said surveyor will survey the balance in the hammocks called langs and cones, situated on the south of Mizzell's lake, which are vacant." The prayer of the petitioner was granted, and the surveys were made. The plats were laid before the district court, and show that one, containing 8000 acres, was surveyed within the bounds of the grant. Two others, one for 5000 and the other for 3000 acres, were surveyed elsewhere. The judge confirmed the title of the petitioner to the three surveys.

The grant conveyed to Clarke the land described in the instrument, and no other. A permit to survey other lands, can be considered only as a new order of the survey, depending for its validity on the power of the person who made it. On the 25th of January 1819, Governor Coppinger did not possess this power. The treaty of February 1819, had declared that all grants (concessions) made after the 24th of January 1818, should be null and void. The acts of congress forbid the allowance of any order of sur vey made after that date. So much of the decree as sanctions these two surveys of 5000 and 3000 acres is, in our opinion, erroneous. But we do not think these irregular surveys affect the title under the original grant, unless the lands have been acquired by others. The vacant lands within its bounds, still belong to the appellee, and may now be surveyed by him.

It is the opinion of this court, that there is no error in so much of the decree of the superior court for the district of East Florida, pronounced in this case in May term 1832, as doth order, adjudge and decree, that this claim is valid, and as confirms the same unto the claimant, to the extent, and agreeable to the boundaries as in the grant for the said lands, and in the plat of survey thereof, made by Don Andrew Burgevin, of 8000 acres, and dated the 24th of February 1817, and that so much of the said decree ought to be affirmed, and it is hereby affirmed accordingly. But that so much of *the said decree as confirms to the claimant the lands contained in two other surveys thereof, made by the said Don Andrew Burgevin; one for 5000 acres, on the 10th of March 1819, and the other for 3000 acres, on the 12th of the same month, is erroneous, and ought to be reversed, and the same is hereby reversed accordingly; and the cause is hereby remanded to the said district court, with directions to take further proceedings therein, in such manner that the residue of the said granted land be surveyed to the said petitioner, within the limits of the grant. All which is ordered and adjudged by this court. [*469

This cause came on to be heard, on the transcript of the record from the superior court from the eastern district of Florida, and was argued by counsel: On consideration whereof, this court is of opinion, that there is no error in so much of the decree of the said court, pronounced in May term 1832, as doth adjudge and decree that the claim of the petitioner in that court is valid, and in so much thereof as confirms the same unto the claimant, to the extent and agreeably to the boundaries as in the grant for the said lands, and in the plat of survey thereof, made by Don Andrew Burgevin, of eight thousand acres, and dated the 24th of February 1819, filed in this cause, and that so much of the said decree ought to be affirmed, and it is hereby affirmed accordingly. But that so much of the said decree as

confirms to the claimants the lands contained in two other surveys thereof, made by the said Don Andrew Burgevin, filed also in this cause, one for five thousand acres, on the 10th of March 1819, and the other for three thousand acres, on the 12th of the same month, is erroneous, and ought to be reversed, and the same is hereby reversed accordingly; and this court doth remand the said cause to the said superior court, with directions to conform to this decree, and to take such further proceedings in the premises, that the remaining eight thousand acres, which have been improperly surveyed without authority, be surveyed on any lands now vacant within the limits of the grant made to the petitioner on the 6th of April 1816, and that the title of the petitioner to the land so surveyed be confirmed. All which is ordered, adjudged and decreed by this court.

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*470] *UNITED STATES, Appellants, *v.* FRANCES RICHARD.

Florida land-claims.

Confirmation of a grant of land by Governor Coppinger made in June 1817. The grant was made to the appellee, on his stating his intention to build a saw-mill.

The decree granted to the petitioner, "license to construct a water saw-mill, on the creek known by the name of Pottsburg, bounded by the lands of Strawberry Hill, and this tract not being sufficient, I grant him the equivalent quantity in Cedar Swamp, about a mile east of McQueen's mill, but with the precise condition, that, as long as he does not erect said machinery, this grant will be considered null and without value nor effect, until that event takes place; and then, in order that he may not receive any prejudice from the expensive expenditures which he is preparing, he will have the faculty of using the pines and other trees comprehended in the square of five miles, or the equivalent thereof, which five miles are granted to him in the mentioned place, the avails of which he will enjoy without any defalcation whatever." The judge of the superior court construed this concession to be a grant of land, and we concur with him.

APPEAL from the Superior Court of East Florida.

The case was argued by *Call*, for the United States; and by *White*, for the appellee.

MARSHALL, Ch. J., delivered the opinion of the court.—This claim is founded on a concession made to the appellee in June 1817, by Governor Coppinger, of 16,000 acres of land, lying in two places, designated in the petition and concession. The surveys were made in 1824. These surveys were laid before the register and receiver, whose report was unfavorable to the title. The appellee, believing it to be well founded, presented a petition to the judge of the district, praying an examination of his title, and that it be confirmed.

The attorney for the United States, in additional to his general objection to the want of power in the governor, contends, that his decree grants permission to cut timber, but does not convey the land itself, and that the condition of the grant has not been performed. The proof is complete, that
*471] the mill, the building *of which was the consideration of the concession, was commenced in 1818, was in full operation in 1820, and the been kept up ever since. The material question is, whether the land itself, or the privilege of cutting timber, was conceded. For this purpose, the petition and concession are to be examined.

Don Francisco Richard, after stating in his petition his intention to

build a water saw-mill, proceeds, "and as for that purpose a fit situation is necessary, such as is offered on Pottsburg creek, bounded by the lands of Strawberry Hill, and the mentioned tract not being sufficient, for the indicated objects, he requests that the quantity equivalent to the object of his petition, be granted to him, about one mile distant, east of McQueen's mill, in order to get cypress for timber; therefore, he supplicates your excellency submissively, to grant him your superior license, and the expressed tract of five miles of land, for the purposes he proposes to himself, in order that, what he solicits being granted, he may, with all possible brevity, commence this advantageous work, and in order that he may have in the said tract the necessary timber." The decree grants to the petitioner, "license to construct a water saw-mill, on the creek known by the name of Pottsburg, bounded by the lands of Strawberry Hill, and this tract not being sufficient, I grant him the equivalent quantity in Cedar Swamp, about a mile east of McQueen's mill, but with the precise condition, that as long as he does not erect said machinery, this grant will be considered null, and without value nor effect, until that event takes place; and then, in order that he may not receive any prejudice from the expensive expenditures which he is preparing, he will have the faculty of using the pines and other trees comprehended in the square of five miles, or the equivalent thereof, which five miles are granted to him in the mentioned place, the avails of which he will enjoy without any defalcation whatever."

This translation was made by order of the court, by the translator. Another translation was made, also by order of the court, by the keeper of the public archives. The difference between them is unimportant. In the last, the petitioner, after stating his object, respectfully prays, that "your excellency will grant him his superior permission, and also five miles square of land, *that he may possess thereon the necessary timber for the purposes aforesaid." The decree grants the permission to build the [*472 mill on the lands adjoining Strawberry Hill, and adds, "if there be not sufficient lands, the deficiency (to the amount granted), on Cedar Swamp." The condition of the grant is then stated nearly as in the preceding translation. The petitioner asks permission to build the mill and a grant of land usually annexed to such permission. It is plainly to be inferred from these documents, that this quantity was five miles square. The same fact is collected from other similar grants. The doubt is, whether the land itself, or only the timber growing on it, is asked and conceded.

The petitioner, in the first translation, says, "that the mentioned tract" (on Pottsburg creek) "not being sufficient for the indicated objects" (that is, not amounting to five miles square), "he requests that the quantity equivalent to the object of his petition, be granted to him in Cedar Swamp. He supplicates his excellency "to grant him his license, and the expressed tract of five miles of land." The application is obviously for land, not merely for the timber growing on it.

The concession is loosely worded, but is understood to allude to land. After granting permission to build a mill on the place designated, the governor adds, "and this tract not being sufficient," plainly indicating the tract on which the mill was to be constructed, "I grant him the equivalent quantity in Cedar Swamp." The word "tract" means land, not timber, and the words "equivalent quantity" refer to the antecedent word "tract,"

and consequently also mean land. After stating the condition of the grant, he adds, "which five miles are granted to him in the mentioned place." This construction is strengthened by the express permission to take timber, while he is erecting the mill, for the purpose of executing the work. While the grant of the tract is of no effect, he is permitted to use the timber on it. The grant of the tract, which depends on building the mill, was obviously supposed to pass something more than was passed by the permission to cut timber until it should have effect. It is difficult to conceive any motive for
*473] granting the timber *and withholding the land. That could not be granted to, or used by another, while the right to the timber existed. It is not to be believed, that the government wished to restrain the grantee from cultivating a part of it. The judge of the superior court construed this concession to be a grant of land, and we concur with him in this construction.

But the surveys laid before the court, were for a larger quantity of land than is expressed in the concession. That made on Pottsburg creek, which was intended for 14,400 acres, actually contains 17,610, being 3210 more than was designed. This difference is accounted for, by the fact, that it includes other tracts previously appropriated, and a quantity of land covered with water. The superior court for the district has very properly, in its opinion, disallowed this excess, so far as respects the land covered with water. But after having adjudged the claim to be valid, "it confirmed and decreed the same to the said claimant, to the extent, and agreeable to the boundaries, as in the grant for the said land, and as in the surveys thereof, made by Andrew Burgevin; provided said surveys do not include a greater quantity of land than 16,000 acres." But the surveys do include a greater quantity, as the petitioner himself states in his petition. This conditional confirmation of the larger survey, according to the exterior boundaries as described in the plat, when the petitioner is confessedly not entitled to all the vacant land lying within those boundaries, is, we think, not to be sustained.

The court is of opinion, that there is no error in so much of the decree of the superior court for the district of East Florida, made in this case, as declares the claim to be valid, and as confirms the title of the petitioner to the land described in the second survey mentioned in the said decree, containing 1600 acres, made the 26th of November 1824, and doth affirm so much thereof. Bnt this court is of opinion, that there is error in so much of the said decree as confirms the title of the petitioner to the land described in the first survey, made on the first day of November 1824, because the said survey is admitted by the petitioner to contain more than
*474] 14,400 acres of land, not previously granted. This court doth, *therefore, reverse so much of the said decree as confirms the title of the petitioner to the land contained in the said survey, according to the exterior boundaries in the said decree described, and doth remand the cause to the said superior court, with directions to conform its decree to the decree of this court, by ordering the said tract to be so surveyed as to contain 14,400 acres of land, not previously granted, and no more.

This cause came on to be heard, on the transcript of the record from the superior court for the eastern district of Florida, and was argued by

counsel: On consideration whereof, this court is of opinion, that there is no error in so much of the decree of the superior court for the district of East Florida, made in this case, as declares to be valid, and as comfirms the title of the petitioner to the land described in the second survey mentioned in the said decree, containing 1600 acres, made the 26th of November 1824; and doth affirm so much thereof. But this court is of opinion, that there is error in so much of the said decree, as confirms the title of the petitioner to the land described in the first survey, made on the first day of November 1824, because the said survey is admitted by the petitioner, to contain more than 14,400 acres of land, not previously granted. This court doth, therefore, reverse so much of the said decree as confirms the title of the petitioner to the land contained in the said survey, according to the exterior boundaries in the said decree described; and doth remand the cause to the said superior court, with directions to conform its decree to the decree of this court, by ordering the said tract to be so surveyed, as to contain 14,400 acres of and, not previously granted, and no more.

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*United States, Appellants, *v.* Antonio Huertas. [*475

Florida land-claims.

The decree of the superior court of East Florida, confirming a concession of land by Governor Kindelan, to the appellee, affirmed.

Appeal from the Superior Court of East Florida.

This case was submitted by *Call*, for the United States; and by *White* for the appellee.

Marshall, Ch. J., delivered the opinion of the court.—The appellee had obtained a concession for 10,000 acres of land, from Governor Kindelan, in March 1813. The petitioner, in his application to the governor, sets forth many and great services rendered to the government, in the course of which he had sustained considerable loss, in the last insurrection. He also states that he has ten children, and fourteen slaves. Governor Kindelan, in his decree making the concession, states his own knowledge of the facts set forth in the petition, but grants the 10,000 acres, with the precise cendition to use the same for the purpose of raising cattle, "without having the faculty of alienating the said tract, without the knowledge of this government."

On the 20th of July 1816, Governor Coppinger granted a complete title to this land. His grant recites the decree made by Governor Kindelan, and the boundaries of the land. This claim was laid before the board of commissioners, and recommended for confirmation. Don Antonio Huertas presented his petition to the court for the district of East Florida, by which tribunal his claim was adjudged valid. It was confirmed to him to the extent, and agreeable to the boundaries as in the grant, and the plat of the survey of said land, made by Andrew Burgevin, on the 19th of September 1818, and filed in the cause.

No exception can be taken to this decree, unless the survey *made [*476
by Burgevin varies from the grant. The description in the survey corresponds, in many respects, with that in the grant; but does not pursue its calls with such regular precision as to prove, completely, their exact

identity. But as this objection was not taken in the superior court for the district, where a survey could have been ordered, if deemed necessary; as the testimony in favor of identity greatly preponderates; and as the judge appears to have entertained no doubt that the survey represented truly the and granted; this court thinks the judgment ought not to be reversed on that account. It is, accordingly, affirmed.

This cause came on to be heard, on the transcript of the record from the superior court for the eastern district of Florida, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said superior court in this cause be and the same is hereby affirmed in all respects.

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*477] *United States, Appellants, *v.* Eusebio M. Gomez.

Florida land-claims.

The decree of the superior court of East Florida, confirming a grant of land to the appellee, affirmed.

Appeal from the Superior Court of East Florida.

The case was submitted to the court by *Call*, for the United States; and by *White*, for the appellee.

Marshall, Ch. J., delivered the opinion of the court.—This claim is for 12,000 acres of land, on Jupiter Island, in East Florida, for which a concession was made by Governor Estrada, on the 16th day of July 1815. The concession is for services, and is unconditional. It was declared valid by the district court to the extent of the grant. The decree is affirmed.

This cause came on to be heard, on the transcript of the record from the superior court for the eastern district of Florida, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said superior court in this cause be and the same is hereby affirmed in all respects.

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*478] *United States, Appellants, *v.* George Fleming's Heirs.

Florida land-claims.

The decree of the superior court of East Florida, confirming a grant of land to the ancestor of the appellees, affirmed.

Appeal from the Superior Court of East Florida.

The case was submitted to the court by *Call*, for the United States; and by *White*, for the appellees.

Marshall, Ch. J., delivered the opinion of the court.—This claim is for 20,000 acres of land, situated on the banks of the river St. Sebastian, to the south of Indian river, between the eastern coast of Florida and the river St. John's. The complete title was granted by Governor Coppinger to George Fleming, the ancestor of the plaintiffs, on the 24th of September

1816. The court decided that it was a valid title, and confirmed it to the plaintiffs to the extent, and agreeable to the boundaries, as set forth in the grant. The judgment is affirmed.

This cause came on to be heard, on the transcript of the record from the superior court for the eastern district of Florida, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said superior court in this cause be and the same is hereby affirmed in all respects.

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*United States, Appellants, *v.* Moses E. Levi. [*479

Florida land-claims.

The decree of the superior court of East Florida, confirming grants of land claimed by the appellee affirmed in part.

Appeal from the Superior Court of East Florida.

The case was submitted to the court by *Call*, for the United States; and *White*, for the appellee.

Marshall, Ch. J., delivered the opinion of the court.—Moses E. Levi presented his petition to the superior court for the district of East Florida, praying that his claim to 65,000 acres of land might be declared valid, and confirmed to him, according to several different grants and surveys under which he derived title. He is not himself a grantee of any one of the tracts, but is a purchaser from various persons.

The first claim stated in his petition, is to 20,000 acres of land, derived from Philip R. Younge. On the 22d of February 1817, Governor Coppinger granted, in full title, to Philip R. Younge, for services, "twenty-five thousand acres of land, south of the place known by the name of Spring Garden, in this form: twelve thousand acres of them, adjoining the lake or pond called Second, and known by the name of Valdes, and the remaining thirteen thousand acres on the pond farther above the preceding, known by the name of Long Pond, the whole west of the river St. John's." This survey was made on the 2d of August 1819, under an order granted by the governor, of the 25th of May of the same year. The certificate and plat of the surveyor, show that the 12,000 acre tract lies on the lake called Second, but omits to state that it was also known by the name of Valdes. The 13,000 acre tract is stated to be on the long lake, called in the grant, Long Pond. The fair presumption, under all circumstances, no objection *to identity having been made in the superior court for the district, [*480
is, that the places are the same. The surveyor has returned another plat, describing 8000 acres, part of the 13,000 acre tract, which, with the 12,000 acre tract, were sold to the petitioner by William Travers, who purchased the same from the grantee.

The second claim stated in the petition, is to 10,400 acres of land, part of a larger tract of 15,000 acres, for which Antonio Huertas obtained a concession from the governor of East Florida, on the 15th of September 1817. This land was divided into four tracts, one of which, amounting to 10,400 acres, was sold and conveyed by Huertas to the petitioner. The concession

grants the land as asked in the petition. The prayer of the petition is for a grant of 15,000 acres of land, on a stream which runs from the west and unites itself with the river St. John, at about twelve miles south of lake George, the survey being to commence at four or five miles west of the river St. John, and the said stream dividing the said tract into two parts." The full title was issued on the 10th day of April 1821, and the survey was made on the 5th day of the same month. It conforms to the concession, except that it does not state the distance from the St. John, at which the survey commenced. This tract was confirmed to Antonio Huertas, as well as to Moses E. Levi; but the conveyance to Levi appears in the proceedings, and is admitted by the counsel for Huertas and for Levi.

The third claim stated in the petition, is to two other tracts of land, comprising together 7400 acres, part of a tract of 10,000 acres, originally conceded in absolute property to Pedro Miranda, on the 10th day of September 1817, by the governor of East Florida. These 7400 acres of land have come, by regular conveyances, from Miranda to the petitioner. The concession grants the land described in the petition. It lies on a stream running from the west, and entering the river St. John, and called in English the Big Spring, about twenty-five miles south of St. George's lake, one
*481] of the fronts *of the said tract to be on St. John's river, and to be divided in two parts by the stream aforesaid. The survey was made on the 5th of April 1821, and conforms, in all respects, to the concession.

The fourth claim stated in the petition is to two other tracts of land, comprising together 8000 acres, being part of a larger parcel, containing 10,000 acres, granted in absolute property to Fernando de la Maza Arredondo, on the 20th of March 1817, the title to which 8000 acres the petitioner derives from the grantee. The land contained in the concession, is described in the petition as lying, "five thousand of them, in a hammock to be found five or six miles east of Spring Garden, and the remaining five thousand, west of the river St. John, contiguous to a creek called Black creek, near Fleming's Island, and the pond called Doctors' Lake." Four thousand acres in each of these tracts have been conveyed to the petitioner, and the surveys conform to the concession.

The fifth claim of the petitioner is to 20,000 acres, part of a tract of 22,000 acres, granted to George J. F. Clarke. The complete title was made by the governor on the 17th of December 1817. The land is described in the grant as lying "in the hammocks, known under the names of Cuscowillo and Chachala, situate west of the place of the river St. John's, where there was a store of the house of Panton, Leslie & Co., and about thirty miles from it." The survey was executed on the 2d of August 1819, in pursuance of an order from the governor, dated the 20th of April of the same year. It conforms to the grant.

The judge of the superior court for the district of East Florida decreed in favor of the validity of all these claims, and confirmed them to the petitioner, to the extent of the several concessions, grants and surveys, under which they were respectively held.

The validity of the several grants depends on the principles which were discussed and decided in the case of the *United States* v. *Clarke*, so that the only question remaining undecided respects the conformity of the surveys with the valid title. This conformity exists in every case, unless it be

in the tract of 10,400 acres, derived from Antonio Huertas. *In that concession, the land is required to lie on a stream, which is sufficiently designated, the survey to commence four or five miles from the St. John's. The land lies on the stream which is required, but its distance from the St. John's is not mentioned. Two decrees of confirmation are entered for this tract. One a separate decree on the 23d, and the other a general decree on the whole claim, on the 26th of May 1832.

This court is of opinion, that there is no error in so much of the decrees of the superior court of the district of East Florida, as declares the claim of Moses E. Levi to be valid, and in so much of the said decree as confirms to the petitioner the lands conveyed to him contained in the grant to Philip R. Younge, on the 22d of February 1817, in the grant to Pedro Miranda, on the 10th day of September 1817, in the grant to Fernando de la Maza Arredondo, on the 20th of March 1817, and in the grant to George J. F. Clarke, on the 17th of December 1817, as described in the said decree; and this court doth affirm the same so far as respects the land claimed by the petitioner in these several grants and concessions.

But this court is of opinion, that there is error in so much of the decree pronounced on the 23d of May 1832, and in so much of the decree pronounced on the 26th of the same month, as confirms the title of the said Moses E. Levi to the land contained in the concession made to Antonio Huertas, according to the boundaries described in the said decrees, and doth so far reverse the same; and doth farther adjudge and decree, that the said cause be remanded to the superior court for the district of East Florida, with directions to conform, in all things, to this decree: And if it shall appear to that court, that the tract of 10,400 acres has not been surveyed, according to the concession made to Antonio Huertas on the 15th of September 1817, that the same be re-surveyed, on the land contained in the said concession, and be decreed and confirmed to the petitioner, if the same be now vacant.

This cause came on to be heard, on the transcript of the record from the superior court for the eastern district of Florida, and was argued by counsel: On consideration whereof, this court is of opinion, that there is no error in so much of the *decrees of the superior court of the district [*483
East Florida, as declares the claim of Moses E. Levi, to be valid, and in so much of the said decree as confirms to the prtitioner, the lands conveyed to him contained in the grant to Philip R. Younge, on the 22d of February 1817; in the grant to Pedro Miranda, on the 10th day of September 1817; in the grant to Fernando de la Maza Arredondo, on the 20th of March 1817; and in the grant to George J. F. Clarke, on the 17th of December 1817, as described in said decree, and this court doth affirm the same so far as it respect the land claimed by the petitioner in these several grants and concessions. But this court is of opinion, that there is error in so much of the decree pronounced on the 23d of May 1832, and in so much of the decree pronounced on the 26th of the same month, as confirms the title of the said Moses E. Levi, to the land contained in the concession made to Antonio Huertas, according to the boundaries described in the said decrees, and doth so far reverse the same; and doth further adjudge and decree, that this cause be remanded to the superior court for the district of East Florida, with directions to conform in all things to this decree, and if it

shall appear to that court, that the tract of 10,400 acres has not been surveyed according to the concession made to Antonio Huertas, on the 15th of September 1817, that the same be re-surveyed on the land contained in the said concession, and be decreed and confirmed to the petitioner, if the same be now vacant.

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*484] *UNITED STATES, Appellants, *v.* PHILIP R. YOUNGE.

Florida land-claims.

The decree of the superior court of East Florida, confirming a grant of land to the appellee, affirmed.

APPEAL from the Superior Court of East Florida.

The case was submitted to the court by *Call*, for the United States; and by *White*, for the appellee.

MARSHALL, Ch. J., delivered the opinion of the court.—This is a claim for 5000 acres of land; part of a grant for 25,000 acres, made by the governor of East Florida to the petitioner, on the 22d of February 1817. Part of this land, 20,000 acres, was conveyed to Moses E. Levi, and both the validity of the claim, and the identity of the land, were established, in the opinion given in that case. The decree of the superior court for the district of East Florida is affirmed.

THIS cause came on to be heard, on the transcript of the record from the superior court for the eastern district of Florida, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed, by this court, that the decree of the said superior court in this cause be and the same is hereby affirmed in all respects.

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*485] *UNITED STATES, Appellants, *v.* JOSEPH H. HERNANDEZ.

Florida land-claims.

The decree of the superior court of East Florida, confirming a concession of land by Governor Coppinger to the appellee, affirmed.

APPEAL from the Superior Court of East Florida.

The case was argued by *Call*, for the United States; and by *White*, for the appellee.

MARSHALL, Ch. J., delivered the opinion of the court.—This is an appeal from a decree of the judge of the superior court for the eastern district of Florida, declaring the claim of the appellee to 20,000 acres of land to be valid. His title commences with the following decree, made by Governor Coppinger on the 18th of November 1817.

"In attention to what the interested party sets forth and represents, and in virtue of the powers which are annexed to my authority, also conforming to the laws and royal dispositions on the distribution of lands, the memorialist being one of those settlers who most contributes to the improvement of

this province; I grant him, in the name of his majesty, and of his royal justice which I administer, the twenty thousand acres of land which he requests, in the places which he points out in his memorial, that he may possess them in absolute property and dominion. And for confirmation, and his security, until titles in form be delivered him, which will be as soon as he shall have accomplished the survey and demarcation of said lands by a surveyor, let the proceedings be lodged in the archives of the notary, and an authenticated copy given to the interested."

The order of survey was made on the 5th of December 1820, and executed by Don Andrew Burgevin, in three surveys, on the 4th and 5th of April 1821. The full title was granted on the 9th of the same month.

The court decreed, that the claim was valid, and confirmed *the same "to the claimant to the extent and agreeably to the boundaries, as in the three surveys of the said land made by Don Andrew Burgevin, and dated the 4th and 5th day of April 1821, and filed as herein is set forth." [*486

As the surveys and full title were made after the 24th day of January 1818, the claim of the petitioner depends entirely on the concession of the 18th of November 1817; and such was the opinion of the district court. That concession having been unconditional, and the power of the governor to make it having been decided in the case of *G. J. F. Clarke*, the only remaining question is, whether the land contained in the surveys is also contained in the concession?

The decree of the governor refers to the petition on which it was made, for a description of the property conveyed. The petitioner, after setting forth his services and meritorious claims, proceeds, "wherefore, he prays your excellency to be pleased to grant him in absolute property and dominion, twenty thousand acres of land: to wit, ten thousand on both banks of the river St. John's, between the place known by the name of Buffalo's Bluff and another place named Mount Tucker; and the remaining ten thousand, on the west side of Lake St. George, the land to be divided into two parts by a brook or creek, which discharges itself into said lake, named Salt Spring, about ten miles more or less to the north of another creek, named Silver Creek." The 10,000 acres on both banks of the river St. John's, are laid of in two surveys of 5000 acres each. One on the east side of the river, between Buffalo's Bluff and Mount Tucker, and the other on the west side of that river. These tracts appear to have been properly surveyed.

The other survey for 10,000 acres, is laid down on the west side of lake St. George, and is divided into two parts, by a brook which discharges itself into the lake, and is in the decree named Salt Spring. In the certificate of the surveyor, it is called White Spring. The decree of the court corresponds precisely with the concession, as does the figure of the plat. No other discrepancy is found, than in the name of the spring. As no notice was taken of this discrepancy in the district court, where the locality of the survey was understood, we suppose, *that the spring may have been known by both names, or that some error may have taken place in transcribing the record. The decree of the district court is affirmed. [*487

This cause came on to be heard, on the transcript of the record from the superior court for the eastern district of Florida, and was argued by counsel:

On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said superior court, confirming the title of the petitioner in this cause be and the same is hereby affirmed in all respects.

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*488] *United States, Appellants, *v.* John Huertas.

Florida land-claims.

The decree of the superior court of East Florida, confirming a concession of land to the appellee, by Governor Coppinger, in 1817, affirmed.

Appeal from the Superior Court of East Florida.

The case was submitted to the court by *Call*, for the United States; and by *White*, for the appellee.

Marshall, Ch. J., delivered the opinion of the court.—This is an appeal from a decree of the court for the district of East Florida, in favor of the validity of his claim to 15,000 acres of land, under a grant made by Governor Coppinger in 1817.

He has failed to allege in express terms, in his petition to the district court, that his claim is protected by the treaty of 1819, and this objection has been taken on the part of the United States. If the reference made in the acts of congress, which authorize this proceeding, to the act of the 26th of May 1824, for the conditions, restrictions and limitations, according to which these claims should be adjudicated, was considered as made, for the purpose of describing the jurisdiction of the court, the objection would, perhaps, be fatal. But it has been decided in the case of *Clarke*, that the words to which this reference is made, do not describe the jurisdiction of the court, but the principles according to which this jurisdiction is to be exercised; and that if the petition shows a case which is really submitted to the court by the law, it is sufficient. This is fully shown by the petition before the court; it states the concession to have been made to him by the Spanish governor, and adds, that he was in possession when the flags were changed. We think, no valid objection exists to the petition.

It is also urged, that the motive to the grant is the service rendered by raising cattle, and the advantage to be derived *from the establishment of a cow-pen. It is added, that the petitioner has ceased to apply the land to the intended object. It having been decided, that land might be granted for meritorious services, the governor must necessarily judge of them; and the full title acknowledges that the conditions of the concession, which was made by Governor Kindelan, in October 1814, had been complied with. After reciting that the conditions of the concession have been fully performed, the grant proceeds: "I have, therefore, granted, and by these presents do grant, in the name of his majesty, to the said Don Juan Huertas, his heirs and successors, the said fifteen thousand acres of land, in absolute property," &c. The title to the land is complete, and cannot depend on his continuing to raise cattle, or to keep up his cow-pen, after the change of government. The only question in the case which has not been already decided, respects the identity of the land decreed with that granted.

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The decree confirms the title of the claimant, "to the extent and agree-

able to the boundaries, as in those surveys made by Don Andrew Burgevin ;" the plats of which are in the record. The first, of 5000 acres, dated the 19th of September 1818, is situated on the east side of St. John's, about six miles southward of Picolata, beginning on the margin of the river, near the mouth of Tocoy creek. The description of the grant is 5000 acres, at a place called Tocoy, five miles above Picolata, and bounded on the west by the river St. John's. The grant also mentions the adjoining lands of others, which the surveyor has omitted to mention. The place called Tocoy in the grant, and the mouth of Tocoy creek, mentioned in the survey, may be considered as the same; since the land binds on the river into which the Tocoy empties itself. The grant places the land five miles above Picolata, on the St. John's ; and the survey places it about six miles south of Picolata. Now, the St. John's runs from south ; and consequently, land on the river above Picolata, is south of Picolata. The identity of this tract is, we think, sufficiently proved.

The grant for the remaining 10,000 acres is placed on *the bank of the river, about twelve miles above a place called the Ferry, below [*490 A. Rayant's, bounded on the south by the lands of John Moore, and thence east, to the head of Deep creek, taking in the east and west banks of the said creek, and bounded on the north by the south west line of Tocoy, and on the west by the river St. John's. This part of the grant is surveyed in two tracts, one of six and the other of four thousand acres. The survey of 6000 acres is bounded on the west by the St. John's river, and on the south by Moore's land, and by vacant land. The certificate of the surveyor does not mention the other boundaries described in the grant. But as the tract is bounded on the west by the river St. John's, and on the south by Moore's land, the omission of the other boundaries is not material.

The remaining survey of 4000 acres contains no description which connects it in any manner with the grant. The order for this survey having been made subsequent to the 24th of January 1818, could give no title to land not within the grant.

There is no error in so much of the decree as declares the claim to be valid, and as confirms the title of the claimant, to the extent and agreeable to the boundaries as in the surveys dated the 19th day of September 1818 and the 31st day of May 1820 ; and so far the same is affirmed ; but there is error in so much of the said decree as confirms the title of the claimant to the extent and agreeable to the boundaries, as in the survey dated the 26th day of June 1820, and the said decree, so far as respects the title to the land contained in that survey, is reversed ; and the cause is remanded to the said district court with direction to reform the said decree, so as to conform the same to the decree of this court, by directing the said 4000 acres of land, to be surveyed within the bounds of the grant to the claimant, if the land be now vacant.

This cause came on to be heard, on the transcript of the record from the superior court for the eastern district of Florida, and was argued by counsel : On consideration whereof, it is the opinion of this court, that there is no error in so much of the decree of the said superior court as declares the claim *of the petitioner to be valid, and as confirms the title of the claimant to the extent and agreeable to the boundaries in the surveys [*491

dated the 19th day of September 1818, and the 31st day of May 1820; and so far, it is ordered, adjudged and decreed by this court, that the said decree be and the same is hereby affirmed. But it is the opinion of this court, that there is error in so much of the said decree as confirms the title of the claimant to the extent and agreeable to the boundaries as in the survey dated the 26th day of June 1820; and that the said decree, so far as respects the title to the land contained in that survey, be and the same is hereby reversed. And it is further ordered and decreed by this court, that this cause be and the same is hereby remanded to the said superior court, with directions to reform the said decree, so as to conform the same to the decree of this court, by decreeing the said 4000 acres to be surveyed within the bounds of the grant to the claimant, if the land be now vacant.

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*492] UNITED STATES, Appellants *v.* FRANCES P. FATIO'S and LOUISA HALLOWES'S HEIRS.

Florida land-claims.

Confirmation of a Spanish grant of land in Florida, to Philip P. Fatio.

APPEAL from the Superior Court of East Florida.

The case was submitted by *Call*, for the United States; and by *White*, for the appellees.

MARSHALL, Ch. J., delivered the opinion of the court.—This was a petition presented in pursuance of the act of congress, of the 23d of May 1828, providing for the adjudication of private land-claims in Florida. The petitioners state that their claim is founded upon a grant for 10,000 acres of land, made by the governor of the province, then under the dominion of the king of Great Britain, to their ancestor, Philip P. Fatio, deceased; and that by the stipulations of the treaty between their Britannic and Catholic Majesties, dated the 3d of September 1783, provision was made in the fifth article, that the British proprietors should be allowed a specified period to sell their lands in the provinces of East and West Florida, which were by that treaty ceded to Spain. It was further provided, that where the value of the possessions was such, that "they should not be able to dispose of them within the said term, then his Catholic Majesty shall grant them a prolongation proportioned to that end." Provision was also made by Spain in favor of such of the British proprietors as remained in the province, and became Spanish snbjects. The ancestor of the petitioners remained and took the oath of allegiance, and the lands were surveyed and confirmed to him by the Spanish authorities.

The title was presented to the commissioners, and a report made in favor of the grant; and by the third section of the act of congress, approved May the 26th, 1830, it was provided, "that all claims derived from the former
*493] British government, *contained in the reports of the commissioners of East Florida, who did not avail themselves of the treaty between Spain and England, signed at Versailles, on the 20th of January 1783, by leaving said province, but who remained in the same, and became Spanish subjects, and whose titles were approved by the Spanish authorities, and

have been recommended by the commissioners, or the register and receiver acting as such, be and the same are hereby confirmed." The treaty referred to in the above recited act, was evidently intended to be that of the 3d of September 1783, and the article is the fifth of that treaty, and not the third, as alleged in the petition.

In addition to the above laws and treaties, the petitioners have proved a possession, which constitutes a title by prescription, by the laws of Spain. It is, therefore, considered, adjudged and decreed, that the decree of the superior court of East Florida, be affirmed.

This cause came on to be heard, on the transcript of the record from the superior court for the eastern district of Florida, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said superior court in this cause, be and the same is hereby affirmed in all respects.

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*United States, Appellants, *v.* William Gibson *et al.*, Heirs of Francis P. Fatio, deceased. [*494

Florida land-claims.

Confirmation of the decree of the superior court of East Florida, in favor of a grant of land to Francis P. Fatio.

Appeal from the Superior Court of East Florida.

The case was submitted by *Call*, for the United States; and by *White*, for the appellee.

Marshall, Ch. J., delivered the opinion of the court.—This was a grant made by Governor Grant, of East Florida, for 10,000 acres of land, whilst that province was under the dominion of Great Britain, and another grant made by Governor Tomyn, to Francis P. Fatio, for 760 acres. The first tract was conveyed by regular deeds to the ancestor of the petitioner. The same questions are involved as in the case of the heirs of Francis P. Fatio. It is, therefore, considered by the court, that the decree of the superior court of East Florida be affirmed.

This cause came on to be heard, on the transcript of the record from the superior court for the eastern district of Florida, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said superior court in this cause be and the same is hereby affirmed in all respects.

*Edward Carrington and others *v.* The Merchants' Insurance Company.

Marine insurance.—Illicit trade.

In a policy of insurance, there was a memorandum, stipulating, "that the assurers shall not be liable for any charge, damage or loss which may arise in consequence of seizure or detention for or on account of illicit trade, or trade in articles contraband of war." This provision is not to be construed, that there must be a legal or justifiable cause of *condemnation*, but that there must be such a cause for *seizure* or *detention*.

It is not every seizure or detention which is excepted, but such only as is made for and on account of a particular trade; a seizure or detention, which is a mere act of lawless violence, wholly unconnected with a supposed illicit or contraband trade, is not within the terms or spirit of the exception; and as little is a seizure or detention, not *bonâ fide* made upon a just suspicion of illicit or contraband trade, but the latter used as a mere pretext or color for an act of lawless violence; for, under such circumstances, it can, in no just sense, be said to be made for or on account of such trade; it is a mere fraud to cover a wanton trespass; a pretence, and not a cause for the tort. To bring a case, then, within the exception, the seizure or detention must be *bonâ fide*, and upon a reasonable ground; if there has not been an actual illicit or contraband trade, there must at least be a well-founded suspicion of it—a probable cause to impute guilt, and justify further proceedings and inquiries; and this is what the law deems a legal and justifiable cause for the seizure or detention.

The ship insured, when seized, had not unloaded all her outward cargo, but was still in the progress of the outward voyage, originally designated by the owners; she sailed on that voyage from Providence, Rhode Island, with contraband articles on board, belonging, with the other parts of the cargo, to the owners of the ship, with a false destination and false papers, which yet accompanied the vessel; the contraband articles had been landed, before the policy, which was a policy on time, designating no particular voyage, had attached; the underwriters, though taking no risks within the exception, were not ignorant of the nature and objects of the voyage; and the alleged cause of the seizure and detention was the trade in articles contraband of war by the landing of powder and muskets, which formed a part of the outward cargo. By the principles of the law of nations, there existed, under these circumstances, a right to seize and detain the ship and her remaining cargo, and to subject them to adjudication for a supposed forfeiture, notwithstanding the prior deposit of the contraband goods; there was a legal and justifiable cause of seizure.

According to the modern law of nations, for there has been some relaxation in practice from the strictness of the ancient rules, the carriage of contraband goods to the enemy, subjects them, if captured *in delicto*, to the penalty of confiscation; but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty; the penalty is applied to the latter, only when there has *been some actual co-operation on their part, in a meditated fraud upon the belligerents, by covering up the voyage under false papers and with a false destination. This is the general doctrine, when the capture is made *in transitû*, while the contraband goods are yet on board; but when the contraband goods have been deposited at the port of destination, and the subsequent voyage has thus been disconnected with the noxious articles, it has not been usual to apply the penalty to the ship or cargo upon the return-voyage, although the latter may be the proceeds of the contraband; and the same rule would seem, by analogy, to apply to cases where the contraband articles have been deposited at an intermediate port, on the outward voyage, and before it had terminated; although there is not any authority directly in point. But in the highest prize courts of England, while the distinction between the outward and homeward voyage is admitted to govern, yet it is established, that it exists only in favor of neutrals who conduct themselves with fairness and good faith in the arrangement of the voyage; if, with a view to practice a fraud upon the belligerent, and to escape from his acknowledged right of capture and detention, the voyage is disguised, and the vessel sails under false papers and with a false destination, the mere deposit of the contraband, in the course of the voyage, is not allowed to purge away the guilt of the fraudulent conduct of the neutral.[1]

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Nothing is better settled both in England and America, than the doctrine, that a non-commis-

[1] See The Bermuda, 3 Wall. 514.; The Springbok, 5 Id. 1.

sioned cruiser may seize for the benefit of the government; and if his acts are adopted by the government, the property, when condemned, becomes a *droit* of the government.

When there has been a *bonâ fide* seizure and detention for and on account of illicit or contraband trade, and by a clause in the policy of insurance it was agreed, that "the assurers should not be liable for any charge, damage or loss, which may arise in consequence of seizure or detention for or on account of illicit trade or trade in articles contraband of war," a sentence of condemnation or acquittal, or other regular proceeding to adjudication, is not necessary to discharge the underwriters. If the seizure or detention be lawfully made, for or on account of illicit or contraband trade, all charges, damages and losses consequent thereon, are within the scope of the exception; they are properly attributable to such seizure and detention as the primary cause, and relate back thereto. If the underwriters be discharged from the primary hostile act, they are discharged from the consequences of it.

CERTIFICATE of Division from the Circuit Court of Massachusetts. The case, as stated in the opinion of the court, was as follows:

On the 1st of October 1824, the defendants, the Merchants' Insurance Company, underwrote a policy of insurance for the plaintiffs, Carrington and others, for $10,000, on property on board the ship General Carrington, at and from the port of Coquimbo, in Chili, to any port or ports, place or places, one or more times, for and during the term of twelve calendar months, commencing on the 5th day of June 1824, *at noon, and ending on the 5th day of June 1825, at noon. The policy was [*497 against the usual perils, and contains the following clause: "It is also agreed, that the assurers shall not be answerable for any charge, damage or loss which may arise in consequence of seizure or detention, for or on account of illicit or prohibited trade, or trade in articles contraband of war. But the judgment of a foreign consular or colonial court shall not be conclusive upon the parties, as to the fact of there having been articles contraband of war on board; or as to the fact of an attempt to trade in violation of the law of nations."

The ship sailed from Providence, Rhode Island, on the 21st of December 1823, cleared for the Sandwich Islands and Canton, but was immediately bound to Valparaiso, in Chili, with such ulterior destination as was stated in her orders; the clearance being a usual and customary mode of clearance at that time for vessels bound to Chili and Peru. A part of the cargo consisted of eighteen cases of muskets and bayonets, each case containing twenty; and three hundred kegs or quarter kegs of cannon powder, containing about twenty-five pounds each; and these, together with the residue of the cargo, belonged to the owners of the ship. At the commencement of the voyage, and until the final loss of the ship, open hostilities existed between Spain and the new governments or states of Chili and Peru. From the orders, it was apparent, that the object of the voyage was to sell the cargo in Chili and Peru. The ship was to proceed direct for Valparaiso, and was to enter that port, under the plea of a want of water. Some part of the cargo was expected to be sold at that port; and thence the ship was to proceed along the coast of Chili and Peru, for the purposes of trade. There was no allegation that the underwriters were not well acquainted with the nature and objects of the voyage.

The ship arrived at Valparaiso, on the 17th of April 1824. At the time of her arrival, and until the loss, as hereinafter stated, the Spanish royal authorities were in possession of a portion of upper Peru, including Quilca and Moliendo, and of the port of Callao, in lower Peru. The rest of Peru,

and the whole of Chili, were in possession of the Peruvian and Chilian new governments. In the harbor of Valparaiso, sixteen casks of the powder were, with the knowledge of the government, *sent on board of an *498] English brig, then in the harbor; and, as the plaintiffs alleged, sold to the master of the brig; and all the muskets, except ten, alleged to be kept for the ship's use, were landed in Valparaiso, with the knowledge of the government.

The ship, with the remainder of her cargo on board, sailed from Valparaiso, early in May following; and arrived at Coquimbo, in Chili, on the 13th day of the same month. There, the remainder of the powder, except nine casks, more or less damaged, alleged to be retained for the ship's use, was landed, in the course of the same month, with the knowledge of the government. The ship sailed from Coquimbo, for Huasco, in Chili, on or about the 5th day of June following, and arrived at Huasco, in the same month; having sold, at the previous port, a part of her outward cargo, by permission of the government, as the plaintiffs alleged, and taken in merchandise belonging to the plaintiffs, and other citizens of the United States, to be delivered at some ports on the coast. The ship arrived at Quilca, with the greater part of her outward cargo still on board, on the 20th of June, and there sold, with the knowledge of the government, as the plaintiffs alleged, a considerable portion of her outward cargo; and delivered some of the articles taken in at the previous ports. While lying at anchor in the roadstead of Quilca, and before she had completed the discharge of her outward cargo, she was seized by an armed vessel, called the Constante, commanded by one Jose Martinez, sailing under the royal flag, and acting, as the defendants alleged, by the royal authority of Spain; but alleged by the plaintiffs to be fitted out and commissioned at Callao, by Jose Ramon Rodil, the highest military commander of the castle of Callao, holding his commission subordinate to La Serna, the viceroy of Peru, under the king of Spain; there being, as the defendants alleged, no regular civil government in the place; the castle of Callao being then, and until the final loss of the ship, besieged by sea and land. The ship was carried from Quilca to Callao, where certain proceedings were had against her and her cargo on board, by the orders of General Rodil; and they were never restored, but were totally lost to the plaintiffs. The alleged cause of the seizure and detention, was the trade in articles contraband of war, by the landing of the powder and muskets in Chili, as aforesaid.

*Upon the trial of the cause, upon the evidence, the following *499] questions occurred, upon which the opinions of the judges were opposed; and, thereupon, it was ordered by the court, on motion of the counsel for the plaintiffs, that the points on which the disagreement happened, should be certified to the supreme court of the United States, for their decision, viz:

1. Whether a seizure and detention, to come within the exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause?

2. Whether, assuming the other facts to be as stated and alleged, and taking the authority of the seizing vessel to be such as the plaintiffs alleged, there was a legal and justifiable cause for her seizure and detention of the General Carrington and her cargo?

3. Whether, assuming the other facts to be as stated and alleged, and taking the authority of the seizing vessel to be such as the defendants alleged, there was a legal and justifiable cause for the seizure and detention of the General Carrington and her cargo?

4. Whether a general in the military service of Spain, subordinate to La Serna, viceroy of Peru, under the king of Spain, but having the actual and exclusive command of Callao, and no civil authority existing therein, and cut off by the forces of the enemy, by sea and land, from all communication with any superior civil or military officer, could lawfully seize and detain neutral property, for contraband trade, if just cause exis'ed for a condemnation thereof?

5. Whether such officer, so situated, had a right to appoint and constitute a court, of which he himself was one, for the trial and condemnation of such property?

6. Whether, supposing the ship to have traded in articles contraband of war, in the ports of Chili, and to have been seized afterwards, in a port of Peru, then under the royal authority, before she had discharged her outward cargo, for and on account of such contraband trade, the underwriters were not discharged, whether the subsequent proceedings for her adjudication were regular or irregular?

The case was argued *Binney* and *Sergeant*, for *the plaintiffs; [*500
and by *Franklin Dexter* and *Webster*, for the defendants.

Binney, for the plaintiffs, contended, upon the first point—whether a seizure and detention, to come within the exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause? That the seizure must be for a legal and justifiable cause, in order to take it out of the policy; an asserted cause is not enough. This is evident from the words of the policy, from the context and circumstances of the insurance, from the reason and spirit of the agreement of the parties, from the mischief of the old law; and from the consequences of a contrary doctrine.

The words of the policy designate an actual, not a supposed trade in contraband goods. There cannot be a seizure for cause of contraband, unless there has been actually such a trade. There could not be a seizure *for or on account of such a trade*, without there having been such a trading. If the fact of the trade does not exist, it is a mere allegation, suspicion or pretence of trade, when there is none in reality. Had such been the intention of the parties, the words would have conformed to it. Both the fact and the illegality must concur, or there is no trade in contraband. This is implied in the term *contraband*. In legal understanding, gunpowder and muskets are not contraband; they may be innocently transported by a neutral; although, under particular circumstances, their transportation may be illegal and a breach of neutrality, and they become contraband. There is no trade in contraband, except what the law declares such; nor can there be a seizure for contraband, when the fact and the law do not concur to prove contraband. The plain natural meaning of the words of the policy is: 1. That there must be a seizure. 2. That there must be a trade in contraband in fact. 3. That it must have been so in law, to justify a seizure.

2. The context is conclusive to show, that the fact of a contraband trade, instead of pretence or allegation, was intended by the parties; and this is

conformable to the law. The language used is intended to exclude the conclusion of a material fact, resulting from the judgment of a foreign court; *501] and this *shows the materiality of that question of fact. Both parties agreed, that the fact was material, and provision is made to guard against the operation of a foreign judgment; and to leave that question open to the parties, if it should become material.

3. The reason and spirit of the whole contract confirm this construction. The intention of the assured was, to secure themselves against unlawful violence. In the policy, there were many exceptions in which the assured took upon themselves the risk of loss. An exception against *unlawful* violence, is contrary to the whole spirit of the instrument. An exception against *lawful* violence is not so, but is inconsistent with its general tenor.

4. The mischief of the contract to the underwriters, before the clause was introduced into policies, sustains the construction. The clause, it is believed, is of Pennsylvania origin, having been introduced into policies of insurance, in Philadelphia, in 1788. In Boston, it was introduced in 1823. Its history is given by Chief Justice TILGHMAN, in *Smith* v. *Delaware Insurance Company*, 3 Serg. & Rawle 81. He says, that the assured contended, that unless the foreign revenue laws were known to them, the underwriters were not answerable for a loss by their violation. Perhaps, it would have been more accurate to say, that they contended, that if the underwriters knew, or were bound to know, that the trade insured was prohibited, they were liable for the loss. This was so held, in 1780, in *Lever* v. *Fletcher*, 1 Marsh. 54, and it is now the doctrine of insurance as held by various authorities. Phillips 276; 1 Emerigon 684; 2 Valin 131; *Parker* v. *Jones*, 13 Mass. 173; *Richardson* v. *Marine Insurance Company*, 6 Ibid. 102, 114; *Seton* v. *Low*, 1 Johns. Cas. 1; 2 Ibid. 77, 120; Phill. 280. The mischief was, that the underwriters were liable, in cases in which they knew, or were bound to know, that the trade was contraband or illicit, for a lawful seizure. The clause was introduced to guard against this mischief. It could never have been regarded as a mischief, that the underwriters were answerable for a seizure which was unlawful; and, consequently, the clause should not be construed to extend to such a seizure.

*5. The consequences of a different construction are, that they *502] make the clause depend, not on the fact of contraband and the law of contraband, but on the allegation, pretext and false suggestion of the wrongdoer. The policy protects against thieves, enemies, pirates; but does not protect against a pirate or thief who robs with a lie in his mouth. It makes the case of the assured, however innocent, fall before the false suggestions of a rogue. These views are sustained by express decisions. *Smith* v. *Delaware Insurance Company*, 3 S. & R. 82; *Faudel* v. *Phœnix Insurance Company*, 4 Ibid. 59; 1 Caines Cas. 29; *Johnston* v. *Ludlow*, 2 Johns. Cas. 481; *Church* v. *Hubbart*, 2 Cranch 187, 236; 1 Marsh. 356; 1 Cond. Rep. 385, 393, 346; 12 Mass. 291; 1 Pick. 281.

II. Upon the second question—whether, assuming the other facts to be as stated and alleged, and taking the authority of the seizing vessel to be such as the plaintiffs allege, there was a legal and justifiable cause for the seizure and detention of the General Carrington and her cargo?—he contended, that on any supposition, there was no justifiable cause of seizure. The only difference as to the facts under which the second and third ques-

tions on which the judges were divided in opinion is, that the authority of the seizing vessel, is, by the plaintiffs, alleged to have been of one kind, and by the defendants, of another kind. The facts sustain the position of the plaintiffs. The facts sustain the following positions:

1. That a seizure for contraband at Callao was illegal and unjustifiable, because there was no contraband on board; it had all been previously landed in Chili. 2. There was nothing in the other facts to make the seizure legal, in consequence of having previously carried contraband. 3. The seizure was not lawful, because no contraband articles were on board, at the time of the seizure. This point, of course, depends on another: that to justify a seizure for contraband, the contraband goods must be seized.

The character of contraband trade, *jure belli*, is in one respect peculiar. It is a trade which a neutral has a right to carry on; and which a belligerent has a right to intercept and to confiscate. It presents the case of conflicting rights. The neutral *to do, and the belligerent to prevent. [*503
If the neutral can carry his right into effect or enjoyment, the belligerent cannot complain. If the belligerent can intercept him, and prevent his carrying it into effect, the neutral cannot complain. The neutral commits no offence by the successful attempt. The belligerent commits none, by defeating it. The contrabrand article is alone the offence in the sight of the belligerent; and the only penalty is the confiscation of the article. These principles flow from authorities. Bynk. ch. 10, Du Ponceau's translation, p. 74, 76, 80, 81; Grotius, lib. 3, ch. 1, 520; Vattel, lib. 3, ch. 7, § 111. 310 (503), § 113; *Richardson* v. *Marine Insurance Company*, 6 Mass. 112-13; *The Santissima Trinidad*, 7 Wheat. 292; 1 Kent's Com. 132; Phillips 152; *Seton* v. *Low*, 1 Johns. Cas. 1; 2 Ibid. 77, 120. The doctrine of the English adjudication is, that the contraband articles must be taken, the goods must be intercepted. It is wrong to say, this must take place when they are *in delicto*. There is no *delictum*. 3 Rob. Adm. 138 (167).

But it is supposed, that some English cases assert the doctrine, that if the contraband is carried outward, and the proceeds homeward, they are prize; and if carried out with false papers, or under a false destination, that the penalty may be inflicted on the ship, or other goods of the same owner on the homeward voyage. This doctrine is a novelty, of which it is supposed, no trace in an earlier authority, than cases decided in 1809, 1810, can be found. These cases are *The Baltic*, and *The Margaret*, cited in Chitty's Law of Nations 128, 143. In England, the doctrine is a novelty, merely the result of their principles in regard to the colonial trade, under the rule of 1756; and has not been applied to any other than a case of that trade. It is not the law of nations, as understood by others nations, and shown by their conventional law, particularly by Spain. In support of these positions, cited, *The Margaretha Magdalena*, 2 Rob. 115; *The Rosalie and Betty*, Ibid. 281; *The Nancy*, 3 Ibid. 102; *The Franklin*, Ibid. 178; 6 Ibid. 390. It is the doctrine of the British, under the rule of 1756, which is, that, whether concealed or not, contraband outward *affected [*504
the proceeds home; and if concealed, affected the ship and cargo. It proceeds on the principle, that the whole trade is illegal, except as the British release or permit it. This is shown by the British orders. 4 Rob. app'x, A; 7 Ibid. 473, app'x, note 1; and the subsequent orders of council,

in 2 Ibid. 126, 311, app'x, 1, 2; 5 Ibid. 367, app'x. This doctrine is an interpolation, as the rule of 1756 was. It has been rejected by the United States. Message of the president of the United States to congress, 27th January 1806, (5 Waites' State Papers, 321). It is entirely an English doctrine, and modern English; not admitted by other nations; and is inapplicable to a voyage to Chili, which is not a relaxed trade, but a trade to an independent country.

The general doctrine claimed for the plaintiffs appears to be sanctioned by the conventional law of nations between the United States and foreign nations—that concealment of contraband goods does not aggravate the case. With England, by the treaty of 1794, art. 17, 18; with France, by the treaty of 6th February 1778, art. 12, 13, 23; of 3d September 1800, art. 12, 13, 20; with Holland, by the treaty of 8th October 1782, art. 10, 11; with Sweden, by the treaty of 3d April 1783, art. 7, 12, 13. The French ordinance of 1681 expressly makes a provision which excludes capture, unless contraband is *on board.* 2 Valin 266, liv. 3, tit. 9, Reglement de 23d July 1704. But the treaty with Spain would seem to leave no doubt on this subject. Treaty of 27th October 1795, confirmed by the treaty of 1819; 8 U. S. Stat. 138; Ibid. 250, art. 15, 17. Such is the Spanish law generally: contraband is to *be found;* and is punishable only *in delicto.* It permits no molestation for having carried contraband articles. 3 Nov. Recop. tit. 8, ley 4, 20 June 1801, art. 34, p. 128.

III. There is no ground on which the seizure was justifiable, within the exception. 1. The contraband was not on board. 2. The papers of the cargo were true. 3. The papers of the ship were true. 4. The clearance was according to the customary form of the place, and in conformity with the requisition of thn treaty. Art. 17, 8 U. S. Stat. 148. 5. There is *505] *no allegation by the captors of anything but the landing of contraband in Chili. 6. Chili is an independent state, and was at the time recognised by the United States as such.

The attention of the court is asked to another suggestion. The question is, whether the facts show a justifiable cause of seizure within the exception; whether landing contraband at Chili, is a justifiable case of seizure, and is within the exception? It may be granted, that it was a justifiable cause of seizure; yet if it is not within the exception, then it was not a justifiable cause of seizure, to exonerate the underwriters; and the second and third questions must be so answered. The exception excludes a loss by seizure for contraband trade: the question is, contraband trade on what voyage? The answer is, contraband trade on the voyage insured from Coquimbo. The exception means not only seizure on the voyage insured for trade or contraband, but seizure for contraband trade on that voyage. This is the true interpretation of the clause. Had not the exception been inserted, the policy would have covered a loss by contraband trade on this voyage. The exception is intended to cut off this loss, and nothing more. The goods are insured for this voyage, and the exception is of contraband in the same voyage. Whether the underwriters are liable for a seizure made for carrying contraband on a former voyage may, or may not be; but the disagreement certified concerns the exception; and the exception does not exclude contraband trade on any voyage but that on which the seizure was made. Upon

either hypothesis, there was no justifiable cause of seizure, upon the second and third questions.

IV. Whether a general in the military service of Spain, subordinate to La Serna, viceroy of Peru, under the king of Spain, but having the actual and exclusive command of Callao, and no civil authority existing therein, and cut off by the forces of the enemy by sea and land from all communication with any superior civil or military officer, could lawfully seize and detain neutral property for contraband trade, if just cause existed for a condemnation thereof? 1. A lawful authority to seize must exist, to bring the case *within the exception. 2. A person so described had not lawful [*506 authority to make the seizure.

1. The seizure must be by lawful authority. It has been shown, that there must be a justifiable cause of seizure. It follows, that the seizure must be by *lawful* authority, to come within the exception. A justifiable seizure is a cause which justifies the party who makes the seizure. If he is not authorized to seize, the trade does not justify the seizure, and is not a justifiable cause of seizure. The lawfulness of a seizure, necessarily regards the party who seizes, as much as the offender. This is not only logically, but it is practically so, under this exception. A seizure by a neutral, by a pirate, by the very person with whom the contraband trade is carried on, would all be included, if lawful authority to seize were not necessary. A seizure by any one who has no right to seize, is an act of mere violence and unlawful force. The trade can be no more than a pretence or a pretext to such a person. The policy covers all risks on contraband, except the lawful penalties of the trade: the losses lawfully arising from it. But seizure without authority is not one of them; but, in terms, is a loss *unlawfully* arising. Every seizure without authority is a trespass and wrong, and the policy means to protect the assured against such injuries.

If the laws of Spain did not prevent a seizure by Rodil, or by a vessel under his commission, the same laws made the seizure unlawful. The court must hold, that the contraband did not justify that seizure; was not a justifiable cause of seizure. The clause does not mean a justifiable cause of seizure in the abstract, but a cause justifying a particular seizure. It means, a seizure according to law, and a trade against the law which justifies him who seizes. The seizure was not made by lawful authority in this case. This depends on the law of Spain. Proceedings by a competent court, affirming the seizure and condemning the goods, might be evidence of authority to seize; but in this case, there are no such proceedings. The authority of Rodil must be shown by the law of Spain. It is a question to be settled by that law; for unless by that law there was authority to made the seizure, it was unlawful. *There is nothing in the particular circumstances set [*507 forth in this question, from which the court can infer a lawful authority in Rodil. The circumstances, as stated, do not confer it, by force of any principles that are applicable to the case as described. Whether a general, so separated, can lawfully seize, must depend upon the power that the laws of his own country give him. The case of necessity it supposes, may be sufficient, if his sovereign so wills; but not otherwise. But so far from the acts of Rodil being authorized by the laws of Spain, by those laws, this act was piratical. The commission to make prize of war must issue from a differ-

ent officer, from the *commandant militar de la marina;* or if there be no such officer, it must be issued by the captain-general of the province.

V. Whether such officer, so situated, has a right to appoint and constitute a court, of which he himself is one, for the trial and condemnation of such property? The court in question, like all other courts, must proceed from the sovereign power of the nation. This principle is particularly true as regards prize courts, whose judgments affect the public relations of the country. It is due to other nations, that such court should be authorized by the sovereign power, and by that power only. 2 Azuni 262; 2 Bro. Civil and Adm. Law 331; 1 W. C. C. 271; 3 Binn. 239. If the constitution of the court is not known, it will be presumed to be legal. If known, and not according to what is usual among civilized nations, it must be proved to have been enacted by competent authority. The erection of a court is the act of the sovereign; nothing is to be presumed in favor of a court erected by a military commander. Is such a court as the question supposes, usual among civilized nations? Appointed by a military commander; appointing himself as one of the judges? Possibly, the law, the sovereign, may authorize such a tribunal: but it cannot be presumed; because it is unusual, and to the highest degree dangerous to the rights of individuals, and to the peace of the public. The existence of the power to appoint courts in the hands of a subject, is unknown in the practice of nations; that of a power to appoint the court, himself a judge, is monstrous. *The defendants mush show the law for it, or the negative must be adapted. But the laws of Spain are the other way. 3 Recop. 125, art. 11, 12, 13.

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VI. Whether, supposing the ship to have traded in articles contraband of war, in the ports of Chili, and to have been seized afterwards, in a port of Peru, then under the royal authority, before she had discharged her outward cargo, for and on account of such contraband trade, the underwriters be not discharged, whether the subsequent proceedings for her adjudication were regular or irregular? 1. There must be a lawful seizure. 2. A lawful cause of seizure. 3. Loss by this cause. The question is, whether lawful adjudication is the only proof? No instance has occurred in which there has been a decision that a loss was within the exception, without such an adjudication. *Church* v. *Hubbard*, 2 Cranch 187, requires it.

It is the duty of the captors to proceed to a regular adjudication. The question is, whether the seizure legally affects the property, or what is the operation of law upon the thing taken? How is this proved? Force is not a title which the world respects, without the aid of law to sanction it. There being two kinds of force, lawful and lawless force, the usages of the civilized world require, that all claims to property by an act of force, should be shown to be lawful force by the adjudication of a competent tribunal. Wheaton on Capt. 262, 274.

What is a lawful court? It is a court of the nation under whose laws, and by whose authority the seizure has been made, and the thing taken is possessed. This is so in the case of a seizure under municipal law. *Hudson* v. *Guestier*, 4 Cranch 293. If it be a capture as prize of war, this same principle prevails. Wheaton on Capt. 261. Such a court alone has jurisdiction. Adjudications by any other are null and void, for want of jurisdiction. The sentence of such a court, regularly pronounced, is universally

respected ; and is conclusive as to its direct effect, and as to the facts directly decided by it. Wheaton on Capt. 274 ; 4 Cranch 434.

These principles will not be questioned as to the property seized. No court can consider a title as passing but by such an adjudication. Every court must consider the seizure *as an act of mere force, until its legality is adjudged by such a court. The same is true as to ques- [*509 tions of the same kind, collaterally arising under a policy of insurance. The court is bound to hold the same doctrine in a collateral inquiry, as if the property were brought before them. This court has said, that if adjudication is not obtained in reasonable time, the seizure must be regarded as trespass. *Hudson* v. *Guestier*, 4 Cranch 293. If it is to be so regarded in questions of title to property, it must be so as to every question concerning that trespass. The underwriter who sets up the capture, is bound to prove the very fact, that the property was lawfully lost by a seizure for contraband trade. The utmost this court can say is, that it ought to have been so lost; but nothing can show that it was lost according to the law of another country, but the judgment of a competent court. The difficulty in a case of prize is insuperable. A court of common law cannot adjudge it. It belongs to the prize courts, both the direct and consequential question. 2 Doug. 594, 613 ; 6 Taunt. 439. This court has regarded the condemnation as necessary to bring the case within the exception. *Church* v. *Hubbard*, 2 Cranch 187.

Franklin Dexter, for the defendants.—The answer to the first question must depend on the sense in which the word *cause* is to be understood. If it means, as the counsel for the plaintiff seems to contend, the actual state of the facts, in contemplation of which the seizure was made, the question must be answered in the negative : because, to answer it in the affirmative, would be to require that to discharge the underwriters, legal and justifiable cause of condemnation, as well as of seizure and detention, must have existed. Such is not the language of the question, nor of the exception in the policy. It is said, on the other side, that a vessel cannot, with propriety, be said to be seized, for or on account of contraband trade, unless such trade had been carried on. We think, the common use of language does not require this. It is not unusual, to say, that claims are made, suits brought, and even judgments *rendered, for or on account of a cause of action, without meaning to affirm that the cause exists in point of fact. It [*510 would surely be no solecism to say, that the General Carrington had been seized for contraband trade, but on examination was found innocent and discharged. We understand the word *cause*, in the question, and the words *for or on account of*, in the policy, to relate to the motive of the seizers ; and that any seizure is for and on account of contraband, which is made because the party *bonâ fide* believes such contraband trade to have been carried on. It is a question of good faith ; involving, of course, the question of probable cause on the one hand, and of wanton and lawless violence on the other. It is said, if such be the construction, seizures under mere pretext of contraband trade will discharge the underwriter; and that the motive cannot be proved. We answer, that the question of probable cause is always open to the party, indicative of the motive, and can be tried by a jury, as well as in other causes. We think, this construction will reconcile the apparent contradictions of the cases cited. Those in which it is said,

that there must have been both illicit trade and a seizure on account of it, arose under exceptions of breaches of foreign municipal laws, where the question was not as to the fact of trading; but whether the prohibitory law actually existed, and was binding on the party. The case of *Church* v. *Hubbard*, so much relied on, was decided on the want of sufficient proof of the alleged law of Spain; and the *dicta* of the court which have been cited, were mere concessions to counsel, made *arguendo*. Taking the whole opinion in that case together, we think, it plainly takes the distinction between *bonâ fide* and colorable seizures. This is confirmed by the case of *Livingston and Gilchrist* v. *Maryland Insurance Company*, 7 Cranch 506; which turned, like the present, on a question of national law. The court there decided, that an actual breach of the law of nations was not necessary to discharge the underwriters.

The argument drawn from the proviso of the exception, that the judgment of a foreign consular or colonial court, shall not be conclusive of the fact of contraband goods having been on board, is carried too far. That proviso does not imply, that the fact of such goods having been on board, was thought necessary to the discharge of the underwriter; but only, that *511] a *fact so material in determining the character of the seizure, shall not be conclusively determined by the courts of the captors. It is a fact to be submitted to a jury, to show probable cause for the seizure, or the want of it.

It is admitted, that the language of some of the cases cited, would seem, at first, to favor the position taken for the plaintiff; but when taken in connection with the facts before the court, they will be found consistent with the view of the defendants. In other cases, equally respectable *dicta* may be found, expressly recognising the doctrine that actual delinquency is not necessary to discharge the underwriter. *Livingston and Gilchrist* v. *Maryland Insurance Company; Radcliff* v. *United Insurance Company*, 7 Johns. 38. The law of Massachusetts is the *lex loci contractûs;* and in the case of *Higginson* v. *Pomeroy*, 11 Mass. 104, this is very clearly stated. The case of *Smith* v. *Delaware Insurance Company*, was decided chiefly on the ground that the foreign law did not extent to the territory in which the seizure was made. *Faudel* v. *Phœnix Insurance Company*, was decided on the ground, that the sentence of the court showed that the seizure was not within the exception. There is no case which refuses to discharge the underwriter under this exception, because the captors have been honestly mistaken in the facts. This point, however, is of little importance to the present case, because there is no dispute about facts.

Webster, for the defendants, considered the case under three heads. 1. The contract, as to its nature and object. 2. The facts applicable to the case under the policy. 3. The law growing out of the facts.

1. As to the exception in the policy, and the risks assumed by the undertakers under it, he contended, that they took upon them no risks for or on account of contraband goods or illicit trade. The words of the exception are the same as if they were in the form of a warranty by the assured. All risks which are fairly to be laid to the account of illicit or contraband trade, were not taken by the insurers, but were to be borne by the owner. The

underwriters assumed all sea risks, and the other risks enumerated in the policy.

*2. The voyage was from Providence to where the outward cargo was to be landed. The ship was to enter at Valparaiso, under a false [*512 pretence—the want of water, and then proceed to Coquimbo, where the risk was to commence, on the 5th of June 1824. The ground of the plaintiffs' claim must be for seizure and detention, as all the counts in the declaration allege that as the cause of the loss, except one, which asserts a loss by piratical seizure. The seizure was the cause of the loss, and this is alleged to have been for contraband or prohibited trade. Was this the true cause? If it was, the underwriters are excused; but if there was not such a seizure, then the underwriters are liable under the general words in the body of the policy. There can be no doubt, but that the contraband trade was the cause of the loss; if there had been no contraband trade, there would have been no seizure. It is said, the seizure was too late; but this is not a question for the underwriters. It is enough, that the seizure was actually on account of contraband trade. Probable cause was enough, whether there was cause or not for condemnation. 3 W. C. C. 127; *Higginson* v. *Pomeroy*, 11 Mass. 104, 110. The contract in the present suit was made in Massachusetts; if there is any discrepancy between the law of different states, the *lex loci* must govern. The cases in 7 Johns. 38, and 9 Ibid. 281, fully sustain the ground assumed for the defendants. The excuse is that the vessel was not taken *in delicto*. If this be so, it is a question with which the underwriters have no concern. But this assertion is denied. When the vessel was seized, a state of facts existed, which warranted the seizure and condemnation. The risk was produced by the conduct of the plaintiffs, and was not assumed by the underwriters. By their conduct, the vessel was forfeited; and nothing but the form of a condemnation was wanted.

3. The rule of 1756, is not necessarily involved in the decision of this case; but it is denied, that any new rule in international law was then introduced. That rule arose out of the war of *1756; and it was [*513 established to prevent the trade of the Dutch with the French colonies, under Danish licenses. To show that it was the ancient, and well-settled law of nations, that trading in contraband goods forfeited the vessel, he cited, 3 Rob. 178, and note. The relaxation of the law was, that the articles only should be seized when taken *in delicto*; excusing the ship and innocent cargo. If there was a fraudulent destination originally, the ancient rule applied; the vessel and the innocent cargo were forfeited on account of the fraud. When the vessel is forfeited for carrying on contraband trade, you may pursue her, until she is taken; but public convenience requires a limit, and that limit is fixed by universal assent, to the end of the voyage. The same rule exists as to all seizures for breach of revenue laws. In Chitty's Law of Nations 128, is the case of a vessel seized on the outward voyage. There is necessarily a difference as to the right of seizure for illicit trade, and for trade in contraband articles. In the first case, the vessel was in the prohibited port; in the latter, she was not, but in a neutral port. In the present case, there could not have been a visitation and search; for her false papers showed she was bound to the Sandwich Islands and Canton. If this is a common practice, it is so much the worse. But this can have no operation on the rights or exemptions of the under-

writers; for it would have no effect on the right of the belligerent to seize. 6 Rob. 376, note; *The Edward*, 4 Ibid. 56.

It is insisted, that it is not necessary to show there was cause for condemnation. If there was cause for seizure, it is sufficient, under the exception in the policy, to discharge the underwriters. In the cases cited for the plaintiffs, it may have been shown there was not cause for condemnation; but in those cases, it was considered there was cause for seizure. 3 Rob. 138, 141; 2 Ibid. 115; 1 Acton 25, 333.

The sixth point was intended to raise the question, whether the underwriters could be discharged, before condemnation. This would delay the question of their liability, until a condemnation; and this cannot be.

*514] *Sergeant*, in reply, stated, that the form of the policy *adopted in this case has been in use in Boston since 1823; and the exception as to illicit trade, is in all the policies in the United States; the part as to contraband trade only is new. The principle adopted by the clause had long been recognised in the courts of the United States.

The situation of the country, at the time of the seizure, was peculiar. Chili had actually established her independence. The possession of Rodil was temporary and accidental; and whenever actual possession of any place came into the hands of the officers of Spain, the laws of the Indies applied; and all trade with the place became illegal.

There must be an interpretation of the contract consistent with the *bonâ fide* intention of both parties to it. The parties had no reference to anything which had taken place before the policy attached, on the 5th June 1824, at Coquimbo. The policy is dated in October 1824, and was on the property, "lost or not lost." When the policy attached, the vessel had no contraband articles on board, and never afterwards had; and it may be presumed, that the underwriters knew she had some contraband goods on board. She had not the proceeds of the contraband goods on board, when she was seized in Quilca by an armed vessel.

The whole of the questions in the case turn on the construction of the clause of exception. The first question is, whether the seizure was for a justifiable cause. It must be legal and justifiable, or there was no cause at all. The court cannot say, whether the seizure was *bonâ fide*. Nor can they say, whether there was probable cause or not. They have not the evidence before them. There must be a legal and justifiable cause, or there is no cause.

The clause is not a warranty; it is an exception. A warranty is not of the like effect as an exception. The interpretation of the clause was settled in principle, before it was inserted in policies. It was so settled in 1804, in the case of *Church* v. *Hubbard*, 2 Cranch 187, which was a Massachusetts case; so, 2 W. C. C. 130, decided in 1807; 3 Serg. & Rawle 74, decided in 1817; 4 Ibid. 59; 1 Caines Cas. 29, decided in 1801; 2 Johns. Cas. 481; Marshall on Insurance 346, published in 1810. There never has been a

*515] decision to the contrary. *The principle the plaintiffs claim and rest the case upon is, that there must be a legal and justifiable cause of seizure, and one which would justify a condemnation. *Higginson* v. *Pomeroy*, 1 Mass. 194, when examined, sustains this principle.

The clause allows the contraband trade to be carried on, but at the risk

of the assured; and it rests with the underwriters to show that the seizure was for an unlawful and prohibited trade. A mere lawless seizure is not, therefore, within the exception. The law, as understood, made the underwriters liable in a case like this, and the exception was introduced to excuse them. The specific kind of loss must be by seizure or detention. Mere allegation, of course, will not do. The cause must be shown by a condemnation.

Contraband is a lawful trade, as has been decided in the courts of the United States; and this court will not now pronounce such a trade illegal, and expose the whole vessel and cargo to condemnation. This is the doctrine contended for on the other side. It is denied, that the principle of the law of nations authorizes a seizure and condemnation, after the goods are landed. The cases cited by the opposite side, do not support the position; and it is exclusively British doctrine. There never is an adhering taint, when the offending article was lawful, and no proceeds of it on board, or when there is not a false destination; neither of which existed in this case This court would not condemn the cargo for what the vessel had done with respect to contraband. The case of *The Santissima Trinidad*, 7 Wheat. 292, and the cases in New York show that contraband trade is lawful.

The fourth question is founded on the assumption, that this was enemy's property. It is admitted, that if it had been, any one may seize. But it is denied to have been enemy's property. It may have been liable to seizure, *jure belli;* but this must be under the commission of a regular privateer, when a neutral is concerned. The neutral has the right to claim the benefit of being carried in and tried by a regular tribunal, established by the sovereign of the country. It then becomes the act of the government, which is accountable to the injured party.

*The last three questions, in order to be decided in favor of the underwriters, must decide that it is immaterial how, or in what manner, the seizure was made, if the trade had been a trading in contraband. Unless the court was legally constituted, the trial and condemnation were nothing, and were absolutely void. [*516

Story, Justice, delivered the opinion of the court.—After stating the case, he proceeded: This cause comes before the court upon a certificate of a division of opinion of the judges of the circuit court for the district of Massachusetts. Upon the trial of the cause upon the evidence, the parties propounded certain questions, upon which the circuit court (with the assent of the parties) certified a division of opinion, for the purpose of obtaining the final decision of this court in regard to them.

The first is, whether a seizure and detention, to come within the exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause? The question here propounded is not, whether there must be a legal or justifiable cause for condemnation? but simply, whether there must not be such cause for the seizure and detention? And we are of opinion, that the question ought to be answered in the affirmative. The language of the exception, when properly construed, leads to this conclusion; and it is confirmed by authorities standing upon analogous clauses. The language is, "the assurers shall not be liable for any charge, damage or loss which may arise in consequence of seizure or detention for or on account of illicit trade, or trade in articles contraband of war." It is not,

then, every seizure or detention which is excepted ; but such only as is made for, and on account of, a particular trade. A seizure or detention, which is a mere act of lawless violence, wholly unconnected with any supposed illicit or contraband trade, is not within the terms or spirit of the exception. And as little is a seizure or detention, not *bonâ fide* made upon a just suspicion of illicit or contraband trade, but the latter used as a mere pretext or color for an act of lawless violence ; for under such circumstances, it can in no just sense be said to be made for or on account of such trade. *It is a mere fraud, to cover a wanton trespass ; a pretence and not a cause for the tort. To bring a case, then, within the exception, the seizure or detention must be *bonâ fide*, and upon a reasonable ground. If there has not been an actual illicit or contraband trade, there must, at least, be a well-founded suspicion of it, a probable cause to impute guilt, and justify further proceedings and inquiries ; and this is what the law deems a legal and justifiable cause for the seizure or detention. The general words of the policy cover the risks of restraints and detainments of all kings, princes and people ; the exception withdraws from it such as are *bonâ fide* made for, and on account of, illicit or contraband trade. So that, upon the mere terms of the exception, there would not seem any real ground for doubt. But if there were, the next succeeding clause, associated with it, demonstrates that such must have been the understanding of the parties. It is there said, that the judgment of a foreign consular or colonial court shall not be conclusive upon the parties, as to the fact of there having been articles contraband of war on board, or as to the fact of an attempt to trade in violation of the laws of nations. Now, if a mere lawless seizure or detention, under the pretext of illicit and contraband trade, were within the exception, the inquiry, whether there had been contraband articles on board, or an attempt of illicit trade, would be, in most, if not in all, cases, wholly unimportant and nugatory to the assured, for whose benefit the clause is introduced ; since the sentence would always establish a pretence for the seizure and detention, although not a justifiable cause for it. The reasonable interpretation of the clause must be, that it was introduced to enable the assured to disprove the existence of justifiable cause for the seizure or detention, by showing that the facts did not warrant it.

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We think that the authorities cited at the bar, lead to the same conclusion. In *Church* v. *Hubbard*, 2 Cranch 187, where the exception was, "that the insurers do not take the risk of illicit trade with the Portuguese, and the insurers are not liable for seizure by the Portuguese for illicit trade ;" the main question was, whether an attempt to trade, not consummated by actual trading, was within the exception. The court held that it was. On that occasion, the chief justice said, "no seizure, not justifiable under the laws and regulations established by the crown of Portugal, for the *restrictions of foreign commerce with its dependencies, can come within this part of the contract ; and every seizure which is justifiable by those laws and regulations must be deemed within it." And applying this language to the circumstances of the present case, we may add, that no seizure or detention, not justifiable by the law of nations, can come within the present exception, and every seizure which is justifiable by the law of nations, must be deemed within it. The cases of *Smith* v. *Delaware Insurance Company*, 3 Serg. & Rawle 74 ; and *Faudel* v. *Phœnix Insurance Company*, 4 Ibid. 29 ;

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Johnston and Weir v. *Ludlow*, 1 Caines Cas. 29; s. c. 2 Johns. Cas. 481,(*a*) adopt a similar doctrine, if they do not proceed beyond it. The case of *Higginson* v. *Pomeroy*, 11 Mass. 104, contained an exception of "illicit trade with the Spaniards;" and the court held, that the exception extended to every seizure and detention suggested by the prohibitions of trade and intercourse, as the means of enforcing them, and whether of prevention or of punishment for infraction; and that, therefore, it extended to cases where the charge of illicit trade with the Spaniards might be ultimately repelled, and where the property seized might be, in consequence, acquitted, under the circumstances of the particular case. But this supposes, that there was probable or justifiable cause for the seizure, *bonâ fide* existing; and the court explicitly assented to the general doctrine in *Church* v. *Hubbard*. It is true, that the learned chief justice, in delivering the opinion of the court, added, that "perhaps (we may add), although not necessary to the present decision, even arbitrary acts of the Spanish colonial governments, if assumed to be justified on their parts by the prohibitions of trade and intercourse, are, we think, within the exception of seizure for illicit trade." This is professedly a mere *dictum* of the court; and giving it every reasonable force as authority, it proceeds on the supposition, that such arbitrary acts are *bonâ fide* done, and are not mere pretexts to cover an illegal seizure.

The second question is, whether, assuming the other facts to be a stated and alleged above, and taking the authority of the seizing vessel to be such as the plaintiffs allege (that is to say, of an armed vessel fitted out and commissioned at Callao by Rodil), there was a legal and justifiable cause for the seizure of the General Carrington and her cargo? [*519 The third is precisely the same in terms, except taking the authority of the armed vessel to be such as the defendants allege (that is to say, to be an armed vessel sailing under the royal Spanish flag, and acting by the royal authority of Spain).

Both these questions present the same general point, whether there was, under the circumstances of the case, a legal and justifiable cause for the seizure and detention of the ship and her cargo. The facts material to be taken into consideration in ascertaining this point are, that the ship, when seized, had not landed all her outward cargo, but was still in the progress of the outward voyage originally designated by the owners; that she sailed on that voyage from Providence, with contraband articles on board, belonging, with the other parts of the cargo, to the owners of the ship, with a false destination and false papers, which yet accompanied the vessel; that the contraband articles had been landed, before the policy, which is a policy on time, designating no particular voyage, had attached; that the underwriters, though taking no risks within the exception, were not ignorant of the nature and objects of the voyage; and that the alleged cause of the seizure and detention was, the trade in articles contraband of war, by the landing of the powder and muskets already mentioned. If, by the principles of the law of nations, there existed, under these circumstances, a right to seize and detain the ship and her remaining cargo, and to subject them to adjudication for a supposed forfeiture, notwithstanding the prior deposit of

(*a*) See also Laing *v.* United Insurance Company, 2 Johns. Cas. 174; s. c. Id. 487; Tucker *v.* Juhel, 1 Johns. 20.

the contraband goods; then the question must be answered in the affirmative, that there was a legal and justifiable cause.

According to the modern law of nations, for there has been some relaxation in practice of the strictness of the ancient rules, the carriage of contraband goods to the enemy, subjects them, if captured *in delicto*, to the penalty of confiscation; but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty. The penalty is applied to the latter, only when there has been some actual co-operation, on their part, in a meditated fraud upon the belligerents, by covering up the voyage under false papers, and with a false
*520] destination. This *is the general doctrine, when the capture is made *in transitû*, while the contraband goods are yet on board. But when the contraband goods have been deposited at the port of destination, and the subsequent voyage has thus been disconnected with the noxious articles, it has not been usual to apply the penalty to the ship, or cargo upon the return-voyage, although the latter may be the proceeds of the contraband. And the same rule would seem, by analogy, to apply to cases where the contraband articles have been deposited at an intermediate port, on the outward voyage, and before it had terminated; although there is not any authority directly in point. But in the highest prize courts of England, while the distinction between the outward and homeward voyage is admitted to govern, yet it is established, that it exists only in favor of neutrals, who conduct themselves with fairness and good faith in the arrangements of the voyage. If, with a view to practice a fraud upon the belligerent, and to escape from his acknowledged right of capture and detention, the voyage is disguised, and the vessel sails under false papers, and with a false destination, the mere deposit of the contraband, in the course of the voyage, is not allowed to purge away the guilt of the fraudulent conduct of the neutral. In the case of *The Franklin*, in 1801, 3 Rob. 217, Lord Stowell said, "I have deliberated upon this case, and desire it to be considered as the settled rule of law received by this court, that the carriage of contraband with a false destination, will make a condemnation of the ship, as well as the cargo." Shortly afterwards, in the case of *The Neutralitet*, 1801, 3 Rob. 295, he added, "The modern rule of the law of nations is, certainly, that the ship shall not be subject to condemnation for carrying contraband goods. The ancient practice was otherwise; and it cannot be denied, that it was perfectly justifiable in principle. If to supply the enemy with such articles is a noxious act, with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose, cannot be innocent. The policy of modern time has, however, introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscated for that act. But this rule is liable to exceptions. Where a ship belongs to the owner of the cargo, or where the ship is going on such service, under a
*521] false destination or false *papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient rule." The cases in which this language was used, were cases of capture upon the outward voyage.(*a*) The same doctrine was afterwards held by the same learned judge to apply to

(*a*) See also, The Edward, 4 Rob. 68.

cases, where the vessel had sailed with false papers, and a false destination upon the outward voyage, and was captured on the return-voyage.(a) And, finally, in the cases of *The Rosalia* and *The Elizabeth*, in 1802 (4 Rob. note to table of cases), the lords of appeal in prize cases held, that the carriage of contraband outward, with false papers, will affect the return-cargo with condemnation. These cases are not reported at large. But in the case of *The Baltic*, 1 Acton 25, and that of *The Margaret*, Ibid. 333, the lords of appeal deliberately re-affirmed the same doctrine. In the latter case, Sir WILLIAM GRANT, in pronouncing the judgment of the court, said, "The principle upon which this and other prize courts have generally proceeded to adjudication in cases of this nature (that is, where there are false papers), appears simply to be this; that if a vessel carried contraband on the outward voyage, she is liable to condemnation on the homeward voyage. It is by no means necessary, that the cargo should have been purchased by the proceeds of this contraband. Hence, we must pronounce against this appeal; the sentence (of condemnation) of the court below being perfectly valid and consistent with the acknowledged principles of general law."

We cannot but consider these decisions as very high evidence of the law of nations, as actually administered; and in their actual application to the circumstances of the present case, they are not, in our judgment, controlled by an opposing authority. Upon principle, too, we think, that there is great soundness in the doctrine, as a reasonable interpretation of the law of nations. The belligerent has a right to require a frank and *bonâ fide* conduct on the part of neutrals, in the course of their commerce, in times of war; and if the latter will make use of fraud and false papers, to elude the just rights of the belligerents, and to cloak their own illegal purposes, there is *no injustice in applying to them the penalty of confiscation. [*522
The taint of the fraud travels with the party and his offending instrument, during the whole course of the voyage, and until the enterprise has, in the understanding of the party himself, completely terminated. There are many analogous cases in the prize law, where fraud is followed by similar penalties. Thus, if a neutral will cover up enemy's property under false papers, which also cover his own property, prize courts will not disentangle the one from the other, but condemn the whole as good prize. That doctrine was solemnly affirmed in this court, in the case of *The St. Nicholas*, 1 Wheat. 417.

Upon the whole, our opinion is, that the general question involved in the second and third questions, whether there was a legal and justifiable cause of capture, under the circumstances of the present case, ought to be answered in the affirmative. The question, as to the authority of the cruiser to seize, so far as it depends upon her commission, can only be answered in a general way. If she had a commission, under the royal authority of Spain, she was, beyond question, entitled to make the seizure. If Rodil had due authority to grant the commission, the same result would arise. If he had no such authority, then she must be treated as a non-commissioned cruiser, entitled to seize for the benefit of the crown; whose acts, if adopted and acknowledged by the crown, or its competent authorities, become equally binding. Nothing is better settled, both in England

(a) See The Nancy, 3 Rob. 122; The Christiansberg, 6 Id. 376.

and America, than the doctrine, that a non-commissioned cruiser may seize for the benefit of the government; and if his acts are adopted by the government, the property, when condemned, becomes a *droit* of the government. (*a*)

The fourth and fifth questions involve the point as to the authority of Rodil. The fourth is in the following terms: Whether a general in the military service of Spain, subordinate to La Serna, viceroy of Peru, under the king of Spain, not having the actual and exclusive command at Callao, and no civil authority existing therein, and cut off by the forces of the *enemy, by sea or land, from all communication with any superior civil or military officer, could lawfully seize and detain neutral property from contraband trade, if just cause existed for a condemnation thereof? The fifth question is, whether such officer, so situated, has a right to appoint and constitute a court, of which he himself is one, for the trial and condemnation of such property? These questions are both understood to refer to the supposed authority of Rodil, as an officer of the government, to make the seizure in his official capacity. We are of opinion, that no sufficient facts are stated to enable this court to give any opinion as to the nature or extent of the authority of such an officer, under the laws of Spain, or his commission from and under the Spanish government. We shall, therefore, return an answer to them, declaring that they are too imperfectly stated to admit of any opinion to be given by this court.

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The sixth and last question is, whether, supposing the ship to have traded in articles contraband of war, in the ports of Chili, and to have been seized afterwards, in a port of Peru, then under the royal authority, before she had discharged her outward cargo, for and on account of such contraband trade, the underwriters be not discharged, whether the subsequent proceedings for her adjudication were regular or irregular? This question is understood to raise the point, whether, if the seizure and detention be *bonâ fide* for and on account of illicit or contraband trade, a sentence of condemnation or acquittal, or other regular proceedings to adjudication, are necessary to discharge the underwriters. We are of opinion, that they are not. If the seizure or detention be lawfully made, for or on account of illicit or contraband trade, all charges, damages and losses consequent thereon, are within the scope of the exception. They are properly attributable to such seizure and detention, as the primary cause, and relate back thereto. If the underwritters be discharged from the primary hostile act, they are discharged from the consequences of it. The whole reasoning in *Church* v. *Hubbard*, 2 Cranch 187, presupposes, that if the underwriters be exempted from the risk of a justifiable seizure for illicit trade, they are not accountable for losses consequent thereon, whether arising from a sentence of condemnation or otherwise.

*This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Massachusetts, and on the points and questions on which the judges of the said circuit court were divided in opinion, and which were certified to this court for its opinion, agreeable to the act of congress in such case made and pro-

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(*a*) The Amiable Isabella, 6 Wheat. 1; The Dos Hermanos, 10 Ibid. 306; The Melomane, 5 Rob. 43; The Elsebe, 5 Ibid. 174; The Maria Françoise, 6 Ibid 282.

vided, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that upon the question so certified by the circuit court for the district of Massachusetts, upon which the judges of that court were opposed in opinion, the opinions of this court be certified to that court as follows, to wit:—Upon the first question, "whether a seizure and detention, to come within the exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause?" that it is the opinion of this court, that the seizure and detention, to come within the exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause. Upon the second question, "whether, assuming the other facts to be as stated and alleged above, and taking the authority of the seizing vessel to be such as the plaintiffs allege, there was a legal and justifiable cause for the seizure and detention of the General Carrington and her cargo?" that it is the opinion of this court, that assuming the facts stated in that question, there was a legal and justifiable cause for the seizure and detention of the ship General Carrington and cargo. Upon the third question, "whether, assuming the other facts to be as stated and alleged above, and taking the authority of the seizing vessel to be such as the defendants allege, there was a legal and justifiable cause for the seizure and detention of the General Carrington and her cargo?" that it is the opinion of this court, assuming the facts stated in that question, there was a legal and justifiable cause for the seizure of the ship General Carrington and cargo. If the armed vessel referred to was lawfully commissioned by Rodil (upon which this court can pronounce no opinion), then she is to be deemed entitled to make the seizure and detention, in the same manner as if she had been commissioned by the royal authority of Spain; but if she was not so commissioned, then the parties making the seizure and detention are to be treated as non-commissioned cruisers, seizing for the government of Spain; *and their validity depends upon their adoption and recog- [*525
nition by the competent authorities of Spain, according to the general principles of the law of nations on this subject. Upon the fourth question, "whether, a general in the military service of Spain, subordinate to La Serna, viceroy of Peru, under the king of Spain, but having the actual and exclusive command of Callao, and no civil authority existing therein, and cut off by the forces of the enemy, by sea and land, from all communication with any superior civil or military officer, could lawfully seize and detain neutral property for contraband trade, if just cause existed for a condemnation thereof?" and the fifth question, "whether such officer, so situated, has a right to appoint and constitute a court, of which he himself is one, for the trial and condemnation of such property?" that it is the opinion of this court, that the facts are too imperfectly stated to enable this court to ascertain and decide what are the nature and extent of the powers of such an officer, according to the laws of Spain, or his commission from and under the Spanish government. Upon the sixth question, "whether, supposing the ship to have traded in articles contraband of war, in the ports of Chili, and to have been seized afterwards, in a port of Peru, then under the royal authority, before she discharged her outward cargo, for and on account of such contraband trade, the underwriters be not discharged, whether the subsequent proceedings for her adjudication were regular or irregular?" that it is the opinion of this court, that under the circum-

stances stated in that question, the underwriters are discharged, whether the subsequent proceedings, after the seizure and detention of the ship and cargo for their adjudication, were irregular or not.

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*526] *Mary Deneale, Executrix of George Deneale, and others, Plaintiffs in error, *v.* John Archer and John W. Stump, Executors of John Stump, deceased, Defendants in error.

Practice.

A writ of error, brought in the name of "Mary Deneale and others," dismissed for irregularity; a new one, in due form, may be brought.

Error to the Circuit Court of the District of Columbia and county of Alexandria. Upon the opening of the record in this case, it was found, that the writ of error had been issued in the name of Mary Deneale, executrix of George Deneale, and others.

Coxe, for the defendants, objected to the writ of error as informal. All the parties to the proceedings in the circuit court should be parties to the writ of error; those who have not joined in it, are not before the court. The court cannot know who are the persons meant by "others."

Lee, for the plaintiff in error, contended, that the record showed who were the parties to the case.

Marshall, Ch. J., delivered the opinion of the court.—This was the case of a *scire facias* against devisees, to revive a judgment. The *scire facias* is, in its form, without precedent, and a demurrer was filed to it. Process on the *scire facias* issued against four devisees, and service was made upon two only of them. An office-judgment was then taken against all the devisees. The two of them, on whom the process was served, afterwards appeared, and the office-judgment was set aside as to them, and they then pleaded the statute of limitations. There was a demurrer to the replication, and judgment against all the devisees.

The present writ of error is brought by Mary Deneale "and others," as plaintiffs; but who the others are cannot be known to the court, for their
*527] names are not given in the writ of error, *as they ought to be. Mary Deneale cannot alone maintain a writ of error on this judgment; but all the parties must be joined, and their names set forth, in order that the court may proceed to give a proper judgment on the case. The present writ of error must, therefore, be dismissed for irregularity; but a new one, in due form, may hereafter be brought to revise the judgment.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Alexandria, and was argued by counsel: On consideration whereof, it is the opinion of this court, that this writ of error is irregular, and should be dismissed, inasmuch as it is in the name of "Mary Deneale and others," without naming who those others are; whereupon, it is ordered and adjudged by this court, that this cause be and the same is hereby dismissed.

*Mary Deneale, Executrix of George Deneale, and Nancy Patton Deneale, Plaintiffs in error, *v.* John Archer and John W. Stump, Executors of John Stump, deceased.

Statute of limitations.

By the revised code of Virginia, it is enacted, that "judgments in any court of record within this commonwealth, where execution hath not issued, may be revived by *scire facias*, or an action of debt brought thereon, within ten years next after the date of such judgment, and not after;" the proceedings in this case were a *scire facias* on a judgment against the testator, against his executrix, and an execution on the judgment rendered against her on that *scire facias*. The writ of *scire facias* is no more an execution than an action of debt would have been; and the execution which was issued on the judgment against the executrix, is not an execution on the judgment against George Deneale.

It is understood to be settled in Virginia, that no judgment against the executors can bind the heirs, nor in any manner affect them; it could not be given in evidence against them.

If the defence set up by the defendants in the district court, had rested on the presumption of payment, the *scire facias* against the executor would undoubtedly have accounted for the delay, and have rebutted the presumption; but the statute creates a positive bar to proceeding on any judgment on which execution has not issued, unless the plaintiff brings himself within one of the exceptions of the act; proceedings against the personal representative, is not one of the exceptions.

Error to the Circuit Court of the District of Columbia, and county of Alexandria.

This case came before the court on an earlier day in the term, and was dismissed in consequence of an informality in the writ of error (see the preceding case). By consent of the parties, the proceedings were amended, and a writ of error in proper form was substituted.

The case was argued by *Lee*, for the plaintiffs in error; and by *Coxe*, for the defendants.

Marshall, Ch. J., delivered the opinion of the court.—This is a *scire facias* to revive a judgment obtained by the *executors of John Stump against George Deneale, on the 19th of December 1817, in the [*529 court of the United States for the county of Alexandria. The writ of *scire facias* is against the heirs and devisees of Deneale, and was issued on the 17th day of May 1828. The *scire facias* was returned executed on two of the defendants, the others not found. Two *nihils* having been returned against the defendants who were not found, an office-judgment was entered against them all. At the succeeding term, Mary Deneale and Nancy P. Deneale, on whom the process had been executed, set aside the office-judgment and demurred to the *scire facias*. The plaintiffs joined in demurrer. The same defendants further pleaded, "that the plaintiffs ought not to have or maintain their said execution, because they say, that the judgment recited in the said *scire facias* was rendered more than ten years next prior to the day of the date of the said *scire facias*." The plaintiffs reply, that after the death of the said George Deneale, the plaintiffs issued out of the circuit court of the said district of Columbia, held for the county of Alexandria, a *scire facias* against the said Mary Deneale, executrix of the said George Deneale, to show cause, if any she could, why the plaintiffs should not have execution of their judgment aforesaid, of the goods and chattels which were of the said George Deneale, and which came to the hands of said Mary

Deneale to be administered. On which *scire facias*, such proceedings were had, that by the judgment of the court, it was considered, that the plaintiffs should have execution of their said judgment, &c.; on which said award of execution accordingly, on the 10th day of January 1820, an execution was, by the plaintiffs, issued out, returnable on the fourth Monday in March 1820, and on which execution the marshal made the following return—"no property found to levy this execution upon."

To this replication, the defendants demurred, and the plaintiffs joined in demurrer. The court, overruling the demurrer, both to the *scire facias* and to the replication, rendered judgment in favor of the plaintiffs against all the defendants. This judgment is brought before this court by writ of error.

Although the *scire facias* is entirely informal, the court is not satisfied, *530] that the demurrer to it ought to be sustained, and *will, therefore, proceed to inquire, whether the judgment be erroneous on other grounds.

A joint judgment has been rendered against those defendants who were not found, and against those who appeared and pleaded. The law of Virginia, as it stood when jurisdiction over this district was vested in congress, is the law of the courts of Alexandria. In the Revised Code of Virginia, vol. 1, p. 500, § 65, it is enacted, that "on writs of *scire facias* for the revival of judgments, no judgment shall be rendered on the return of two *nihils*, unless the defendant resides in the county, or unless he be absent from the commonwealth, and have no known attorney therein. But such *scire facias* may be directed to the sheriff of any county in the commonwealth wherein the defendant or his attorney shall reside or be found, which being returned served, the court may proceed to judgment thereupon, as if the defendant had resided in the county." It does not appear, that the defendants did not reside in the county, nor does it appear, that they were absent from the district. But there is great difficulty in applying this act to writ of *scire facias* issued in the county of Alexandria.

Without deciding whether the office-judgment against the defendants, not served with process, be legal or otherwise; the court will proceed to consider the demurrer to the plea of the act of limitations. In the first volume of the Revised Code, p. 389, it is enacted, that "judgments in any court of record within this commonwealth, where execution hath not issued, may be revived by *scire facias*, or an action of debt brought thereon, within ten years next after the date of such judgment, and not after." We are not informed, that any decision applicable to the question arising in this case, has ever been made in the courts of the state. We must, therefore, construe the statute, without the aid such decision would afford us. It certainly does not apply to any judgment on which an execution has issued; and if the proceedings which have taken place on the judgment obtained against George Deneale, in December 1817, be equivalent to an execution, the demurrer to the replication was rightly overruled.

Those proceedings are a *scire facias* against his executrix, *and *531] an execution on the judgment rendered against her on that *scire facias*. The writ of *scire facias* is no more an execution than an action of debt would have been; and the execution, which was issued on the judgment against the executrix, is not an execution on the judgment against

George Deneale. It is understood to be settled in Virginia, that no judgment against the executors can bind the heirs, nor in any manner affect them. It could not be given in evidence against them.

If the defence set up by the defendants in the district court had rested on the presumption of payment, the *scire facias* against the executor would undoubtedly have accounted for the delay, and have rebutted that presumption; but the statute creates a positive bar to proceeding on any judgment on which execution has not issued, unless the plaintiff brings himself within one of the exceptions of the act. Proceedings against the personal representative is not one of those exceptions. We are, therefore, of opinion, that the demurrer to the replication ought to have been sustained, and the judgment must be reversed, and the cause remanded to the circuit court for the county of Alexandria, with directions to enter judgment on the demurrer to the replication of the plaintiffs, in favor of the defendants.

This cause came on to be heard, on the transcript of the record of the United States court for the district of Columbia, sitting in the county of Alexandria, and was argued by counsel: On consideration whereof, this court is of opinion, that there is error in the judgment rendered by the said court, in this, that the demurrer filed by the defendants in that court to the replication of the plaintiffs, filed to the plea of the statute of limitations, pleaded by the said defendants, was overruled, whereas, it ought to have been sustained. It is, therefore, considered by this court, that the said judgment be reversed and annulled, and the cause remanded to the said court of the United States for the district of Columbia, in the county of Alexandria, with drections to enter judgment on the said demurrer to the replication of the plaintiffs, in favor of the defendants in that court.

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*Thomas Boon's Heirs, Complainants, *v.* William Chiles *et al.*, Defendants. [*532

Parties in chancery.

T. Boon, a citizen and resident of Pennsylvania, filed a bill in the circuit court of Kentucky, against W. Chiles and others, praying that the defendant and such others of the defendants as might hold the legal title to certain lands, might be decreed to convey them to him, and for general relief.

The bill stated, that Reuben Searcy, being entitled to one moiety of a settlement and pre-emption right of 1400 acres of land, located in Licking, sold the same to William Hay, in September 1781, and executed a bond for a conveyance; in December following, Hay assigned this bond to George Boon, who, in April 1783, assigned it to the plaintiff; Hay, while he held the bond, obtained an assignment of the plat and certificate of survey, which he caused to be registered; and the patent was issued in his name, in 1785; in 1802, the plaintiff made a conditional sale of this land to Hezekiah Boon, but the conditions were not complied with, and the contract was considered by both parties as a nullity; yet, a certain William Chiles, and the said Hezekiah Boon and George Boon, fraudulently uniting the plaintiff's name with their own, without his consent or knowledge, filed a bill in chancery, praying that the heirs of Hay might be decreed to convey the legal title to the said William Chiles, who claimed the right of Searcy, through the plaintiff, under his pretended sale to Hezekiah Boon; a decree was obtained, under which a conveyance was made to Chiles, by a commissioner appointed by the court; the plaintiff averred his total ignorance of these transactions at the time, and disavowed them.

While this suit was depending, the decree of the Bourbon court was reversed in the court of appeals of the state, and the cause remanded to that court for further proceedings. The com-

plainant died, and the suit was revived in the name of his heirs. The complainants amended their bill showing a reversal of the decree of Bourbon court, and making the heirs of Hay defendants, and praying a conveyance from them; their amended bill was in the record. They also filed an amended bill, making the heirs of George Boon parties, and stating that his heirs disclaimed all title to the property; one of them answered and disclaimed title. It is not stated, whether process was, or was not executed on the other heirs of George Boon. The defendant, William Chiles, in his answer stated, that there were other heirs of Hay than those mentioned in the bill and made defendants, who are not residents of Kentucky.

The circuit court of Kentucky were divided in opinion on two questions which were certified to this court as follows. 1st. This court being then divided, and the judges opposed in opinion as to the jurisdiction over the case, and unable, therefore, to render a decree on the merits, they resolve they adjourn that question to the supreme court: to wit, under all the circumstances
*533] appearing as above, can this court entertain cognisance of the case? *2d. The judges were also opposed in opinion on the point, whether the complainants were entitled to a decree, in the absence of any proof that the persons made defendants in the amended bill as heirs of George Boon, were, in fact, his heirs? Both of which points occurred, and became material in this case.

The question between the plaintiffs, and the defendant William Chiles, is within the jurisdiction of the circuit court for the district of Kentucky, and may be decided by that court, though Hay's heirs were not parties to the suit; that they were made parties, cannot oust the jurisdiction as between those who are properly before the court.

It is not intended to say, that where there are several heirs, some out of the jurisdiction of the court, a decree may not be made for a conveyance of their own shares, from those on whom process has been served; but it is not thought necessary to decide that question in this case as it is stated.

The principles settled in the answer to the first question, decide the second. George Boon's heirs are not necessary defendants; they can have no interest in the contest, nor is any decree asked against them. If they are made defendants, and the answer admits that they are heirs, as it admitted by the defendant who has answered, no further proof can be required; if they do not answer, and the process is executed, so that the bill is taken for confessed, no further proof is necessary; if the process be not executed they are not before the court.

CERTIFICATE of Division from the Circuit Court of Kentucky. The case was submitted to the court upon printed arguments, prepared by the counsel for the complainants and the defendants in the circuit court.

Flaggin, for the complainants; *Wickliffe* and *Depeu*, for the defendants.

MARSHALL, Ch. J., delivered the opinion of the court.—In this cause, the judges of the court for the seventh circuit and district of Kentucky, were divided in opinion on two questions, which were ordered to be certified to this court in the following manner. 1st. This court being then divided, and the judges opposed in opinion as to the jurisdiction over the case, and unable, therefore, to render a decree on the merits, they resolve to adjourn that question to the supreme court: to wit, under all the circumstances, appearing as above, can this court entertain cognisance of the case? 2d. The
*534] judges were also opposed in opinion on the point, *whether the complainants were entitled to a decree, in the absence of any proof that the persons made defendants in the ameded bill, as heirs of George Boon, were, in fact, his heirs? both of which points occurred, and became material in this case.

1. The first question adjourned to this court is, "under all the circumstances appearing as above, can this court (the circuit court for the district of Kentucky) entertain cognisance of the case? The circumstances mentioned above are, that Thomas Boon, a citizen and resident of Pennsylvania, filed a bill in that court, in January 1823, against William Chiles and others, citizens and residents in Kentucky, praying that the defendant, Chiles, or

such other of the defendants as may hold the legal title, may be decreed to convey to him certain lands in the bill mentioned, and for general relief. The bill states, that Reuben Searcy, being entitled to one moiety of a settlement and pre-emption right of 1400 acres of land, located in Licking, sold the same to William Hay, in September 1781, and executed a bond for a conveyance. In December following, Hay assigned this bond to George Boon, who, in April 1783, assigned it to the plaintiff. Hay, while he held the bond, obtained an assignment of the plat and certificate of survey, which he caused to be registered; and the patent was issued in his name, in 1785. The bill states, that in 1802, the plaintiff made a conditional sale of this land to Hezekiah Boon, but the conditions were not complied with, and the contract was considered by both parties as a nullity. Yet, a certain William Chiles, and the said Hezekiah Boon and George Boon, fraudulently uniting the plaintiff's name with their own, without his consent or knowledge, filed a bill in chancery, praying that the heirs of Hay might be decreed to convey the legal title to the said William Chiles, who claimed the right of Searcy, through the plaintiff, under his pretended sale to Hezekiah Boon. A decree was obtained, under which a conveyance was made to Chiles, by a commissioner appointed by the court. The plaintiff avers his total ignorance of these transactions at the time, and disavows them. While this suit was depending, the decree of the Bourbon court *was reversed in the court of appeals of the state, and the cause remanded to that court for further [*535 proceedings. The complainant died, and the suit was revived in the name of his heirs. The case states, that the complainants amended their bill, showing a reversal of the decree of Bourbon court, and making the heirs of Hay defendants, and praying a conveyance from them. Their amended bill is not in the record. They also filed an amended bill, making the heirs of George Boon parties, and stating that his heirs disclaimed all title to the property. One of them answered and disclaimed title. It is not stated, whether process was, or was not, executed on the other heirs of George Boon. The defendant, William Chiles, in his answer, states, that there were other heirs of Hay than those mentioned in the bill and made defendants, who are not residents of Kentucky. Upon this statement, the court is required to say, whether the circuit court for the district of Kentucky can take cognisance of the case?

No controversy exists between the plaintiffs and William Chiles, respecting the title of Searcy, or his conveyance to Hay, or that of Hay to George Boon, or the conveyance of George Boon to Thomas Boon. Both claim under three several conveyances; both admit and assert their validity. Chiles contends, that Thomas Boon sold this equitable title to Hezekiah Boon, under whom he claims, which sale the plaintiffs deny. This, then, is the single point in issue between the parties. If the case is in such a situation as to enable the circuit court to take cognisance of this question, it has jurisdiction.

The bill states a contract between Thomas and Hezekiah Boon, for the sale of the property, which contract, it charges, became void by consent of parties; and that Chiles purchased from Hezekiah Boon, with full knowledge that it was void, and that the equitable title still remained in Thomas Boon. That, with this knowledge, he fraudulently filed a bill, in the name of himself and of the said Thomas, who was totally ignorant of the transaction,

praying that the heirs of Hay might be decreed to convey to him. This decree was obtained, but has been since reversed.

*536] It is clear, that the heirs of Hay can have no interest in this *contest between the heirs of Thomas Boon and William Chiles, and need not be made parties, but for the purpose of obtaining a conveyance of the legal title, if it still remains in them. The court may very properly decree as between Boon's heirs and Chiles, although the heirs of Hay should not be parties. Chiles is in possession of a contract for the sale of Boon's equitable title, which Boon alleged to be totally invalid, and to have been fraudulently acquired. His heirs now allege it. Chiles maintains that the sale from Thomas to Hezekiah Boon was absolute and *bonâ fide;* and that the whole equitable interest of Thomas Boon is legally and justly vested in him. The heirs of Thomas Boon may certainly come into a court of equity, and ask its decree to compel William Chiles, to surrender this contract, if it has indeed become a nullity, or to enjoin him perpetually from the use of it, or to convey any legal title he may have acquired under color of it, to those who possess the real equitable right. Should the court be unable to decree against Hay's heirs, it may decree as between Boon's heirs and William Chiles, so far as respects the title of Chiles under Boon; if the bill be so framed as to enable the court to grant that relief.

The original bill, as has already been shown, charges that Chiles purchased from Hezekiah Boon, knowing that he had no equitable right, and fraudulently prosecuted that right in the name of Thomas Boon, without his consent or knowledge. It prays for a conveyance of the legal title from those who may possess it, and also prays for general relief. This last prayer entitles the plaintiffs to any relief which may be granted under his bill, and which is not inconsistent with the specific relief for which he asks. It must be admitted, that had the bill prayed specifically for a surrender of the contract under which Chiles claimed, the court might have decreed it, had the testimony justified such a decree; and it will be conceded, that this relief is not inconsistent with that for which the bill particularly prays.

We think, therefore, that the question between the plaintiffs, and the defendant William Chiles, is within the jurisdiction of the circuit court for the district of Kentucky, and may be decided by that court, though Hay's

*537] heirs were not parties to *the suit. That they were made parties, cannot oust the jurisdiction as between those who are properly before the court.

It is not intended to say, that where there are several heirs, some out of the jurisdiction of the court, a decree may not be made for conveyance of their own shares, from those on whom process had been served: but it is not thought necessary to decide that question in this case as it is stated.

The principles settled in the answer to the first question decide the second. George Boon's heirs are not necessarily defendants. They can have no interest in the contest, nor is any decree asked against them. If they are made defendants, and the answer admits that they are heirs, as is admitted by the defendant who has answered, no further proof can be required. If they do not answer, and the process is executed, so that the bill is taken for confessed, no further proof is necessary. If the process be

not executed, they are not before the court. We do not perceive that in this case, as stated, any proof respecting the heirs of George Boon ought to be required. The court directs the following certificate.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Kentucky, and on the questions and points on which the judges of the said court were opposed in opinion, and which was certified to this court for its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel: On consideration whereof, this court is of opinion, 1. That under the circumstances stated in the certificate of the judges, the said circuit court could entertain cognisance of the case. 2. That the want of proof that the persons made defendants in the amended bill as the heirs of George Boon, were in fact his heirs, is no obstruction to a decree on the merits of the cause. All of which is hereby ordered and adjudged to be certified to the said circuit court, under the seal of this court.

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*The Ship Virgin, and Graf and Delplat, her owners, Appellants, *v.* Adam Vyfhius, Junior, Appellee. [*538

Adam Vyfhius, Junior, Appellant, *v.* The Ship Virgin, and Graf and Delplat, her owners, Appellees

Bottomry.—Seamen's wages.

On an appeal from the decree of the circuit court of Maryland, on a libel on a bottomry bond originally filed in the district court, it appeared, that commissioners appointed by the circuit court had reported, that a certain sum, being a part of the amount of the bond, was absolutely necessary for the ship, as expenses and repairs in the common course of her employment; no exception was taken to this report by either party, in the circuit court, and it was accordingly confirmed by that court. The report is not open for revision in this court, there being nothing on its face impeaching its correctness.

It is no objection to a bottomry bond, that it was taken for a larger amount than that which could be properly the subject of such a loan; for a bottomry bond may be good in part, and bad in part; and it will be upheld by courts of admiralty, as a lien, to the extent to which it is valid, as such courts, in the exercise of their jurisdiction, are not governed by the strict rules of the common law, but act upon enlarged principles of equity.

It is notorious, that in foreign countries, supplies and advances for repairs and necessary expenditures of the ship, constitute, by the general maritime law, a valid lien on the ship; a lien which might be enforced *in rem*, in our courts of admiralty, even if the bottomry bond were, as it certainly is not, void *in toto*.

An objection was taken to the bond, that the supplies and advances might have been obtained on the personal credit of the owners of the ship, without an hypothecation: *Held*, that the necessity of the supplies and advances being once made out, it is incumbent upon the owners, who assert that they could have been obtained upon their personal credit, to establish that fact, by competent proofs; unless it is apparent from the circumstances of the case.

It was objected, that the supplies and repairs were, in the first instance, made on the personal credit of the master of the ship, and therefore, could not be afterwards made a lien on the ship: *Held*, that the lender on the bottomry bond might well trust the credit of the master, as auxiliary to his security; and the fact that the master ordered the supplies and repairs, before the bottomry was given, can have no legal effect to defeat the security, if they were ordered by the master, upon the faith, and with the intention that a bottomry bond should be ultimately given to secure the payment of them. In cases of this sort, the bottomry bond is, in practice, ordin-

arily given after the whole supplies and repairs have been furnished; for the plain reason, that the advances required can rarely be ascertained with exactness until that period.[1]

*539] It was objected, that the advances were for a voyage not authorized by the *owners; that the original orders were for the master to get a freight for Baltimore or New York, and if he could not, then to proceed to New Orleans; whereas, the master broke up his voyage, and, without any freight, returned to Baltimore. It may be admitted, that if a bottomry lender, in fraud of the owners, and by connivance with the master, for inproper purposes, advances his money on a new voyage, not authorized by the instructions of the owner, his bottomry bond may be set aside as invalid; but there is no pretence to say, that if the master does deviate from his instructions, without any participation or co-operation or fraudulent intent of the bottomry lender, the latter is to lose his security for his advances, *bonâ fide* made for the relief of the ship's necessities.

Seamen have a lien, prior to that of the holder of a bottomry bond, for their wages; but the owners are also personally liable for such vages; and if the bottomry holder is compelled to discharge that lien, he has a resulting right to compensation over against the owners; in the same manner as he would have, if they had previously mortgaged the ship.

Graf, one of the owners, had the ship delivered up to him upon an appraisement, at the value of $1800, and he gave a stipulation, according to the course of admiralty proceedings, to refund that value, together with damages, interest and costs, to the court. He is not of liberty now to insist, that the ship is of less than that value in his hands, or that he has discharged other liens, diminishing the value for which the owners were personally liable, *in solido*, in the first instance.

To the extent, then, of the appraised value of the ship, delivered upon the stipulation, the owners are clearly liable; for she was pledged for the redemption of the debt, and they cannot take the fund, except *cum onere;* but beyond this, there is no personal obligation upon the owners.

In this case, the value of the ship, the only fund out of which payment can be made, fell far short of a full payment of the amount due upon the bottomry bond. But this is the misfortune of the lender, and not the fault of the owners; they are not to be made personally responsible for the act of the master, because the fund has turned out to be inadequate; since, by our law, he had no authority, by a bottomry bond, to pledge the ship and also the personal responsibility of the owners. The consequence is, that the loss, *ultra* the amount of the fund pledged, must be borne by the libellant.

Appeals from the Circuit Court of Maryland. The ship Virgin sailed, in August 1822, from Baltimore to Amsterdam, where she arrived on the 12th of October of that year, under command of John Cunnyngham. By the plan of the voyage, she was to return from Amsterdam to Baltimore, if she could procure a freight; otherwise, she was positively directed to proceed to New Orleans. She was owned, when she sailed, by John C. Delplat, who, during her passage to Amsterdam, became insolvent, and on the 4th of September, sold one-third of her to Frederick C. Graf.

*540] *The vessel, on her way to Amsterdam, encountered severe weather, and arrived there in want of sails and a cable, and of various repairs. At her departure from Baltimore, her owner directed, that at Amsterdam, as the most economical place for the supply, she should be furnished with a mainsail and topsail, and cable, of which it was foreseen she would then be in urgent need. The vessel had a cargo, of which, except twenty hogsheads of tobacco, all belonged to Delplat; and all of the cargo was consigned to N. & I. & R. Vanstaphorst, at Amsterdam, to whom

[1] A lender on bottomry will be protected, in case there was an apparent necessity for his advances. The Fortitude, 3 Sumn. 228. But he is bound to ascertain, that the money is necessary for the particular voyage, as well as that the master has no other resources on hand. The Boston, 1 Bl. & H. 309. There must be an actual necessity; an anticipated want of funds is not enough. The Texas, Crabbe 236. In an action on the bond, the court will not go into the question of the reasonableness of the charges for repairs, if they were made in good faith. The Yuba, 4 Bl. C. C. 352.

Delplat also consigned the vessel. The twenty hogsheads of tobacco belonged to Frederick C. Graf. Agreeable to these consignments, the master, on arrival at Amsterdam, delivered to the Vanstaphorsts the cargo, and committed to them all the concerns of the vessel; in consequence of which, they collected and held in their hands all the freight that was actually payable upon any portion of the cargo, and all the proceeds of the tobacco belonging to Mr. Graf.

The master, desiring to refit the vessel, and afford her all the necessaries for her return-voyage, applied to the Vanstaphorsts for the requisite means, and ultimately even offered them a bottomry of the ship for the funds. After much delay, they refused all advances—intelligence of the failure of Delplat, asserted by them to be largely their debtor, having meanwhile reached them. To provide for the event of this refusal, the master set on foot a negotiation, through brokers, for raising the means by bottomry; and the application to the Vanstaphorsts, and this provisional negotiation, were pending for about three weeks—the master knowing no friends of the owner, except the Vanstaphorsts, to whom he could apply for the aid. During this period, the master contracted, on his own responsibility, for various supplies, which he designates in his evidence, as all those that were furnished before the 1st of November. The payment for these and for the other necessaries of the ship, was made out of the moneys received from the appellee Vyfhius. On the 12th of November, after the Vanstaphorsts had finally declined making the advances, the master contracted with Vyfhius for the loan upon bottomry, of 8000 guilders, at an interest of ten per cent.; all which, he showed, was appropriated for the indispensable uses of the ship.

*About the 3d of November, the master received from Mr. Graf a letter, dated in September 1822, announcing his purchase of one-third of the Virgin, and referring to a certificate of his purchase, as inclosed in the letter; which in fact appeared not to have been inclosed. About the same time, by another letter from Mr. Graf, and perhaps also from other quarters, information was given to the master of Mr. Delplat's failure; and, in consequence, the master, on consultation, determined that it was his duty to proceed with the vessel home to Baltimore, and not to dispatch her to New Orleans. After undergoing repairs, and receiving all her supplies paid for by the appellee Vyfhius, the Virgin sailed from Amsterdam to Baltimore, and arrived there in March 1823. [*541

The owners refusing to pay the appellee his advances, the libel in this cause was filed, which prayed citation against the owners by name, as well as the master, and condemnation of the vessel for paying the loan, and also further relief such as the court might deem adequate and just. The owners, Delplat and Graf, appeared and answered; their answers called into question the fact and the necessity of expenses at Amsterdam, insisting too, that the Vanstaphorsts had property enough of the owners, and which should have been applied for the wants of the ship, and charging that the bottomry was really taken by the Vanstaphorsts, though colorably in Vyfhius' name, and maintaining, finally, that all requisite funds could have been raised on the credit of the owners, or of the master.

A commission for evidence was sent to Holland, the chief object of which was to prove the Vanstaphorsts to be really the owners of the bot-

tomry. The circuit court determined that the bottomry was invalid, but that the owners were personally liable for all the necessary supplies furnished by the means of Vyfhius for the vessel, and that, to that extent, he was entitled in this cause, to recover against them. The cause was then referred to the clerk of the court to ascertain, calling to his aid two merchants, the amount of the necessary supplies referred to. The clerk and his assistants reported their ascertainment; exceptions by Delplat and Graf were filed to it; the case was remanded to the clerk, who called two other merchants to co-operate with him, and they reported their statement of the *necessary expenses, which the court confirmed. Thereupon, the court passed its final decree, awarding payment to Vyfhius, by Delplat and Graf, of the sum of $2900, with interest from the 26th of November 1830, the date of the decree; the principal of the ascertained expenses being $2900. Both parties appealed to this court.

*542]

The case was argued by *Steuart*, for the owners of the ship Virgin; and by *Mayer*, for Mr. Vyfhius.

For the owners of the Virgin, it was contended, that the decree of the circuit court which made them personally liable for the claim of the libellant Vyfhius, was erroneous:

1. Where it is attempted to pursue the owner of a ship personally, for advances which he may be made personally liable, the proper remedy (in the admiralty court) is by libel *in personam*, or at all events, the personal liability must be distinctly averred and charged in the libel.

2. When the proceeding is altogether *in rem* (for example, against a ship on a bottomry bond), it presents no question but the validity of the hypothecation. The court is restricted to that question, and cannot decree *in personam*.

3. The circuit court, acting in its appellate character, could do no more than the district court, that is to say, affirm or reverse the decree of the district court (which simply held the bottomry good, on a libel exclusively *in rem*); and having by its interlocutory order of 1828, pronounced the bottomry invalid, and thereby reversed the decree of the inferior court, it had no right to go further and decree *in personam* against the owners.

4. Although owners, when pursued personally in an admiralty court, may be held personally liable for advances for the necessary repairs and supplies of their ships, expressly made on the personal credit of the owners, or where it is fairly inferred that the personal credit is looked to; yet when it appears the personal credit of the owners was not looked to, they cannot be held personally liable.

5. There is no evidence, that the advances were made on the *credit of Delplat and Graf or either of them, but the contrary is alleged by libellant himself, and appears in all the proofs.

*543]

6. Some of the supplies for which the advances are alleged to have been made, were not necessary, and have been improperly charged and allowed, as appears in the report and exceptions.

7. Part-owners of a ship are not liable beyond the extent of their respective interests, and the decree is erroneous in subjecting Graf to more than one-third, and Delplat to more than two-thirds, in which proportions they held the ship.

8. Evidence appears, sufficient to warrant the belief that Vanstaphorsts were the real lenders of the money advanced to the master, and Vyfhius only an agent of theirs. If so, they (Vanstaphorsts) cannot recover against the owners personally; because they had sufficient funds in the freight, which they were bound to apply to the uses of the ship.

9. Admitting (which is not proved), that the Vanstaphorsts had a right to withhold Delplat's two-thirds of the freight, on the ground of his indebtedness to them—they had no right to withhold from Graf, as they have done, his one-third of the freight, amounting to $1900, and they cannot now recover from him, personally, without accounting for that sum.

10. The evidence raises a strong presumption that Vanstaphorsts knew, and also that Vyfhius knew (or might and ought to have known), that the voyage to Baltimore was in direct violation of the orders of the owners, without any necessity for such violation by the master; and if so, Vyfhius is not entitled to recover against the owners, whether he be considered the real lender, or only as the agent of Vanstaphorsts.

11. All the evidence in the case, taken together, raises a strong presumption, that there was fraud and collusion between Vyfhius and Vanstaphorsts not to apply the freight or other funds of Graf, in Vanstaphorsts' hands, to the uses of the ship, but to subject her unnecessarily to a bottomry, and her owners to loss; wherefore, neither Vyfhius nor Vanstaphorsts are entitled to recover againts the owners.

Steuart argued, that the original advances by Vyfhius were illegal, as there was no survey, showing the necessity for *the repairs, and the outfit of the Virgin. To show that this was necessary, he cited, [*544 Abbott on Shipping 124, note 2, last edition; 1 Wheat. 96. He contended, that the disbursements were paid for on the personal responsibility of the master, as the evidence showed they were made before the bottomry was executed. The freight was an ample fund for the repairs and disbursements, and was properly applicable to pay for the same. Abbott 107, 114; Marshall on Insurance 741; 1 Wheat. 96.

The money was advanced by Mr. Vyfhius to fit out the Virgin for a voyage, in direct opposition to the orders of the owners. She was to proceed to New Orleans, if no freight could be obtained to Baltimore; yet she returned to Baltimore, subjected to the heavy claims of Mr. Vyfhius, and without any freight. Advances are only legal, when they are made to effectuate the proper voyage of the vessel. Abbott on Shipping 124; 1 Wheat. 96; 2 Marsh. on Ins. 741; 1 Ibid. 96; 3 W. C. C. 494. Some of the articles furnished were not necessary. Abbott 106.

The real lenders of the money were the consignees, the Vanstaphorsts, and they could not, as consignees, become creditors by a bottomry contract. Bee 339, 344; Abbott 126, note 1; 1 Dods. 207. Upon the second point, Mr. Steuart cited, 1 Pet. Adm. 94, 98; 2 Ibid. 295. Upon the seventh point, were cited, Abbott 84; 1 Johns. 106; 2 Vern. 643. Upon the eighth point, cited, Bee 339, 344; Abbott 126, note 1; 1 Dods. 207; 2 Ibid. 143–4. Upon the eleventh point, cited, 1 Hagg. Adm. 14, 69–76; Bee 120.

Mayer, for the libellants, Vyfhius & Co., contended for the following positions:

1. The prayer for general relief in the libel warrants the decree *in per-*

sonam, though the special relief prayed is *in rem*. 1 Johns. Ch. 111; 6 Har. & Johns. 29; 2 Atk. 2; 4 Madd. 468; 6 Ibid. 218; 1 Cox 58.

2. Where a bottomry is declared ineffectual, the person who has supplied the necessaries for the ship for which the bottomry *is given, *545] is remitted to his original right *in personam*, against the owners, who are bound for all supplies to the ship; which is also impliedly hypothecated for them. *In personam*, the libellant here waives marine interest, and claims only principal and legal interest. To that extent, the bottomry binds personally, where the *res* is, after the bottomry, accepted. This personal liability exists, whether the bottomry be good or unavailing. Bee 252; 2 Pet. Adm. 295; 2 Bro. Adm. 407; Emerigon Mar. Laws 101, 104. The penal obligation at least goes to the value of the *res*. 1 Hagg. 13–14. Or, at all events, the lender, as to it, is only involved in any equities that may subsist between master and owners, when the supplies are furnished to the master (Emer. p. 82), so as so far to limit the personal responsibility; and the lender is then substituted for the master's lien for supplies, which is here conceded to him. The accepted definition of bottomry, implies a personal responsibility of the owners, for, at least, principal and legal interest, under the bottomry itself. The only aspect in which the remedy is exclusively *in rem* under a bottomry bond, is as to the marine interest. 2 Bl. Com. 457–8; 1 Paine 671; 1 W. C. C. 293; 3 Ibid. 294; 2 Pet. Adm. 295.

The question of personal liability under a bottomry, is only a point of jurisdiction. And in England, only a court of equity can give the relief personally under the limited scope *there* of the admiralty remedies. 6 Madd. 11, 79; 2 Ld. Raym. 931, 981; 3 T. R. 269 (*Yates* v. *Hall*, 1 Ibid. 73, is erroneous as to the grounds of these decisions); 1 Ves. sen. 443; 1 Bro. P. C. 288; Emerigon Mar. Laws 71–104. Our admiralty courts give a remedy *in personam*, where there is a remedy *in rem* for supplies, and even where the latter does not exist; and a vessel is impliedly hypothecated for repairs in a foreign port. Abbott 125; Bee 169; 2 Gallis. 345; 1 Paine 620; *The General Smith*, 4 Wheat. 438. Our admiralty courts, within the sphere of their jurisdiction, act as courts of equity. 2 Gallis. 526; 3 Mason 255, 334; 4 Ibid. 250. Where, as here, all parties are before the court, it may decree as equity requires, 1 Wheat. 197; and avoid circuity of remedy. The court may moderate interest on bottomries. Abbott *127. Owners are liable, and *in solido*, without regard to their *546] respective portions of interest in the ship, for master's contracts for the ship. Abbott 100, 106, 76; 11 Mass. 34; 2 Rose 91; 1 Stark. 23; 2 Ibid. 377; Cowp. 639; 1 Dall. 129; 10 Mass. 47; 7 Johns. 311; 1 Cow. 290; Emerig. 101.

The lender may claim to be substituted to the master's remedies *in personam* and *in rem*, in admiralty, for disbursements for supplies. Abbott 107, 115, 248; 1 Paine 73; 1 Pet. Adm. 223. The claim for personal liability need not to be under the bond, as such. It may rest on the implied hypothecation, or on the general responsibility of the owners for supplies to their ship, or against the owners, as holders of the *res*. 3 T. R. 340; 1 Gallis. 75; 5 Pet. 675. In all cases in admiralty, *in rem*, the respondent's fidejussory caution binds him personally, even beyond the value of the *res*; unless, abandoning the *res*, he enters into a special fidejussory caution. 2 Bro. Adm. 406, 408–11; 3 T. R. 340; 1 Gallis. 75; 3 Wheat. 58; 1 Gallis.

503, 541 ; 2 Ibid. 249. The stipulation here does not supersede this implied responsibility of the owners ; though it is one more appropriate for a prize than an instance proceeding. 3 T. R. 340 ; 1 Gallis. 148. A process *in personam* may begin by monition simply, as here. 3 Rob. 177 ; 3 T. R. 340 ; 1 Gallis. 75. Admiralty here would, for such supplies, decree *in personam*. It does, for pilotage, 1 Mason 108 ; for master's wages, 3 Ibid. 91 ; for *respondentia* claims, 4 Ibid. 250 ; for salvage, Abbott 399 ; 1 Pet. Adm. 94 (as in England, 1 Rob. 271 ; 3 Ibid. 177); for materialmen, 4 Wheat. 438. The remedy *in rem* implies remedy *in personam* on account of the *res*. 1 Pet. Adm. 238, note of Judge WINCHESTER'S decision. The remedies *in rem* and *personam* may both be prayed for, or alternatively enforced under one libel, as a bill in equity may have two aspects of relief. 2 Ld. Raym. 981 ; Bee 252 ; 2 Pet. Adm. 295 ; 1 Ibid. 94. If necessary to the award of remedy *in personam*, the libel would be allowed by this court to be amended in the court below. 11 Wheat. 1 ; 12 Ibid. 1 ; 7 Cranch 570 ; 9 Ibid. 244. This court may render such decree *in rem* as *the court below should have rendered, if it deems a decree *in personam* improper. 3 Dall. 54. [*547

It is maintained, that the relief *in personam* may be decreed, for principal and legal interest, although the bottomry bond be good *in rem*. The bottomry is good here, although taken where there were consignees of the vessel, and even admitting that they had funds ; those funds being denied to the master, if they existed. Although the master may have purchased the supplies, the lenders of the money to pay for them did not advance their means upon his personal credit. And if the advances had not been made, the vessel might, in the foreign port, have been proceeded against. Abbott 125, 126 ; 1 W. C. C. 52 ; 1 Dods. 276, 288, 464 ; 2 Ibid. 147 ; 1 Hagg. 13, 176, 326 ; 1 Wheat. 96. The lenders were not bound to see to the application of the money ; nor implicated in any degree on account of the master's violation of his instructions as to the voyage to be pursued. Abbott 126 ; Bee 362–3 ; 2 Dall. 194 ; 1 Dods. 465 ; 3 W. C. C. 495, 497. The payments for duties and port-charges were proper to be secured by bottomry. 2 Caines 77 ; 1 Hagg. 176.

If the record be considered as presenting the question whether the seamen's wages are to be deducted from the bottomry, it is contended, that the owners being personally liable for them, they cannot make them a charge against the bottomry interest ; the bottomry holder would be substituted for the seamen against the owners, if they (the bottomry holders) had paid the wages. Cited also, *The Langdon Cheves*, 2 Mason 58.

Steuart, in reply.—It is contended on the part of the libellant, that the bottomry bond is good, so far as it covers advances strictly within the law of maritime loans ; and for the residue, recourse must be had *in personam*. To show what circumstances are necessary to make a valid bottomry, he cited, *The Aurora*, 1 Wheat. 96 ; 2 Pet. Adm. 301–3 ; Abbott 125. There is no precedent of a decree in the admiralty *in personam*, except *The Fair American*, 1 Pet. Adm. 87 ; and that was a case in the circuit court. The allegations in the libel in this case are not sufficient to maintain a claim *in *personam*. The prayer for general relief is not enough for this purpose. The relief by a decree *in personam* is not consistent with the [*548

case made by the bill; and is not, therefore, within the rules of chancery proceedings. If the claims of the libellant are *in personam*, he has his remedy at common law; and the admiralty will not convert a claim, originally against the ship, into one of a common-law character exclusively. Cited also, 2 Hagg. 48, 66; 2 Pet. Adm. 295; Bee 254; 1 Pet. Adm. 94; *The Mary*, Bee 120.

Story, Justice, delivered the opinion of the court.—This is the case of a libel *in rem*, upon a bottomry bond, originally instituted in the district court of the district of Maryland, and thence brought by appeal to the circuit court, and thence by appeal to this court. The ship Virgin belonged to Baltimore, and being in Amsterdam, in the kingdom of Holland, in November 1822, a bottomry bond was there given to the libellant by the master, for the sum of $3200, and maritime interest at the rate of ten per cent., for advances asserted to be made by the libellant to supply the necessities of the ship, on a voyage from Amsterdam to Baltimore. The voyage was duly performed; and the bottomry loan not being paid by the owners, proceedings were duly commenced for the recovery thereof, and the suit has been protracted to the present period. The owners interposed a claim and defensive allegation, denying the validity of the bond; and at the hearing in the district court, a decree was entered, affirming its validity, and awarding to the libellants the full amount of the bottomry bond, with interest at the rate of six per cent. from the filing of the libel. The circuit, on the appeal, reversed this decree, pronounced the bottomry bond invalid, and then proceeded to entertain the suit *in personam* against the owners; holding them liable for the necessary supplies and repairs of the ship, in the same manner as if the suit had been originally commenced *in personam* against the owners. And after some interlocutory proceedings, the circuit court awarded a final decree against the owners, for the sum of $2900, being
*549] the amount ascertained by a report of commissioners, as * "expenditures and advances absolutely necessary, and made in the course of the usual employment of the ship," with interest from the time of the decree, until the payment of the amount thereof. From this decree, both parties have appealed to this court, and the cause now stands upon the argument for a final decision.

The first question is, whether the bottomry bond was valid in its origin, and constituted a good lien on the ship. Several objections have been taken to its validity. In the first place, it is said, that the bottomry bond, though taken in the name of the libellant, Vyfhius, was, in fact, taken in trust, and for the benefit of Vanstaphorst & Company, who were the consignees of the ship and cargo, and had ample funds of the owners in their hands, to meet the necessary expenditures, if any were necessary; and therefore, they cannot now subject the ship to a bottomry lien. But we do not think that this objection is sustained as matter of fact, by the evidence in the case. The only testimony to support it is a loose statement of Schimmelpennick, one of the partners of the house of Vanstaphorst & Company; who stated to a witness, "that the expenses of the Virgin had amounted to about 8000 guilders, and that they would not be so foolish as to make such an expense for Delplat, without securing themselves by a bottomry." This language is quite equivocal, and admits of different interpretations; and it does not

appear, upon what occasion, nor under what circumstances, it was used. It may mean, that they had declined to make the advances without a bottomry bond, without meaning to affirm, that one had been actually taken for their benefit. But, what is most important in the case, this declaration cannot be competent evidence against Vyfhius, who is not shown to have had any knowledge of it, or to have been in privity with Schimmelpennick; so that, as to him, it is the mere hearsay of a third person. And on the other hand, the master of the Virgin expressly disclaims any knowledge, that any of the advances were made by Vanstaphorst & Company, and affirms that they were made by Vyfhius, at his request, through the instrumentality of a broker. We may then dismiss all further consideration of this objection, since the bottomry bond is not traced home to Vanstaphorst & Company.

*The next objection is, that the advances were not necessary for the supplies and repairs of the ship. This objection is not now [*550 fairly open upon the record. The second and last report of the commissioners expressly finds, that the sum of $2900 of the advances was absolutely necessary for the ship, as expenses and repairs, in the common course of her employment. No exception was taken to this report by either party, and it was accordingly confirmed by the circuit court; so that it is not now open for review in this court, there not being anything on its face impeaching its correctness. It is true, that the bottomry bond was taken for a larger amount; but that furnishes no ground of objection to the bond, except for the surplus; for a bottomry bond may be good in part, and bad in part; and it will be upheld by courts of admiralty, as a lien, to the extent to which it is valid; as such courts in the exercise of their jurisdiction, are not governed by the strict rules of the common law, but act upon enlarged principles of equity. There are many authorities to this effect; but it is only necessary to cite the cases of *The Augusta*, 1 Dods. 283, *The Tartar* and *The Nelson*, 1 Hagg. Adm. 169, 176. And, indeed, except so far as regards the maritime interest of ten per cent., the question would be unimportant; for it is notorious, that in foreign countries, supplies and advances for repairs and necessary expenditures of the ship, constitute, by the general maritime law, a valid lien on the ship; a lien which might be enforced *in rem*, in our courts of admiralty, even if the bottomry bond were, as it certainly is not, void *in toto*.

The next objection is, that the supplies and advances might have been obtained upon the personal credit of the owners, without an hypothecation. Now, the necessity of the supplies and advances being once made out, it is incumbent upon the owners, who assert that they could have been obtained upon their personal credit, to establish that fact by competent proofs, unless it is apparent from the circumstances of the case. Now, not only is there no proof to this effect, upon the record, but it is fairly repelled by the testimony of the master, as well as by the other circumstances of the case. When the ship sailed on her voyage from Baltimore to Amsterdam, she was exclusively owned by Delplat; and she, as well as her cargo, a great part *of which was also owned by Delplat, was consigned to Vanstaphorst & [*551 Company. Delplat failed, daring the voyage, and about that time assigned one-third of the ship to Graf, and the other two-thirds to other persons. The cargo, on the ship's arrival, was delivered, pursuant to the consignment, to Vanstaphorst & Company, and certainly could not be rightfully withheld

from them under the bills of lading. Delplat, after deducting all his consignments, remained in debt to Vanstaphorst & Company, in about 19,000 guilders. And after they were apprised of Delplat's failure, and after a negotiation of some weeks between them and the master for advances, they declined to make any to him; and he was thus compelled to obtain them elsewhere.

It is wholly immaterial, in this case, whether Vanstaphorst & Company had funds in their possession, which ought to have been advanced by them for the relief of the ship. It is sufficient, to justify the master, that he could not obtain them; and the non-existence of funds, and the non-ability to get at them, must, as to the master, be deemed to be precisely equal predicaments of distress. It would not be very easy to convince any lender of money, that he could safely trust to the personal security of an insolvent debtor; and although Graf was not involved in the failure of Delplat, yet his title was acquired on the eve of Delplat's failure, and did not appear on the ship's papers, so that a cautious lender might well hesitate as to the ability of the master to bind Graf; even if it had appeared, which it does not, that Graf's credit was not unquestionable at Amsterdam, that his personal security, given by an acknowledged agent, would have been satisfactory. But the truth is, that the master's testimony negatives any other adequate means of supplying the ship's necessities, without resort to a bottomry bond; and there is not the least reason to suppose, that he did not act with entire good faith, and from a consciousness that funds could not otherwise be obtained. It is certainly incumbent on the owners, if they assert that such means existed, to give some solid proofs in support of their assertion.

Then, again, it is objected, that the supplies and repairs were, in the first instance, made upon the master's credit. But how were they made? There is not a tittle of proof, that the material-men originally trusted to his personal credit exclusively, *waiving the lien which the foreign law would give on the ship for them, or the general responsibility of the owners. On the contrary, they might well trust to his credit, as auxiliary to these sources; and the fact that the master ordered the supplies and repairs, before the bottomry bond was given, can have no legal effect to defeat that security, if they were so ordered by the master, upon the faith, and with the intention, that a bottomry bond should ultimately be given to secure the payment of them. In truth, in cases of this sort, the bottomry bond is in practice ordinarily given, after the whole supplies and repairs have been furnished, for the plain reason, that the advances required can rarely be ascertained with exactness, until that period. In a case before Lord Stowell,(a) an objection of a similar nature was taken, viz., that the advances were made before the bottomry bond was taken; but that learned judge overruled it, and said, that it was sufficient, that it was the understanding of the parties at the time, that the money should be secured by means of bottomry; and that it was of no consequence, whether the money was advanced at once, and the bond immediately entered into, or whether the master received it, from time to time, in different sums, and gave a bond for the whole amount. And he added, what is very significant under

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(a) La Ysabel, 1 Dods. 273, 276.

the circumstances of the present case, that the party who lent the money, had a right, by the maritime law, to detain the ship and cargo, until the debt was repaid; and it was only by the means of the bond, that the owners had the benefit of the liberation of their property.

In the next place, it is objected, that the advances were for a voyage not authorized by the owners; that the original orders were for the master to get a freight for Baltimore or New York, and if he could not, then to proceed to New Orleans; whereas, the master broke up his voyage, and without any freight, returned to Baltimore. Now, it may be admitted, that if a bottomry lender, in fraud of the owners, and by connivance with the master, for improper purposes, advances his money on a new voyage, not authorized by the instructions of the owner, his bottomry bond may be set aside as invalid. *But there is no pretence to say, that if the master does deviate from his instructions, without any participation or co- [*553
operation or fraudulent intent of the bottomry lender, the latter is to lose his security for his advances, *bonâ fide* made for the relief of the ship's necessities. In the present case, there is no proof, that Vyfhius ever saw the master's instructions; much less, that he fraudulently co-operated with him in a wilful disobedience of the orders of the owner. A new and unexpected state of things had arisen; the owner had failed, and new owners had been substituted, with some of whom he had not had any communication. Under these circumstances, he applied for advice to the friends of his former owners, and they advised him to return home; as not only prudent and proper, but as required by the change of ownership. His own judgment coincided with theirs; and there is no ground to assert, that he did not act with entire good faith, and that under all the circumstances, the course adopted by him was not discreet and fit for such an emergency. To set aside a bottomry bond, given under such circumstances, would be to impair in no small decree the general confidence of the commercial community in their security; and would overturn the great maritime policy upon which they have been hitherto held sacred and privileged liens.

We have thus considered the principal objections urged against the bottomry bond, and are of opinion, that they are unmaintainable. The consequence is, that the bond must be upheld to the extent of the property pledged for the security of it. It has been said, that the seamen have a prior lien on the ship for their wages, and that the amount of the wages ought first to be deducted. Undoubtedly, the seamen have such prior lien, but the owners are also personally liable for such wages; and if the bottomry holder is compelled to discharge that lien, he has a resulting right to compensation over against the owners, in the same manner as he would have, if they had previously mortgaged the ship. But, in strictness, no such question arises on the present record. Graf, one of the owners, has had the ship delivered up to him upon an appraisement, at the value of $1800; and he has given a stipulation, according to the course of admiralty proceedings, to refund that value, *together with damages, interest and costs, to [*554
the court. He is not at liberty now to insist, that the ship is of less than that value in his hands; or that he has discharged other liens, diminishing the value for which the owners were personally liable *in solido*, in the first instance.

To the extent, then, of the appraised value of the ship, delivered upon

the stipulation, the owners are clearly liable; for she was pledged for the redemption of the debt, and they cannot take the fund, except *cum onere*. But beyond this, there is no personal obligation upon the owners. It has been correctly remarked by Lord STOWELL,(*a*) that the form of bottomry bonds is different in different countries, and so is their authority. In some countries, they bind the owners; in others, not; and where they do not, even though the terms of the bond should affect to bind the owners, that part would be insignificant; but it would not at all touch upon the efficiency of those parts, which have an acknowledged operation. In England and America, the established doctrine is, that the owners are not personally bound, except to the extent of the fund pledged which has come into their hands.(*b*) To this extent, indeed, they may correctly be said to be personally bound; for they cannot subtract the fund, and refuse to apply it to discharge the debt. But in that case, the proceeding against them is rather in the character of possessors of the thing pledged, than strictly as owners. In the present case, the value of the ship, the only fund out of which payment can be made, falls far short of a full payment of the amount due upon the bottomry bond. But this is the misfortune of the lender, and not the fault of the owners. They are not to be made personally responsible for the act of the master, because the fund has turned out to be inadequate; since, by our law, he had no authority, by a bottomry bond, to pledge the ship, and also the personal responsibility of the owners. The consequence is, that the loss, *ultra* the amount of the fund pledged, must be borne by the libellant.

But as the owners have had the full benefit of the bond, under the appraisement and delivery, during this protracted controversy, *it is
*555] but reasonable, that they should be responsible for interest upon the appraised value, from the time when the delivery upon the appraisement took place.

The view, which has been thus taken of the present case, renders it wholly unnecessary to consider, whether a decree *in personam* could be made by the circuit court, upon a libel and proceedings instituted *in rem*. That and the other questions respecting the exercise of the admiralty powers of the court, may well be left for decision, when they shall constitute the very points in judgment.

The decree of the circuit court must be reversed; and a decree will be entered conformable to the opinion of this court, to be carried into effect by that court.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Maryland, and was argued by counsel: On consideration whereof, it is declared by this court, that the bottomry bond in the case stated is, and ought to be held valid for the sum of $2900, being the amount ascertained by the second and last report of the commissioners to be due to the libellant for expenditures and advances absolutely necessary, and made in the course of the *usual* employment of the said ship Virgin, and also for the additional sum of ten per cent., the maritime interest agreed on, and payable by the terms of the

(*a*) The Nelson, 1 Hagg. Adm. 176.
(*b*) The Tartar, 1 Hagg. Adm. 1, 13; The Nelson, Id. 169, 176.

said bottomry bond, amounting, in the whole, to the sum of $3190, and that the said libellant is entitled to the said last-mentioned sum, with interest thereon, at the rate of six per cent., from the commencement of the present suit to the time when the decree of this court shall be carried into effect by the circuit court; and it is hereby ordered, adjudged and decreed by this court accordingly: and it is hereby further ordered, adjudged and decreed, that the decrees of the district and circuit courts, so far they differ from this present decree be, and hereby are, reversed accordingly. And this court, further proceeding to render such decree as the circuit court ought to have rendered in the premises, it is further ordered, adjudged and decreed, that the said claimant, Graf, do *forthwith pay into the said circuit court the sum of $1800, being the amount of the appraised [*556 value of the said ship Virgin, delivered to him on stipulation, as in the proceedings mentioned, together with interest thereon, at the rate of six per cent., from the 24th day of March 1824, when the same was delivered to him on stipulation as aforesaid, unto the day when the same sum shall be so paid into the circuit court, together with the costs of the district and circuit courts; and unless he shall do so, within ten days after the said circuit court shall require the same to be done, that execution do issue, in due form of law, upon the stipulation aforesaid, against all the parties thereto. And upon the payment of such sums, then that the claimants, as owners of the said ship Virgin, be and hereby are for ever exonerated from all other and further payment in the premises. And it is further ordered, adjudged and decreed, that this cause be remanded to the said circuit court, with directions to carry this decree forthwith into effect.[1]

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[1] On the 9th of November 1874, the question of bottomry came before this court, in the case of —

The Belle of the Sea.

Strong, Justice, delivered the opinion of the court.—Very clearly, the ship was not discharged from the bottomry lien, unless the bond was actually paid, or unless the libellants agreed to pay it and look to the freights, the general average, and the insurances exclusively, for their reimbursement. Of actual payment, there is no evidence whatever; on the arrival of the ship at New York, Mr. E. A. Hammond, who had a mortgage upon her, which, with interest, amounted to more than $80,000, took her into his possession, in virtue of authority conferred by the mortgage, and employed the libellants to take up the bottomry bond, to collect the freight, the general average and insurance, and generally to transact the business of the vessel. Subsequently, this arrangement was assented to by the owner and the charterer. Accordingly, the libellants took up the bond, by taking an assignment of it from the Messrs. Ward, who held it, and proceeded to adjust the business of the ship, collecting the freights, general average, and insurance, and making the necessary disbursements; but as they were unable to realize from the insurances what was expected, the sums collected proved insufficient to pay the expenses of discharging the ship, the commissions and the necessary disbursements, together with the bottomry bond. They now claim the right to apply what they have been able to collect, first, to reimburse themselves the commissions, necessary expenses, and disbursements made by them on account of the ship; and secondly, to the discharge of the bottomry lien, looking to the ship for that portion of the bond which, by such marshalling of the fund, remains unpaid. And such, we think, are their rights, if they have not been surrendered. By the assignment of the bottomry bond to them, they became bottomry-creditors and even if there had been no such assignment, and they in fact paid the bond, at the instance of the owner and mortgagee, they would have been entitled, in equity, to the rights of the bottomry-creditor. Being thus creditors by bottomry, and also by payments on behalf of the ship for expenses, they have a clear right to apply whatever funds of the ship come to their hands, first, to the satisfaction of their unsecured claims; and secondly, to the bond, and to look to the ship for any unpaid balance of the bottomry. If, however, when they undertook their agency, they agreed to pay the bond, and thus discharge its lien, looking to the freight, the general average

and the insurance alone for reimbursement, or to the personal liability of the owner, as the appellants insist they did, they cannot now set up a lien on the ship. But we do not think the evidence establishes any such agreement, and its existence is quite improbable. They were adjusters of averages, and they desired to be employed as such, to attend to the business of the ship. To secure such employment, they made the most favorable representation of what they were able and willing to do. But they proposed to the Messrs. Ward, who held the bond, to take it up, taking an assignment of it, before they had an interview with Mr. Kimball, the owner. They could then have had no accurate knowledge of the amount of the freight, the general average, and the insurance. They could not have known that the ship's resources would not suffice to pay the bottomry, and the other expences necessary to make the freight and the general average available. And they had then no control over the insurance. It is therefore, quite unlikely, that they undertook to pay the bond and discharge the lien. Their arrangement was with the mortgagee, and there is no evidence, that they agreed with him to do anything more than take the bond from the holder, and act as general agents of the ship, in adjusting its affairs. The proofs do not establish that, in that arrangement, they undertook to satisfy the bottomry and extinguish its lien, without regard to the amount of freight, general average, and insurances which could be collected, and without regard to the necessary disbursements and commissions. Such is not the testimony of Mr. Higgins, nor has the mortgagee so testified, and the owner was not present at the arrangement.

The appellants, however, rely upon the statement of two sons of the owner, who do not speak at all of the arrangement with the mortgagee. They speak only of a subsequent interview of Mr. Higgins with the owner, from whom the possession had been taken, and who had then no control over the settlement of the ship's affairs. Their statement is, that Higgins proposed to pay the bottomry bond, for the owner, if he would give his firm adjustments of claims against insurance companies, and expressed his convictions of what his firm could do, making some promises respecting the rate of commissions, a promising to apply collections to the bond immediately. The sons state further, that this was verbally agreed to, but the policies were not delivered in pursuance of any such agreement, nor was there any agreement to deliver them, and what is very remarkable, the sons state that nothing was said at that interview about the policies. They were subsequently handed to Mr. Higgins to be collected, and the amount to be applied to the payment of the bottomry bond, if necessary. These witnesses are contradicted in some particulars by Mr. Higgins; but assuming that their statement is correct, it falls far short of the proof, that Higgins agreed to discharge the ship from the bottomry lien, or agreed to pay the bond and look only to the freight, insurances and general average. And even if the firm could be considered as agents of the owner, the payment of his debt, or the debt of the ship, could not work a satisfaction of the debt, or extinguish its lien; it would only change the creditor. We are of opinion, then, that no arrangement with the owner has been proved, by which the libellants have been disabled from enforcing the bottomry lien.

Another defence has been set up. The appellants contend, that the libellants are estopped from resorting to the ship for any balance of the bond unpaid by their representations. They insist, that they purchased the ship, relying upon a representation of Mr. Higgins, that if they purchased, and would settle certain claims of the charterers, there would be at least $3000 beyond what was needed to pay the bottomry bond, and other claims of the firm. There is, however, no sufficient proof of such representations. They are denied by Mr. Higgins, and the only person who affirms they were made is Mr. Nickerson, the purchaser himself. And even the testimony of Mr. Nickerson appears to assert only that Higgins expressed an opinion respecting what would be the result, rather than a positive assertion of the fact. This is quite an insufficient basis for an estoppel, and manifestly the opinion was not relied upon. Nickerson had examined for himself, some of the accounts at least.

This disposes of the case. Admitting the libellants have no lien in admiralty, for their fees and commissions, or even for their disbursements on account of the ship, they had, as we have said, a right to apply the funds they had in hand, first, to the satisfaction of the debt due them for such fees, commissions and disbursements, applying only to the remainder of the bond. For the balance unpaid, they have the security of the bottomry lien.

The decree of the circuit court is affirmed with interest at the rate allowed in Pennsylvania, and with costs.

*Samuel Hazard's Administrator, Plaintiff in error, *v.* The New England Marine Insurance Company.

Marine insurance.

Insurance was effected in Boston, Massachusetts, on the ship Dawn, from New York to the Pacific ocean, on a whaling voyage, and until her return; the letter ordering insurance was written in New York, by the owner of the ship, who resided there; and the ship was represented to be a "coppered ship;" the ship on the outward passage, struck upon a rock at the Cape de Verd islands, and knocked off a part of her false keel, but proceeded on her voyage, and continued cruising, and encountered some heavy weather, until she was finally compelled to return to the Sandwich Islands; where she arrived in a leaky condition, and upon examination by competent surveyors, she was found to be so entirely perforated by worms, in her keel, stem and sternpost, and some of her planks, as to be wholly innavigable; and being incapable of repair at that place, she was condemned and sold; the vessel, on her outward voyage, had put into St. Salvador, and both at the Cape de Verds, and at St. Salvador, her bottom was examined by swimmers; it was in evidence, that the terms "a coppered ship," had a different meaning, and were differently understood in Boston and in New York: *Held*, that the assured, in making the representation in the letter, was bound by the usage and meaning of the terms contained therein in New York, where the letter was written, and his ship was moored, and not by those of Boston, where the insurance was effected.

A representation to obtain a insurance, whether it be made in writing or by parol, is collateral to the policy; and as it must always influence the judgment of underwriters, in regard to the risk, it must be substantially correct; it differs from an express warranty, as that always makes a part of the policy, and must be strictly and literally performed.

The underwriters are presumed to know the usages of foreign ports to which insured vessels are destined; also the usages of trade, and the political condition of foreign nations; men who engage in this business are seldom ignorant of the risks they incur; and it is their interest to make themselves acquainted with usages of the different ports of their own country, and also those of foreign countries; this knowledge is essentially connected with their ordinary business; and by acting on the presumption that they possess it, no violence or injustice is done to their interests.

It is upon the representation, that the underwriters are enabled to calculate the risk, and fix the amount of the premium; and if any fact material to the risk be misrepresented, either through fraud, mistake or negligence, the policy is avoided; it is, therefore, immaterial, in what way the loss may arise, where there has been such a misrepresentation as to avoid the policy.

The judge of the circuit court, on the trial of the case, charged the jury, that "if they should find that, in the Pacific ocean, worms ordinarily assail and enter the bottom of vessels, then the loss of a vessel destroyed by worms would not be a loss within the policy." In the form in which this instruction was given, there was no error.[1]

*The circuit court instructed the jury, "that if there was no misrepresentation in regard to the ship, and she substantially corresponded with the representation, still, if the injury which occurred to the vessel at the Cape de Verds were reparable, and could have been repaired there, or at the St. Salvador, or at any other port at which the vessel stopped in the course of the voyage, the master was bound to have caused such repairs to be made, if they were material to prevent any loss; and if he omitted to make such repairs, because he did not deem them necessary; and if, by such neglect alone, the subsequent loss of the ship by worms was occasioned, the underwriters are not liable for any such loss." If the loss by worms is not within the policy, as has been decided, the court did not err in giving this instruction; the negligence or vigilance of the master would be of no importance, under the circumstances, in regard to the liability of the underwriters. [*558

Hazard *v.* New England Marine Insurance Co., 1 Sumn. 218, reversed.

Error to the Circuit Court of Massachusetts. In the circuit court, an action of *assumpsit* was instituted by the plaintiff in error, as the administrator of Thomas Hazard, deceased, on a policy of insurance, dated 26th December 1827, whereby the defendants caused to be assured Josiah Brad-

[1] S. P. Coles *v.* Marine Ins. Co., 3 W. C. C. 159.

lee & Co., for Thomas Hazard, jun., of New York, $15,000 on the ship Dawn, and outfits, at and from New York to the Pacific ocean and elsewhere, on a whaling voyage, during her stay and fishing, and until her return to New York, or port of discharge in the United States, with liberty, &c. The declaration contained various counts, stating a total loss of the vessel, and a partial loss of the cargo, and also a partial damage to the vessel, by perils of the seas.

It appeared in evidence, that the vessel sailed on the 29th of December 1827; and on her outward passage, struck upon a rock at the Cape de Verd Islands, and knocked off a portion of her false keel, but proceeded on her voyage, and continued cruising, and encountered some heavy weather, until she was finally compelled to return to the Sandwich Islands, where she arrived in December 1829, in a very leaky condition; and upon an examination by competent surveyors, she was found to be so entirely perforated by worms, in her keel, stem and stern-post, and some of her planks, as to be wholly innavigable; and being incapable of repair at that place, she was condemned and sold. It also appeared in evidence, that after the vessel sustained *the injury at the Cape de Verds, she put into St. Salva-
*559] dor; and that both at the Cape de Verds, and at St. Salvador, the bottom of the ship was examined by swimmers.

The defence to the action was rested on the following grounds. That there was a misrepresentation of a fact material to the risk, in the application made for the insurance, which was by letter, and in which the vessel was represented to be a coppered ship. It being alleged by the defendants, that by the terms "coppered ship," applied to a vessel destined upon a whaling voyage in the Pacific ocean, it would be understood, according to the usages of insurance in Boston, that the sides and bottom of her keel were covered with copper; and they adduced evidence to prove this position, and also that the keel of this vessel was not so covered.

And upon this point, the plaintiff produced evidence to prove that the keel was so covered, or if not, that it was nevertheless covered with leather, and which was alleged to afford an equally permanent and effectual protection against worms. The letter referred to was as follows:

New York, Twelfth month 22, 1827.

Josiah Bradlee & Co., Boston.

Respected Friends:—My ship, the Dawn, of New York, Henry Gardiner, master, is now nearly ready for sea, and will probably sail in the course of next week, on a whaling voyage to the Pacific ocean and elsewhere. I wish you to have $25,000 insured for my account, on the ship and outfit, the ship valued at $15,000, and the outfit valued at $10,000, each subject to its own average—the outfit to be transferred to my share of the oil, which will be about two-thirds of the oil, as fast as it shall be obtained; the oil valued at sixty cents a gallon. If any part of the oil should be sent home by any other vessel or vessels, that part of the oil not to be deducted from the sum insured on the outfit. Our ships sometimes take oil on their outward passage, and wish to send it home; therefore, you will please to have it stipulated in the policy, for liberty to do it, and also for liberty to stop, from time to time, to procure refreshments, as is usual and customary on such voyages. This is the same ship that you had insured for me in

Boston, some years since. I will only *observe, that I believe her to be one of the strongest and best ships in the whale fishery; she has been newly coppered, to light water-mark, above which she is sheathed with leather to the wales, and fitted in every respect in the best manner, and commanded by an experienced, capable and prudent master, which entitles her to be insured at as low a premium as any ship in that business. You got her insured for me, the last time, on a similar voyage, against all risks, for six per cent., although I understand that premiums have risen a little in Boston. I can but hope that you will be able to get this assurance effected at six and a half or seven per cent.—indeed I should not be willing to give more than eight per cent. Hoping to hear from you soon, on the subject of this insurance, I remain, with great repect, your assured friend,

THOMAS HAZARD, JUN.

The plaintiff also gave in evidence a letter from his intestate, of which the following is a copy.

New York, Eighth month 20, 1824.

JOSIAH BRADLEE & CO.

Esteemed Friends:—My ship, the Dawn, of New York, John H. Butler, master, sailed yesterday morning on a whaling voyage to the Pacific ocean and elsewhere. I wish you to have $25,000 insured, provided you can get it effected at seven per cent. or under. This ship is about 327 tons, built in this city, of excellent materials; is between seven and eight years old, copper-fastened, newly sheathed with wood, which was put on with composition nails, and then sheathed over the wooden-sheathing with sole leather, which was also put on with composition nails. Ship valued at $15,000, and the outfit at $10,000, each subject to its own average: the latter to be transferred to the oil as fast as it may be obtained (say my proportion, which will be about two-thirds of all that may be obtained), the same to be valued at forty cents per gallon; if part should be sent home by any other vessel or vessels, that part not to be deducted from the amount insured on the outfit. Sometimes, our ships take oil between here and the Cape de Verd Islands, and wish to send it home; therefore, I wish you to stipulate in the policy for liberty to do it. Hoping *to hear from you soon, on the [*561
subject of this letter, I remain, your assured and very respectful friend,

THOMAS HAZARD, JUN.

P. S. It must be stipulated in the policy, that the ship have liberty to stop for refreshments, as is usual and customary on such voyages.

The evidence was submitted to the jury, under the following charge, by the presiding judge of the circuit court. That, as to the objection taken to the plaintiff's right of recovery, upon the ground, that there was no sufficient abandonment made out, whatever might be his opinion of the validity of the objection, he should, for the purposes of the trial, rule, and he accordingly did rule, that under all the circumstances of the case, the abandonment was sufficient in point of law. 2. That the representation and facts stated in that letter (the letter of the plaintiff's intestate to his agents, left with the defendants at the time application was made for insurance), so far as they were material to the risk, must be substantially true; that if the ship was not coppered, as stated in that letter; and the ship did not, in that

respect, correspond with the representation, and the difference between the facts and the representation was material to the risk, then the plaintiff was not entitled to recover upon the policy; and he left the facts as to representation and the materiality, to the jury. That, in ascertaining whether the vessel was coppered, it was for the jury to determine, what constitutes a "coppered ship;" and if the jury should find, from the testimony, that in order to constitute what is called a coppered ship, the bottom of the keel, and the sides of the keel, as well as the sides of the vessel, must be coppered; and they should further find, that this vessel was not so coppered, and the deficiency was material to the risk; then there was not a compliance with the terms of the letter left with the underwriters, and the underwriters were not liable upon the policy. Or, if they should find, that a ship coppered on her sides, and also on the sides of the keel, and not on the bottom of the keel or false keel, would meet the representation of a coppered ship on other voyages, but that in whaling voyages in the Pacific ocean, the usual and customary mode is to copper the bottom of the keel or false keel; and
*562] it is understood by underwriters, when application is made for *insurance on such voyages, that vessels are so coppered, unless the contrary is stated; then, inasmuch as the letter applying for insurance is an application for insurance of a vessel on a whaling voyage in the Pacific ocean, the underwriters had a right to consider the representation in the letters as describing the vessel, as coppered, in the manner in which vessels are usually coppered for such voyages; and if the ship was not so coppered, and that deficiency was material to the risk, the terms of the letter were not complied with, and the defendants were not bound by the policy.

1. The court further charged, that in ascertaining what is to be understood as a coppered ship, in applications for insurance on a voyage of this nature, the terms of the application are to be understood according to the ordinary sense and usage of those terms, in the place where the insurance is asked for and made; unless the underwriter knows that a different sense and usage prevail in the place in which the ship is then lying, and in which the owner resides, and from which he writes, asking for the insurance; or unless the underwriter has some other knowledge that the owner uses the words in a different sense and usage from that which prevail in the place where the insurance is asked for and made.

2. The court further charged the jury, that although the terms of the letter applying for insurance were not to be considered a technical warranty, yet, if the coppering of the ship, as stated in the letter on which the insurance was made, was substantially untrue and incorrect, in a point material to the risk; such a misrepresentation would discharge the underwriters, although the ship was partially coppered, and although the loss did not arise from any deficiency in the coppering.

3. The court further charged the jury, that if there was no misrepresentation in regard to the ship, and she substantially corresponded with the misrepresentation; still, if the injury which occurred at the Cape de Verds was reparable, and could have been repaired there, or at St. Salvador, or at any other port at which the vessel stopped in the course of the voyage, the master was bound to have caused such repairs to be made, if they were material to prevent any loss. And if he omitted to make such repairs, because he did not deem them necessary; and if, by such neglect alone, the

subsequent loss of the ship by worms *was occasioned, the underwriters are not liable for any such loss so occasioned.

4. The court further charged, that if the jury should find, that in the Pacific ocean, worms ordinarily assail and enter the bottoms of vessels, then the loss of a vessel destroyed by worms would not be a loss within the policy.

5. The court further charged, that as the decisions of the courts in Massachusetts had established that damage arising from injury by worms was not a loss within the policy, the underwriters in Boston must be deemed as contracting in reference to those decisions, and not liable for losses from that cause.

The court further charged the jury, that if in consequence of the injury sustained at Port au Praya, in the Cape de Verds, the false keel was torn off, whereby the vessel became exposed to the action of the worms, and that they thereby obtained entrance and destroyed the vessel, that the loss would not come within the policy; it being a consequential injury, against which underwriters are not considered as taking the risk.

The counsel for the plaintiff called upon the court to charge upon the two following points: 1. That if the jury believed that the underwriters would not have charged a higher rate or premium, if the vessel had been correctly represented, than they did charge, and that the insured had not intentionally misrepresented the facts; then the representation contained in the letter is not material, and does not defeat the policy. 2. If they believed that the object of coppering the bottom of the keel is to protect it against worms, and if they also believed the leather an equal protection, and was put on; in that case, the letter would not be considered a material misrepresentation.

1. The court refused to direct the jury in the terms stated; but upon this point did direct the jury, that if the fact was not material to the risk, and would not have varied the conduct of the underwriters, either as to the premium of insurance, or as to the underwriting, at all, if the fact had been correctly represented, and the insured had not intentionally misrepresented the facts; then the misrepresentation will not prevent the insured from a recovery in this case, or defeat the policy.

2. The court refused to give the directions in the terms stated; but upon this point directed the jury, that if the object of coppering the bottom of the keel was to protect it against *worms, and if they believed that leather is an equal protection, still if the fact was, that the letter of instructions did contain a representation which was, and must have been, understood, as representing that the keel was coppered; and if that fact was material to the risk, and might have induced the underwriters to ask a higher premium, or not to have underwritten at all; then the misrepresentation of its being copper, when it was leather, would avoid the policy. But if it was not a fact material to the risk, and would not have changed the conduct of the underwriters, either as to underwriting at all, or in asking a higher premium; then the misrepresentation would not avoid the policy. [*564

The counsel for the plaintiff excepted to the charge of the court, on the points above stated; and the jury having rendered a verdict in favor of

the defendants, the court entered judgment thereon; and the plaintiff prosecuted this writ of error.

The case was argued by *Selden*, for the plaintiff in error; and by *Loring*, with whom was *Webster*, for the defendants.

Selden, for the plaintiff in error, contended, that the charge of the court was erroneous on all the points operating against the claim on the underwriters. Upon the evidence in the case, he argued, that it was by no means clear, that "a coppered vessel," in the interpretation given to the terms by the underwriters in Boston, required that the coppering should extend over the false keel. The testimony upon this point, in reference to vessels engaged in the trade of the Pacific ocean, and sailing from Boston, was contradictory; while it was fully shown by the evidence of witnesses examined in New York, that "a coppered ship" was not required to be coppered in any other manner than that in which the Dawn was coppered.

The charge of the court is erroneous, where it adopts the rule to be, that the interpretation of the letter requesting insurance to be such as the terms used in it are understood at the place where insurance is made. The letter for insurance was in this case written in New York, and it is to be understood as it would be in New York. The court excluded the inquiry *as to the meaning of "a coppered ship" in the port of New York. *565] Underwriters are presumed to know the usages and customs of all the places from or to which they make insurances. In this case, the representation, according to the custom and usage in the port of New York, was faithfully correct. Nor could any charge of concealment be made, as the letter of the owner of the Dawn was put into the possession of the underwriters; and that letter describes the ship to be what, in point of fact, she was. There is not a pretence of intentional misrepresentation. Upon these principles were cited, Hughes on Insurance 366, 351; 5 Barn. & Ald. 238; 4 Wend. 76; Pet. C. C. 160; 1 W. C. C. 219; 1 Binn. 341.

2. It is not contended, that if it had been known to the assured, that the interpretation of the words describing the ship as a coppered ship, was different in Boston from that which prevailed in New York, the difference should not have been admitted; and the description of the vessel should have stated with more precision the manner in which she was coppered. But no such information was in the possession of the assured; and he, as well as his agents, acted in perfect good faith. Upon the charge of misrepresentation in the description, the counsel contended, that it should have been shown on the part of the underwriters, as there was no allegation of *mala fides*, that the facts said to have been misrepresented, materially contributed to effect the loss. The proposition laid down in the charge of the court is too broad. The rules of law relative to contracts of insurance, do not differ so widely from the rules relative to ordinary contracts. Those rules in reference to other contracts are, that all that passed before the contracts shall not be considered. Unless when fraud is charged, a party cannot go back to the state of things before the contract was made. Recently, the disposition of courts has been to assimilate the principles of law operating on contracts of insurance to the law of other contracts. The rule claimed for the plaintiff in error applies in all the class of cases where the party has acted under a want of knowledge, and without any fraud.

This is now the established principle. The court will always say, that in all cases the *injury must have been the consequence of the very fact represented. But by the rule laid down in the charge of the [*566 court in this case, from its generality and breadth, the underwriter would be discharged, in case of any deficiency of outfit, although afterwards supplied. Cited, 1 Moo. & Malk. 367; Hughes on Insurance 348; 1 Doug. 238; 8 Wend. 163.

3. The master of the ship should have made the repairs required in consequence of the accident to the ship; and if he did not make them, the underwriters are not discharged, in consequence of his neglect to have the repairs made. It is contended, that after the injury happened, the master become the agent of the underwriters, as well as of the assured, for the purpose of making the necessary repairs. This was most certainly the case in the present controversy, as the judgment of the master was exercised upon the subject of the repairs, and as they might have been considerable. The master thought the interests of the assurers were promoted by the course he pursued; but the charge of the court denies the right of the master to exercise his discretion, and denies to the plaintiff the benefit of this principle of the law of insurance. From the period of the accident, this agency existed; and the assured is not to be subjected to the consequences of its not having been properly used. This rule does not extend to the cases in which the technical rules relative to abandonments prevail. The authorities show that the contract of the owner is fulfilled, when he provides a competent master; and sustain the principle, that, under such circumstances as those of the case before the court, the master is the agent of all the parties to the contract of insurance. 2 Barn. & Ald. 82; Phillips on Ins. 249; 7 Barn. & Cres. 794; 5 Barn. & Ald. 171.

4. As to the point, whether a loss caused by the destruction of the vessel by worms is within the policy, it was argued, that but one case, other than that decided in Massachusetts, sustained the principle claimed for the underwriters in this case; that was the case in 1 Esp. 444. The vessel was engaged in the slave trade, and the destruction was produced by her lying in the rivers in Africa. Her death-wound was received during that time. But in this case, the injury from *worms took place, while the ship [*567 was on the high seas, in the regular prosecution of the voyage insured. The loss was the consequence of her navigating the Pacific ocean. The destruction was not from the age of the vessel, but by a cause which operates on new as well as old ships. The authorities upon the law of insurance do not sustain the position laid down by the circuit court in the charge to the jury. The case of *Martin* v. *Salem Insurance Company*, 2 Mass. 424, is imperfect; and does not establish the general principle. It rests upon the case in Espinasse, cited; and the injury occurred while the vessel was at the wharf, detained by the embargo. The loss by worms has been likened to one sustained by rats, but the cases are dissimilar. In reference to the liability of underwriters for such losses, the cases are contradictory. 1 Binn. 592; 4 Camp. 203. Abbott on Shipping does not class this among the losses for which the assurers are not liable. Abbott 257. In 2 Caines 85, Judge LIVINGSTON disapproved of the decision in *Rohl* v. *Parr*, 1 Esp. 444.

Loring, for the defendant.—The first question presented for the consideration of the court, is one involving the principles of verbal construction. The defendants maintain, that the ruling of the court is correct; that the terms "coppered ship," are to be understood according to the usage and sense prevailing in the place where the insurance was asked for, and the contract was made, and to be performed. The fundamental principle of verbal construction is, that words are to be understood in that sense in which the party using them supposes that the party to whom they are addressed receives them. The position laid down by the court, seems a necessary corollary of this general proposition; for the party using terms to another, in a place in which he knows that a distinct meaning obtains, must presume that to him such will be their only import. If he knows that they admit two or more senses, he either knows that the party to whom they are addressed will construe them in one rather than in the other, or is bound
*568] to explain the meaning; and if he is ignorant of any meaning *differing from that in which he understands them, he should abide the consequences, if the other party, honestly and without fault, is misled; for the writer is the author of the mistake, however inadvertently. And in this particular, the case might be likened to that of an inadvertent trespass, in which the party occasioning the damage is bound to make indemnity, however unintentional may have been the act.

In the case at bar, if the plaintiff's testator honestly used the words in one sense, and the defendants as honestly understood them in another, there was a mutual mistake, and therefore, no contract between them; and the case is analogous, if not similar, to that of an inadvertent and innocent misrepresentation, or concealment of a fact material to the risk; in which, according to the established principles regulating the contract of insurance, the policy is held void. Numerous cases have been decided, illustrative of the application of this principle. Thus, if a bill of exchange, for a given number of pounds, be drawn in London on Dublin or Bermuda, and the currency be not specified, it will be paid in Irish or Bermudian currency, and not in pounds sterling. So, in cases of contracts made between parties resident in different countries, in which a difference of weight or measure prevails, they must be construed according to the import of the terms in that country where the contract is to be performed; although the party residing in the other may have been ignorant of such difference. *Potter* v. *Brown*, 5 East 130; *Bridge* v. *Wain*, 1 Stark. 504; *Kearney* v. *King*, 2 Barn. & Ald.; *Benson* v. *Schneider*, 7 Taunt. 272; *Burrows* v. *Jemino*, 2 Str. 733.

In reply to the position taken by the plaintiff's counsel, that the rule laid down by the court is not applicable, because the terms in question were not used in the policy, but in a collateral paper; it is submitted, that the paper referred to, being the written representation upon which the insurance was applied for, was the basis of the whole contract, and can with no more propriety be termed collateral, than would be the foundation of a building in reference to the superstructure.

It is said, that because the letter was written in New York, it is to be understood as the terms are there used. But if it was written, it was not to be read, nor understood, nor acted upon there, but in Boston. If the
*569] plaintiff's testator, instead *of writing, had applied personally, and used the language in the city of Boston, it is believed, that the rule

laid down by the court would be esteemed correct ; and it is not perceived, that there is any substantial difference between the two cases.

It is asked by the plaintiff's counsel, what would have been the consequence, if the question before the court had come up in the form of one of seaworthiness, instead of one of construction, and it had been proved, that this vessel was seaworthy for the voyage, according to the understanding of merchants in New York, though not so considered in Boston? The answer is obvious. Admitting, that in such case, the insurers would be liable, because by underwriting a New York ship, they must be presumed to have known, or been willing to take the risk of such preparation as is usual in that port, still, such a view does not cover the case at bar. For here, the question is one of representation concerning a particular fact, affecting the seaworthiness of the vessel, which the insured was not bound to make, but which, if made, must be strictly true. And if it prove otherwise, and be of a fact affecting the risk, the policy is void, although the vessel might have been seaworthy. If there is a material difference between a leathered and a coppered keel, and the insured represented it to be coppered, when, in fact, it was covered with leather ; it is not the less a misrepresentation, though both be seaworthy. So that the question rests wholly upon the inquiry, as to what is the proper construction of the particular terms used, without reference to the question of seaworthiness.

Again, it was urged, that insurers are bound to know the usages of trade, and of course, to know the meaning of the terms used in trade. It is conceded, that they are bound to know the usages of trade affecting the risks which they assume ; and it may also be admitted, that they are bound to know the ordinary meaning of the terms used in their contracts ; but they are only bound to know them, as used in those places where the contract is made, and to be performed. If, in this case, at the time when the letter was written, there had been a difference in the currency between New York and Massachusetts, so that a dollar in the former was worth ninety cents only, while in the latter worth an hundred, the plaintiff's *testator would not have been content to have the terms used in the proposal, construed according to their meaning in New York. [*570

The second objection taken by the plaintiff, is to the rule laid down by the court, that the misrepresentation of a fact material to the risk, defeats the policy, although the subject of such misrepresentation may not have contributed to the loss. This rule of law has been so long established, and has been so universally recognised, that it is more properly to be considered as an axiom or postulate in the law of insurance, than a subject for argument. The comments of the plaintiff's counsel upon the evidence to this point, are believed to be irrelevant ; for the fact of the misrepresentation of a circumstance material to the risk being established, we are stopped *in limine ;* we cannot go further to argue what effect the want of copper upon the keel might or might not have had upon the interest, or rights, or obligations of the parties; for there are no rights, nor obligations, nor parties—there was no contract. That this rule has been universally recognised, appears by all the elementary writers. 1 Marsh. on Ins. 453–6 ; Hughes 345 ; Phillips 80–111 ; 3 Kent's Com. 230 ; *Lynch* v. *Hamilton*, 3 Taunt. 37 ; *Lynch* v. *Dunsfor*, 13 East 494.

But the plaintiff relies upon the case of *Kinn* v. *Tobin*, 1 Moo. & Malk.

367, as establishing a different rule; yet upon examination, and a strict application of the language of the court to the facts then under consideration, it will not be found to authorize any such inference. The point upon which it appears to have been decided was, that the alleged misrepresentation was, in fact, a different executory agreement, which could not be proved to vary the written contract; but if fraudulently made, for the purpose of inducing the insurer to subscibe the policy, might be proved to vacate it.

The next point arises upon the refusal of the court to charge the jury, that if they believe, that the object of coppering the bottom is to protect it against worms, and if the leather were an equal protection, the letter applying for insurance would not be considered a material misrepresentation. The refusal of the court seems, however, obviously correct; because the *571] direction prayed for, if given, would have prevented the jury *from inquiring into the other effects of covering a vessel's bottom with leather instead of copper, beside that of protection against worms; and which other effects might be material to the risk, and vary the premium, although vessels might not be coppered on account of them only; as, for instance, the well-known tendency of leather to become foul, and covered with shell-fish and grass, &c., by means of which her sailing is materially affected, and her chance of escaping from capture and other perils diminished, and her voyage prolonged, thus increasing the duration of the risks insured against. And although these reasons might not apply in their full extent to the case at bar, the principle is nevertheless the same; and it may also be added, that there would be a material difference in a keel newly coppered, as this was represented to have been, and one covered with leather three years old, as this was proved to have been; and that insurers are not bound to run the hazard of experiments made contrary to their contract, and without their knowledge.

The next exception taken by the plaintiff was, to the instruction, that if the jury should find, that in the Pacific ocean, worms ordinarily assail the bottoms of vessels, a loss from such a cause would not be within the policy; and that as the decision of the courts in Massachusetts had established this doctrine, the underwriters of this policy must be deemed as contracting in reference to them, and so not liable for such a loss. The first part of this proposition seems manifestly correct. If worms infest the Pacific ocean, so that a vessel upon entering it, and not properly protected, is necessarily exposed to destruction, the danger is not an extraordinary peril, against which alone insurance is made; but a certain one, against which the insured is bound to provide. A contrary doctrine would involve the absurdity of converting the contract of insurance into one of indemnity against certain loss. This point has been long established and acquiesced in by insurers and elementary writers, without question of its soundness. 1 Esp. 144; 2 Marsh. 492; Benecke 456; Hughes 218; 3 Kent's Com. 248. The sug- *572] gestion in Phillips 251, is unsupported by authority; *and however just such a rule might have been, in former times, it cannot be so considered, now that repairs of vessels can be made in all parts of the world. And the application of the *lex loci* is indisputable.

A further exception is to the charge, that if the injury to the copper might have been repaired, and the subsequent loss by worms happened by

reason of the master's neglect to make such repairs, the insurers are not liable. The general proposition, that the assured is bound to keep his vessel in a suitable condition to perform her voyage, it is believed, has never before been questioned. This obligation upon him as owner, in all cases of charter-parties and contracts of affreightment, is perfect; and, it should seem, ought to be so with regard to insurers. 1 Abbott on Shipping 218, note (ed. 1829); *Putnam* v. *Wood*, 3 Mass. 481. It is true, that the original doctrine of implied warranty of seaworthiness has been somewhat mitigated by late decisions; it having been recently held, that an excess or deficiency in the condition of the vessel, removed before a loss, restores the contract. 1 M. & R. 673; 7 B. & C. 794. But no change has been made affecting the implied contract which the insured is under to do his duty, by keeping his vessel in suitable repair.

The plaintiff rests this part of his case upon these two positions. 1. That the implied warranty of seaworthines applies only to the commencement of the voyage, and is not continuous. 2. That the master, after a disaster, becomes the agent of the insurers as well as of the insured; and therefore, the insurers are liable for the consequences of his neglect or mistake in omitting to repair the damage done by such disaster.

The first position is, at least, of doubtful authority, and however maintainable upon the strength of English decisions, the American cases seem to establish a contrary doctrine. It rests upon the authority of the cases above cited. 1 M. & R. 673; 7 B. & C. 794. It seems opposed to those general principles heretofore supposed the basis of this contract. Good faith to the assurer, assuming great hazard for small compensation, having no possession or right of possession of the vessel, nor any knowledge *of her condition, [*573
nor any power to keep her seaworthy, and relying, therefore, entirely upon the skill, care and fidelity of the owner and his agents; requires that they be held strictly to the obligation of such skill, care and fidelity, as a condition precedent to any rights under this contract. And public policy, interested in the preservation of vast amounts of property and of human life, wholly dependent upon the fidelity with which this part of the duty is performed by the assured, equally demands his being holden to this strict obligation, in order to visit upon him, in case of a breach of it, the whole loss, as a just retribution for his carelessness or neglect. The American cases referred to are, *Tidmarsh* v. *Washington Fire and Mar. Ins. Company*, 4 Mason 439; *Peters* v. *Phœnix Ins. Company*, 3 Serg. & Rawle 25.

But if this position were sound, it would not avail the plaintiff; for it would not prove that the insures are liable for a loss happening even by a peril insured against, if the direct consequence of unseaworthiness. And still less would it prove, that they are liable for a loss by a peril *not insured against*, arising from that unseaworthiness, which is the case at bar. The cases relied on by the plaintiff, tend to establish merely this doctrine, that the implied warranty of seaworthiness relates only to the commencement of the voyage, so that, if complied with, the contract still subsists, though there be subsequent unworthiness, which might have been repaired. They do not sustain the doctrine, that if a loss happened from such unseaworthiness, the insurers will be liable for that loss, however they might be for one arising from any other cause. These two propositions are entirely distinct. An implied warranty is in the nature of a condition precedent to the inception of the con-

tract, without the performance of which it never takes effect. The duty of keeping the vessel in a seaworthy state is a continuing obligation, *consequent* upon the contract; the breach of which will not destroy it, though it will visit upon the insured the consequences of such breach. The doctrine, that insurers may be holden answerable for losses occasioned by unseaworthiness, which might have been repaired, is at variance with principles of public policy, the received opinions of insurers, and the reasonable construction of the language of their contract. It would open a wide door to
*574] *frauds, by tempting the assured to convert small into great, and partial into constructive losses. If, for instance, a partial damage should not amount to the stipulated average of five per cent. on the value of the vessel, which is necessary to create liability on the part of the insurer; how easily might it be made one, if left unrepaired, until sufficiently increased, or connected with others. And if a partial loss, one-third of the expense of repairing, which must fall upon the assured, should be worse for him than a constructive total loss, as very frequently happens, what would be more easy than to suffer it to become one? And how readily the assured and their agents yield to temptations of these descriptions, judicial records furnish plenary evidence. If a party may insure against loss by a breach of his own contract, occasioned by the neglect or default of his agent appointed to fulfil it; what limit is there to the temptation to fraud and the exposure of property and life, short of the negligence and avarice of those who may be intrusted with their preservation?

That this doctrine is opposed to received opinions, is manifest, from the consideration, that no decided case, no judicial *obiter dictum*, no opinion of an elementary writer, is adduced in support of the plaintiff's position. The doctrine contended for, if established, would seem to constitute one, if not the only exception to the elementary rule, that no man shall take advantage of his own wrong. Again, this doctrine is opposed to the reasonable construction of the *language* of the contract. The insurers undertake to indemnify against *losses* by perils of the sea. What then is such loss in any given case? It is clearly the extent of damage then sustained, to be estimated by the cost of repairing it, at the time and place when and where such reparation can, by reasonable diligence, be first had. The loss is then ascertained and determined; the peril and its legitimate consequences have then ceased. The assured cannot, by his own act or neglect, add to such loss, or superinduce further consequences at the expense of the underwriters.

If the vessel be further exposed, and lost, by reason of the damage which could have been so repaired, such further loss is not a legitimate consequence
*575] of that peril, because neither *inevitable nor reasonable. And, if a vessel so circumstanced be lost, with or without the occurrence of a new peril, which would not have proved fatal to her, but for the omission to repair the damage, the subsequent loss is not one by a peril insured against. Thus, if a vessel be strained, and arrive at a port where repairs can be made, the expense of such repairs is the amount of the loss; the peril and its legitimate consequences have terminated. If she sail without repairs, and founder in smooth weather, the foundering is not by a peril insured against, for there was none at the time. So, if she founder in a gale of wind, which it could be proved that she would have weathered, had she been properly repaired, the result would be the same. In neither of these cases, is the

total loss the necessary or fair consequence of the peril insured against, but is owing wholly to the neglect of the assured or his agents. In such a case, however, the *partial* loss is by a peril insured against, and to that extent the underwriters are liable; but the subsequent total loss was not so; for it was not immediately owing to any peril, nor necessarily consequent upon any.

The case would be otherwise, if the damage were such as could not by reasonable care have been discovered, or by reasonable diligence been previously repaired; for then all the consequences of the original peril would be properly considered as immediate or necessary. Thus, in the case at bar, the loss of the false keel at the Cape de Verds, and of the copper (if she was coppered), was a partial loss, which might have been immediately or soon after repaired; and for the expense of which reparation, the defendants were accountable, cost what it might. The subsequent loss by worms, therefore, was neither an immediate nor inevitable consequence of the peril there encountered. If the plaintiff's doctrine be sound, then, as it took two years after the happening of the peril for the worms to complete the destruction of the vessel, she is to be considered as having been kept, for that time, under the perpetual and incessant operation of the consequences of the peril, by the mere will or neglect of the assured, at the hazard of the underwriters. If the master, by his omission to make repairs while in port, may render the insurers liable for a subsequent loss at sea, happening by reason of their omission; why would they not *be answerable for the loss, should he abandon the ship in port, instead of repairing her? The [*576 consequences would be far less serious to the underwriters.

The case of a loss, happening in consequence of the previous neglect or default of the assured to repair his vessel, is plainly distinguishable from the case cited by the plaintiff, in which it has been decided, that underwriters are answerable for losses immediately owing to perils insured against; though the exposure to such perils be occasioned by the accidental negligence of the master or crew. From the imperfection of human nature, it must be anticipated, that the perils insured against will thus sometimes occur, and it is not unreasonable, therefore, to consider them as comprehended in the contract; whereas, a neglect or voluntary omission to make necessary repairs, is not accidental, nor to be anticipated, but is like any other omission to fulfil a contract, the consequences of which must fall upon the guilty party. Thus, if the assured were himself on board the vessel, he could not prevent her loss by the former cause, *i. e.* some sudden or accidental carelessness, but he could keep his vessel in good repair; and the master in this respect is his representative. *Paddock* v. *Franklin Ins. Co.*, 11 Pick. 227; 3 Serg. & Rawle 25. But if the plaintiff's position were tenable, and insurers were answerable for losses happening by means of perils insured against, though occasioned by the previous neglect or default of the insured to keep the vessel in a seaworthy condition, such a doctrine would not embrace the case at bar; for here the vessel was not lost by any such peril, but by worms, which is not a peril embraced in this policy. It surely will not be pretended, that underwriters are liable for the negligence or default of the master, as such, where no peril insured against was in operation; and neither can they be liable for a loss occasioned by a peril not insured against, because occasioned by such negligence.

The second proposition of the plaintiff's counsel was, that the master, after a disaster, is to be considered as the agent of the insurers. This is believed to be contrary to all hitherto received opinions upon this subject. He is the agent of the owners, until abandonment, or until legal cause for
*577] abandonment, *and in the latter case, even after such cause, unless the owners shall, within reasonable time, have elected to make such abandonment. Any other doctrine would throw upon the insurer the whole responsibility fairly incumbent upon the assured; would annihilate his part of the contract, and expose the underwriters, not only to the perils of the seas, but to all the consequences of the frauds, carelessness, ignorance, unskilfulness and neglect of the assured and his servants; against which, by the nature of the contract, he stipulates to provide, and which he alone has the means of preventing.

It was argued by the plaintiff's counsel, that the interest of the insurers requires that the master be considered their agent, after a disaster; as otherwise he would be induced to make small repairs, at great expense, and to their detriment. It is suggested, in reply, that if he knew the actual extent of the injury, he must make only such repairs as are reasonably required. If he make more, the insurers will not be answerable for the excess; and in case of controversy, a jury must pass upon the propriety of his proceedings. If, on the other hand, the extent of the injury, or its probable consequences, be doubtful, it is better for the interest of all, that they should be ascertained, at any expense short of a total loss; than that a further one of property, and it may be of life, should be hazarded. No perfect rule, infallible for the protection of both parties, can be prescribed; but that which places the responsibility of honest discretion and reasonable care upon the assured and his agent, must be far less liable to abuse, and to produce injury and injustice, than that which exonerates them from all responsibility whatever.

The last ground of exception is, to the ruling of the court, that if, by the loss of the false keel, the vessel became exposed to the action of the worms, which thereby obtained entrance and destroyed her, the loss by worms was a consequential injury, and so not within the policy. The legal maxim, "*causa proxima, non remota, spectatur*," is recognised by all writers upon this subject, and in many adjudged cases. *Greene* v. *Elmslie*, Peake 212; *Kemp* v. *Vigne*, 1 T. R. 304; *Hehn* v. *Corbett*, 2 Bing. 205; *Livie* v. *Jan-*
*578] *sen*, 12 East 648; *Law* v. *Goddard*, 12 Mass. 112. *These cases are so analogous to that at bar, as to seem decisive of the question.

A cause cannot be said to be immediate, within the meaning or the law, where the consequence is not inevitable; but may be avoided by reasonable skill, care and diligence. To say, as is contended in this case, that the loss of the copper was the immediate cause of the destruction of the vessel, because the entrance of the worms is the inevitable consequence; is to beg the question. It is true, that such was the inevitable consequence of the vessel's *remaining* in that condition; but not true, that it was the inevitable consequence of the injury.

The doctrine relied upon by the plaintiff, that a consequence is inevitable, where it must follow from the cause, in the given conjecture of circumstance, is too broad. For in that sense, all consequences from any cause are inevitable. And it would be just as true to say, that the destruction of a

ship by fire was inevitable, after it was communicated to her, though it might, by reasonable diligence, have been extinguished; or, that her sinking was the immediate consequence of a leak, which might by ordinary care have been stopped; as to say, that in this case, the destruction by worms was the inevitable consequence of the damage sustained at the Cape de Verds.

With regard to any claim for a partial loss, none was shown, amounting to the requisite average of five per cent.; and had there been one, it was merged in the subsequent total loss. *Rice* v. *Homer*, 12 Mass. 230; *Livie* v. *Jansen*, 12 East 648.

Webster stated, that he could add nothing to the full and able argument of *Loring;* and that he submitted the case to the court upon that argument, without any observation upon it from him.

McLean, Justice, delivered the opinion of the court.—The plaintiffs brought an action of *assumpsit*, in the circuit court for the district of Massachusetts, on a policy of insurance, dated the 29th of December 1827; whereby the defendants caused to be assured Josiah Bradlee & Co., for Thomas Hazard, jun., of New York, $15,000 on the ship Dawn and outfits, at and from New York to the Pacific ocean *and elsewhere, on a whaling voyage, during her stay and fishing, and until her return to New [*579
York, or port of discharge in the United States. The declaration contained various counts, stating a total loss of the vessel, and a partial loss of the cargo; and also a partial damage to the vessel by perils of the seas.

It appeared in evidence, that the vessel sailed the 29th of December 1827, and on her outward passage struck upon a rock at the Cape de Verd Islands, and knocked off a part of her false keel, but proceeded on her voyage and continued cruising, and encountered some heavy weather, until she was finally compelled to return to the Sandwich Islands, where she arrived in December 1829, in a leaky condition; and upon an examination by competent surveyors, she was found to be so entirely perforated by worms, in her keel, stem and stern-post, and some of her planks, as to be wholly innavigable; and being incapable of repair at that place, she was condemned and sold. The vessel had sustained an injury at the Cape de Verds, and she put into the port of St. Salvador; at both of which places, the bottom of the ship was examined by swimmers. On the trial, a bill of exceptions was taken by the plaintiff's counsel, to certain instructions of the court to the jury, and the case is brought before this court by writ of error.

The first instruction excepted to, is as follows: "The court further charged, that in ascertaining what is to be understood as a coppered ship, in applications for insurance on a voyage of this nature, the terms of the application are to be understood according to the ordinary sense and usage of those terms, in the place where the insurance is asked for and made; unless the underwriter knows that a different sense and usage prevail in the place in which the ship is then lying, and in which the owner resides, and from which he writes asking for the insurance; or unless the underwriter has some other knowledge, that the owner uses the words in a different sense and usage from those which prevail in the place where the insurance is asked for and made." This instruction refers to the letter written by the plaintiff, at New York, on the 22d of September 1827, to his agent in Bos-

ton, requesting him to have the ship Dawn insured, and in which letter he
*580] made the following statement respecting the *ship: "This is the same ship that you had insured for me in Boston, some years since. I will only observe, that I believe her to be one of the strongest and best ships in the whale fishery; she has been newly coppered to light water mark, above which she is sheathed with leather to the wales, &c."

A representation to obtain an insurance, whether it be made in writing or by parol, is collateral to the policy; and as it must always influence the judgment of the underwriters, in regard to the risk, it must be substantially correct. It differs from an express warranty, as that always makes a part of the policy, and must be strictly and literally performed. The rule prescribed by the circuit court, to govern the jury in giving a construction to the representation in this case, was founded upon the fact, supposed, admitted or proved, that what "is to be understood as a coppered ship at New York, would not be so considered at Boston." And this presents the point for consideration, whether the plaintiff, in making the representation, was bound by the usage of Boston, or of New York, where his letter was written and his ship was moored. It is insisted, that Boston is the place where the contract was made, and where effect was given to the representation; and that, consequently, not only the contract, but the inducements which led to it, must be controlled by the usages of Boston.

This is an important question in the law of insurance, and it seems not to have been settled by any adjudication in this country; and none has been cited from England. The plaintiff's counsel contends, that it is substantially a question of seaworthiness, and should be governed by the same rule; and he refers to a decision in 4 Mason 439, as decisive of the point. In that case, an insurance was made in Boston, upon a British vessel, belonging to the port of Halifax, in Nova Scotia, and the court says, "if the Boston standard of seaworthiness should essentially differ from that in Halifax, in respect to equipments for a South American voyage of this sort, it would be pressing the argument very far, to assert, that the vessel must rise to the Boston standard, before the policy could attach. Where a policy is underwritten upon a foreign vessel, belonging to a foreign country, the underwriter must be taken to have knowledge of the common usages of trade in
*581] such country, as to the equipments *of vessels of that class for the voyage on which she is destined. He must be presumed to underwrite, upon the ground that the vessel will be seaworthy in her equipments, according to the general custom of the port, or at least, of the country to which she belongs."

In every policy, there is an implied warranty of seaworthiness, and this is a condition precedent on the part of the insured. The policy does not attach, unless the vessel be "properly manned and provided with all necessary stores, and in all respects fit for the intended voyage." The equipment of the vessel must depend upon the nature of the voyage; as a ship might be seaworthy for a voyage across the Atlantic, and not for a whaling voyage in the Pacific. A representation might embrace all the facts of an implied warranty of seaworthiness; but this is wholly unnecessary, and is seldom, if ever done. The representation is designed to state the quality and condition of the ship, if that be the object of insurance, so as to induce the underwriters to insure on reasonable terms; and it is not limited to the facts

necessary to constitute seaworthiness. A question of seaworthiness is determined by the usages of the port where the vessel is fitted out, in reference to the destined voyage. But the facts stated in a representation may go beyond those usages; and the insured is bound to the extent of his communication, whether verbal or written. In the one case, the law implies a definite and fixed responsibility; in the other, the liability depends upon the express declarations of the insured. If the representation in this case fall below the implied warranty of seaworthiness, it does not, in any degree, affect such warranty; it cannot, therefore, be considered as a substitute for the implied seaworthiness of the ship, but as a representation which entered into the consideration of the underwriters, when they fixed the premium of insurance.

The question then recurs, was the plaintiff bound, in describing the ship, to use the appropriate terms, according to the usage in Boston or in New York? It is said, the terms used were calculated to mislead the underwriters, as they resided at Boston; and in insuring a "coppered ship," would, of course, refer to a vessel which could be so appropriately called at Boston. *The writer of the letter is a resident of the city of New York; his letter was written at that place; and he described his [*582
vessel then in the harbor of that city. What terms would he be supposed to use, in giving this description; those which are peculiar to New York, or those which are peculiar to Boston? Can he be presumed to know the usages of Boston in this respect; and must he not be presumed to know those of New York? In making a representation respecting his vessel, his mind would not be directed to Boston, but to his ship, then in the harbor of New York; and in describing her as a "coppered ship," he would refer to the appropriate designation at New York. And would not the minds of the underwriters at Boston, seeing that the letter was written at New York, and represented a vessel in the harbor of that city, be very naturally directed to the sense in which the terms used were viewed in that place? Would they not inquire, whether the words "coppered ship" mean the same thing at New York as at Boston?

In a case of seaworthiness, such is admitted to be the rule; and if the representation be not a warranty of seaworthiness, still does not the reason of the rule apply in the one case as forcibly as in the other? The underwriters are presumed to know what constitutes seaworthiness in a foreign port, and to act under this knowledge; and why may they not, with equal propriety, be presumed to know, on a representation, the usage at the place where the vessel lies, and where she is described? It is but a presumed knowledge of usage in both cases; and which, in both cases, must have the same effect on the rights of the parties. If, therefore, the rule be applicable to a case of seaworthiness, it must be equally so to a case of representation.

The underwriters are presumed to know the usages of foreign ports to which insured vessels are destined; also the usages of trade, and the political condition of foreign nations. Men who engage in this business, are seldom ignorant of the risks they incur; and it is their interest to make themselves acquainted with the usages of the different ports of their own country, and also those of foreign countries. This knowledge is essentially connected with their ordinary business; and by *acting on the presumption that they possess it, no violence or injustice is done to [*583

their interests. It would, therefore, seem to be reasonable to conclude that the defendants, when they made the insurance, were not misled by the representation of the plaintiff. That they must have considered the ship to be described according to the New York usage; such, at least, is the presumption which arises from the facts, and in strict analogy to other cases. The circuit court, therefore, erred in their instruction to the jury, that the representation was to be construed by the usage in Boston.

The second instruction of the court, to which exception was taken is, "that although the terms of the letter applying for insurance were not to be considered a technical warranty, yet, if the coppering of the ship, as stated in the letter on which the insurance was made, was substantially untrue and incorrect, in a point material to the risk, such a misrepresentation would discharge the underwriters, although the ship was partially coppered, and although the loss did not arise from any deficiency in the coppering." Taking this instruction as disconnected with the first one, the principle asserted is undoubtedly correct. It is upon the representation that the underwriters are enabled to calculate the risk and fix the amount of the premium; and if any fact material to the risk, be misrepresented, either through fraud, mistake or negligence, the policy is avoided. It is, therefore, immaterial, in what way the loss may arise, where there has been such a misrepresentation as to make void the policy.

The fourth instruction excepted to will be next considered, as it embraces the principle asserted in the third. The judge charged, "that if the jury should find, that in the Pacific ocean, worms ordinarily assail and enter the bottom of vessels, then the loss of a vessel destroyed by worms would not be a loss within the policy." This is an important question, and it seems now for the first time to be brought before this court.

In 1796, the case of *Rohl* v. *Parr* was tried, which involved this question, before Lord KENYON, and a special jury, at *nisi prius*, reported in 1 Esp. 445. His lordship said, that "it appeared to him a question of fact rather than of law, such as the jury were competent to decide on, from the opinion on the *subject adopted by the underwriters and merchants." And "the jury found that it was not a loss within the term of 'perils of the sea,' in policies of insurance, and of course, that the plaintiff could not recover for a total loss." There seems to have been a general acquiescence in this decision in England, as it has never been overruled.

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In the case of *Martin* v. *Salem Marine Insurance Company*, 2 Mass. 420, the court expressly recognised the doctrine laid down in the case of *Rohl* v. *Parr*. But this doctrine is controverted in the case of *Garrigues* v. *Coxe*, 1 Binn. 596; and in *Depeyster* v. *Commercial Insurance Company*, 2 Caines 90, Mr. Justice LIVINGSTON said, that he did not "mean to be understood as subscribing to the *nisi prius* opinion of Lord KENYON, in the case of *Rohl* v. *Parr*; that it was not necessary to decide in the case whether a loss by worms was within the policy.

It was well remarked by Lord KENYON, that whether a destruction by worms be within the policy, was a question of fact rather than of law, and could be best ascertained by a jury, from the opinion of underwriters and merchants. This was a *nisi prius* decision; but it gave such general satisfaction to both merchants and underwriters and all others concerned, as never to have been questioned in England. It was the establishment of a

usage, by the opinions of those most competent to judge of its reasonableness and propriety; and the approbation which has since been given to it in England, by acquiescence, may well constitute it a rule in that country by which contracts of insurance are governed. And independent of the fact of its having been adopted by the supreme court of Massachusetts, is not the decision entitled to great consideration in this country? It comes from the same source from which the principles of our commercial law are derived, and to some extent, the forms of our commercial contracts. Would it not be reasonable to suppose, that these contracts are entered into with a knowledge of the rule by which they are construed in the most commercial country, if our own courts had adopted no rule on the subject? But in the present case, the opinion of Lord KENYON having been adopted in Massachusetts, the rule must certainly apply to all contracts made and to be executed in that state.

*The court, in their instruction, did not lay down the rule broadly, [*585
that a destruction by worms was not within the policy; but the jury
were told, that if, "in the Pacific ocean, worms ordinarily assail and enter the bottoms of vessels, then the loss of a vessel destroyed by worms would not be a loss within the policy." In other words, if the vessel was lost by an ordinary occurrence in the Pacific ocean, it was a loss against which the underwriters did not insure. In an enlarged sense, all losses which occur from maritime adventures, may be said to arise from the perils of the sea; but the underwriters are not bound to this extent. They insure against losses from extraordinary occurrences only; such as stress of weather, winds and waves, lightning, tempests, rocks, &c. These are understood to be the "perils of the sea" referred to in the policy, and not those ordinary perils which every vessel must encounter.

If worms ordinarily perforate every vessel which sails in a certain sea, is not a risk of injury from them, as common to every vessel which sails on that sea, as the ordinary wear and decay of a vessel on other seas? The progress of the injury may be far more rapid in the one case than in the other; but do they not both arise from causes peculiar in the different seas; and which affect, in the same way, all vessels that enter into them? In one sea, the aggregation of marine substances which attach to the bottom of the vessel may possibly produce a loss; in another, a loss may be more likely to occur through the agency of worms. Can either of these losses be said to have been produced by extraordinary occurrences? Does not the cause of the injury exist in each sea, though in different degrees? and against which it is as necessary to guard, as to prevent the submersion of a ship, by having its seems well closed. In the form in which the instruction under consideration was given, this court think there is no error. If it be desirable to be insured against this active agent which infests southern seas, it may be specially named in the policy.

The third instruction objected to is, "that if there was no misrepresentation in regard to the ship, and she substantially correspond with the representation, still, if the injury which occurred at the Cape de Verds was reparable, and could have been repaired there, or at St. Salvador, or at any other port at *which the vessel stopped in the course of the voyage; [*586
the master was bound to have caused such repairs to be made, if
they were material to prevent any loss. And if he omitted to make such

repairs, because he did not deem them necessary ; and if, by such neglect, alone, the subsequent loss of the ship by worms was occasioned, the underwriters are not liable for any such loss so occasioned." If the loss by worms is not within the policy, as has already been considered under the fourth instruction, it must at once be seen, that the court did not err in giving this instruction. The negligence or vigilance of the master could be of no importance, under the circumstances, in regard to the liability of the underwriters.

The other instructions in the case, relate to the loss of the vessel by worms, and the representation made by the plaintiff ; and as they do not raise any distinct point, which has not already been substantially considered, it is unnecessary to enter into a special examination of them. The judgment of the circuit court must be reversed, and the cause remanded for further proceedings.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States, for the district of Massachusetts, and was argued by counsel : On consideration whereof, it is the opinion of this court, that the said circuit court erred in instructing the jury, that in ascertaining what is to be understood as a coppered ship, in application for insurance on a voyage of this nature, the terms of the application are to be understood according to the ordinary sense and usage of those terms, in the place where the insurance is asked for and made, unless the underwriter knows that a different sense and usage prevail in the place in which the ship is then lying, and in which the owner resides, and from which he writes, asking for the insurance ; or, unless the underwriter has some other knowledge that the owner uses the words in a different sense and usage from those which prevail in the place where the insurance is asked for and made ; but there is no error in the other instructions given by the said circuit court. Whereupon, it is ordered and adjudged, that the judgment of the said circuit court be and the same is hereby reversed for this
*587] error ; *and that in all other respects the said judgment be and the same is hereby affirmed. And it is further ordered by this court, that this cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo ;* and that further proceedings be had in said cause, according to right and justice, and in conformity to the opinion of this court.

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*588] **Ex parte* Martha Bradstreet : In the Matter of Martha Bradstreet, Demandant, *v.* Henry Huntington, Tenant.

Mandamus.

Motion for an attachment against the judge of the northern district of New York, for a contempt of this court, in refusing to obey its *mandamus*, directing him to reinstate certain suits which had been dismissed from the docket of that court, and to proceed to adjudicate them according to law ; the motion also asked for a rule to show cause why *mandamus* should not issue to the district judge. A judge must execise his discretion in those intermediate proceedings which take place between the institution and trial of a suit ; and if, in the performance of this duty, he acts opressively, it is not to this court that application is to be made.

A *mandamus*, or a rule to show cause why a *mandamus* should not issue, is asked in a case in

Ex parte Bradstreet.

which a verdict has been given, for the purpose of ordering the judge to enter up judgment upon the verdict; the affidavit itself shows that judgment is suspended for the purpose of considering a motion which has been made for a new trial; the verdict was given at the last term, and we understand it is not unusual in the state of New York, for a judge to hold a motion for a new trial under advisement till the succeeding term. There is then nothing extraordinary in the fact, that the judge should take time till the next term, to decide on the motion for a new trial; this court entertains no doubt of his power to grant it.

The attachment, and the rule to show cause why a *mandamus* should not issue, were refused.

At the January term 1833, of this court, a *mandamus* was awarded, on the application of Martha Bradstreet, to the district judge of the United States of the northern district of New York, commanding him to have the records made up in certain cases depending in that court, in which the said Martha Bradstreet was demandant, and to enter judgments thereon, in order to give the demandant the benefit of a writ of error to the supreme court; and also that, without delay, he should reinstate and proceed to try and adjudge according to the law and right of the several writs of right and the *mises* therein joined in certain cases depending in that court. (7 Pet. 634–50.)

Jones, as counsel for the demandant, now moved the court for a *mandamus* to compel the district judge to permit judgment to be entered, and a writ of seisin awarded upon the verdict of the grand assize, rendered in favor of the said *Martha Bradstreet, against the said Henry Huntington, in the district court, on the 8th day of February 1834; and [*589
to obtain an attachment against the district judge for his prohibiting the demandant from issuing process to assemble the grand assize in each respective cause which was at issue, and which she would otherwise bring to trial at the next stated session of the said district court, to be held at Albany, on the second Tuesday of May then next: and also for a rule on the said district judge, to show cause why a *mandamus* should not be issued, &c.

Mr. Jones, in support of the motion, filed the affidavits of the demandant and her counsel, setting forth the proceedings in the district court in the cases referred to in the motion; and alleging that the district court had not obeyed the *mandamus* of this court, but had, in direct opposition to its injunctions, permitted great delay to take place in bringing the cases to a trial, after they had been reinstated in conformity with the order of this court. He contended, that, upon the affidavits, it was manifest that the proceedings of the district court amounted to a contempt of this court; and that the whole purposes which were to be accomplished by the *mandamus* had, in violation of the commands thereof, been defeated.

Marshall, Ch. J., delivered the opinion of the court.—This motion is for an attachment against the judge of the northern district of New York, for a contempt of this court, in refusing to obey its *mandamus*, directing him to reinstate certain suits which had been dismissed from the docket of that court, and to proceed to adjudicate them according to law. The suits were reinstated and ordered for trial as directed by this court; but delays have taken place, so that a verdict has been given in only one of them, and in that judgment has not yet been rendered. The motion for the attachment is supported by an affidavit of the party, verified by the counsel, giving, at great length, a history of the proceedings which have taken place in these causes, both before and since the *madamus* was awarded. It alleges, that

since the causes have been reinstated, delays have *taken place, which are detailed at great length, and are considered as amounting to a contempt of this court, by disregarding its *mandamus*.

We have only to say, that a judge must exercise his discretion in those intermediate proceedings which take place between the institution and trial of a suit; and if in the performance of this duty he acts oppressively, it is not to this court that application is to be made.

A *mandamus*, or a rule to show cause why a *mandamus* should not issue, is asked in the case in which a verdict has been given, for the purpose of ordering the judge to enter up judgment upon the verdict. The affidavit itself shows that judgment is suspended for the purpose of considering a motion which has been made for a new trial. The verdict was given at the last term, and we understand it is not unusual in the state of New York, for a judge to hold a motion for a new trial under advisement till the succeeding term. There is then nothing extraordinary in the fact, that Judge CONKLIN should take time till the next term to decide on the motion for a new trial. This court entertains no doubt of his power to grant it.

We do not think, that an attachment ought to be awarded, nor do we think, that the present state of the case, in which a verdict has been rendered, would justify this court in directing a rule to show cause why a *mandamus* should not be issued. The motion is dismissed.

Motion dismissed.

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*591] *HENRY WHEATON and ROBERT DONALDSON, Appellants, *v.* RICHARD PETERS and JOHN GRIGG.

Copyright.

From the authorities cited in the opinion of the court, and others which might be referred to, the law appears to be well settled in England, that, since the statute of 8 Ann., the literary property of author in his works can only be asserted under the statute; and that notwithstanding the opinion of a majority of the judges in the great case of Millar *v.* Taylor was in favor of the common-law right, before the statute, it is still considered, in England, as a question by no means free from doubt. [1]

That an author, at common law, has a property in his *manuscript*, and may obtain redress against any one who deprives him of it, or, by obtaining a copy, endeavors to realize a profit by its publication, cannot be doubted: but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.

The argument, that a literary man is a much entitled to the product of his labor as any other member of society, cannot be controverted; and the answer is, that he realizes this product in the sale of his works, when first published.

In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine? In the production of this, his mind has been as intensely engaged, as long, and perhaps, as usefully to the public, as any distinguished author in the composition of his book; the result of their labors may be equally beneficial to society; and in their respective spheres, they may be alike distinguished for mental vigor. Does the common law give a perpetual right to the author, and withhold it from the inventor? And yet it has

[1] It appears to be settled, at least in this country, that though an author has an exclusive perpetual right in his unpublished manuscript, yet, when once published, his rights in the reproduction of copies, are solely dependent on the statutes. Jefferys *v.* Boosey, 4 H. L. Cas. 815; Bartlett *v.* Crittenden, 5 McLean 32; Clayton *v.* Stone, 2 Paine 395; Stowe *v.* Thomas, 2 Wall. Jr. C. C. 564; Boucicault *v.* Hart, 13 Bl. C. C. 47; Donnelley *v.* Ivers, 20 Id. 383; Dudley *v.* Mayhew, 3 N. Y. 9; Palmer *v.* De Witt, 47 Id. 532.

never been pretended, that the latter could hold, by the common law, any property in his invention, after he shall have sold it publicly. It would seem, therefore, that the existence of a principle which operates so unequally, may well be doubted; this is not a characteristic of the common law; it is said to be founded on principles of justice, and that all its rules must conform to sound reason.

That a man is entitled to the fruits of his own labors, must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property which regulate society, and which define the rights of things in general.

It is clear, there can be no common law of the United States; the federal government is composed of twenty four sovereign and independent states, each of which may have its local usages, customs and common law; there is no principle which pervades the Union, and has the authority of law, that is not embodied in the constitution or laws of the Union; the common law could only be made a part of our system by legislative adoption.

When a common-law right is asserted, we look to the laws of the state in which the controversy originated.

When the ancestors of the citizens of the United States emigrated to this *country, they [*592 brought with them, to a limited extent, the English common law, as part of their heritage. No one will contend, that the common law, as it existed in England, has ever been in force, in all its provisions, in any state in this Union; it was adopted only so far as its principles were suited to the condition of the colonies; and from this circumstance, we see, what is the common law in one state, is not so considered in another. The judicial decisions, the usage and customs of the respective states, must determine how far the common law has been introduced and sanctioned in each.

If the common law, in all its provisions, has not been introduced into Pennsylvania, to what extent has it been adopted? Must not this court have some evidence on the subject? If no copyright of an author, in his work, has been heretofore asserted there, no custom or usage established, no judicial decisions been given; can the conclusion be justified, that, by the common law of Pennsylvania, an author has a perpetual property in the copyright of his works? These considerations might well lead the court to doubt the existence of this law; but there are others of a more conclusive character.

In the eighth section of the first article of the constitution of the United States, it is declared, that congress shall have power "to promote the progress of science and the useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and inventions." The word "secure," as used in the condition, could not mean the protection of an acknowledged legal right; it refers to inventors, as well as authors: and it has never been pretended by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented.

It is presumed, that the copyright recognised in the act of congress, and which was intended to be protected by its provisions, was the property which an author has, by the common law, in his *manuscript*, which would be protected by a court of chancery; and this protection was given, as well to books published under the provisions of the law, as to manuscript copies.

Congress, by the act of 1790, instead of sanctioning an existing perpetual right in an author in his works, created the right secured for a limited time, by the provisions of that law.

The right of an author to a perpetual copyright, does not exist by the common law of Pennsylvania.

No one can deny, that where the legislature are about to vest an exclusive right in an author or in an inventor, they have the power to provide the conditions on which such right shall be enjoyed; and that no one can avail himself of such right, who does not substantially comply with the requisites of the law. This principle is familiar as it regards patent-rights; and it is the same in relation to the copyright of a book; if any difference should be made, as respects a strict conformity to the law, it would seem to be more reasonable, to make the requirement of the author rather than of the inventor.

The acts required by the laws of the United States, to be done by an author to secure his copyright, are in the order in which they must naturally transpire: first, the title of the book is to be deposited with the clerk, and the record he makes must be inserted in the first or second page; then the public notice in the newspapers is to be given; and within six months after the publication of the book, a copy must be deposited in the department of state.[1]

[1] The deposit in the clerk's office of the title-page of the book, prior to the sale of any copies of the work, is essential to a valid copyright. Baker *v.* Taylor, 2 Bl. C. C. 82.

*It has been said, these are unimportant acts; if they are indeed wholly unimportant, congress acted unwisely in requiring them to be done; but whether they are unimportant or not is not for the court to determine, but the legislature; and in what light they were considered by the legislature, the court can only know by their official acts. Judging of those acts by this rule, the court are not at liberty to say, they are unimportant, and may be dispensed with; they are acts which the law requires to be done; and may this court dispense with their performance?

The security of a copyright to an author, by the acts of congress, is not a technical grant on precedent and subsequent conditions; all the conditions are important; the law requires them to be performed, and, consequently, their performance is essential to a perfect title. On the performance of a part of them, the right vests; and this was essential to its protection under the statute; but other acts are to be done, unless congress have legislated in vain, to render this right perfect. The notice could not be published, until after the entry with the clerk; nor could the book be deposited with the secretary of state, until it was published; but they are acts not less important than those which are required to be done previously; they form a part of the title; and until they are performed, the title is not perfect.

Every requisite under both the acts of congress relative to copyrights, is essential to the title.

The acts of congress authorizing the appointment of a reporter of the decisions of the supreme court of the United States, require the delivery of eighty copies of each volume of the reports to the department of state; the delivery of these copies does not exonerate the reporter from the deposit of a copy in the department of state, required under the copyright act of congress of 1790; the eighty copies delivered under the reporter's act, are delivered for a different purpose, and cannot excuse the deposit of one volume as especially required by the copyright acts.

No reporter of the decisions of the supreme court has, nor can he have, any copyright in the written opinions delivered by the court; and the judges of the court cannot confer on any reporter any such right.[1]

So is the delivery to the clerk, of a copy of the book, within three months after publication. Struve *v.* Schwedler, 4 Id. 23. So is the delivery of two copies of the work to the librarian of congress, under § 4956 of the revised statutes. Parkinson *v.* Laselle, 3 Sawyer 330; Merrell *v.* Tice, 104 U. S. 557. And so is a notice to the public, by printing in the place designated, the fact of the entry, in the form prescribed by the statute. Jollie *v.* Jacques, 1 Bl. C. C. 620. But where the work consists of a number of volumes, it has been held sufficient to insert the record in the page next following the title-page of the first volume. Dwight *v.* Appleton, 1 N. Y. Leg. Obs. 195; So, it has been held, that a mistake in the printed notices of the year of the entry, as 1867 instead of 1866, will not vitiate. Myers *v.* Callaghan, 10 Biss. 139. And that words of description, added to the title filed in the clerk's office, may be changed in the published work, without invalidating the copyright. Daly *v.* Palmer, 6 Bl. C. C. 256. S. P. Donnelley *v.* Ivers, 20 Id. 381. Until all the things required by the statute have been performed, the copyright is not secured; but by taking the incipient step, a right is acquired, which chancery will protect, until the other acts may be done. Pulte *v.* Derby, 5 McLean 332. And see Chase *v.* Sanborn, 4 Cliff. 306; Osgood *v.* Allen, 1 Holmes 192.

[1] It appears to be settled, at this day, that reports of legal decisions are as much the subject of copyright as any other literary work. Hodges *v.* Welsh, 2 Ir. Eq. 266. And that a state reporter is entitled to a copyright in whatever is the work of his own mind and hand. Myers *v.* Callaghan, 10 Biss. 139. This includes the syllabus or marginal notes of the cases and points decided, the abstract of the record and evidence, and the notes of the argument of counsel. Little *v.* Gould, 2 Bl. C. C. 165, 362. And accordingly, it has been held to be a piracy, to reprint *verbatim*, in the form of a digest, the head-notes of a series of reports, without the consent of the reporter, in whom the copyright is vested. Sweet *v.* Benning, 16 C. B. 459. So also, it is unlawful to collect together, and reprint from the reports, all the cases upon a particular subject, though the collection and classification may be new, and with the addition of several previously unpublished decisions, and notes. Hodges *v.* Welsh, 2 Ir. Eq. 266. Where, however, as in New Hampshire, the judges of the superior court are required by law, to prepare the head-notes to their own opinions, the reporter has no copyright in the volumes which he edits. Chase *v.* Sanborn, 4 Cliff. 306. In New York, where the state reporter, for an adequate salary secured by law, is required to report every cause argued and determined in the court of

Wheaton v. Peters.

APPEAL from the Circuit Court for the Eastern District of Pennsylvania. The case, as stated in the opinion of the court, was as follows :

"The complainants, in their bill, state, that Henry Wheaton is the author of twelve books or volumes of the reports of cases argued and adjudged in the supreme court of the United States, and commonly known as 'Wheaton's Reports ;' which contain a connected and complete series of the decisions of said court, from the year 1816 until the year 1827. That before the first volume was published, the said Wheaton sold and transferred his copyright in the said volume to Matthew Carey, of Philadelphia ; who, before the publication, deposited a printed copy of the title page of the volume in the clerk's office of the district court of the eastern district of Pennsylvania where he *resided. That the same was recorded by the said clerk, [*594
according to law, and that a copy of the said record was caused by said Carey to be inserted at full length in the page immediately following the title of said book. And the complainants further state, that they have been informed and believe, that all things which are necessary and requisite to be done in and by the provisions of the acts of congress of the United States, passed the 31st day of May 1790, and the 29th day of April 1802, for the purpose of securing to authors and proprietors the copyrights of books, and for other purposes, in order to entitle the said Carey to the benefit of the said acts, have been done.

"It is further stated, that said Carey afterwards conveyed the copyright in the said volume to Matthew Carey, Henry C. Carey and Isaac Lea, trading under the firm of Matthew Carey & Sons ; and that said firm, in the year 1821, transferred the said copyright to the complainant, Robert Donaldson. That this purchase was made by an arrangement with the said Henry Wheaton, with the expectation of a renewal of the right of the said Henry Wheaton under the provisions of the said acts of congress ; of which renewal he, the said Robert Donaldson, was to have the benefit, until the first and second editions of the said volume which he, the said Donaldson, was to publish, should be sold. That at the time the purchase was made from Carey & Sons, a purchase was also made of the residue of the first edition of the first volume, which they had on hand ; and in the year 1827, he published another edition of said volume, apart of which still remains unsold.

"The bill further states, that for the purpose of continuing to the said Henry Wheaton the exclusive right, under the provisions of the said acts of congress, to the copy of the said volume, for the further term of fourteen years, after the expiration of the term of fourteen years from the recording of the title of the said volume in the clerk's office as aforesaid, the said Robert Donaldson, as the agent of Wheaton, within six months before the expiration of the said first term of fourteen years, deposited a printed copy of the title of the said volume in the clerk's office of the district court of the

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appeals, which that court shall direct him to report, and where it is provided, that no copyright shall be taken out for said reports, but that the notes and references made by the reporter may be copyrighted, it is extremely doubtful, whether this last provision extends to the narrative of the case, which is part of the report proper, and in no sense of the word, a portion of the reporter's notes and references. This point was not noticed by Judge NELSON, in deciding the case of Little *v.* Gould, 2 Bl. C. C. 362. See the remarks of Judge DRUMMOND, in Myers *v.* Callaghan, 10 Biss. 142.

southern district of New York, where the said Wheaton then resided; and caused the said title to be a second time recorded in the said clerk's office; and also caused a copy of the said record to be a second time published *595] *in a newspaper printed in the said city of New York, for the space of four weeks, and delivered a copy of the said book to the secretary of state of the United States; and that all things were done agreeably to the provisions of the said act of congress of May 31st, 1790, and within six months before the expiration of the said term of fourteen years.

"The same allegations are made as to all the other volumes which have been published; that the entry was made in the clerk's office and notice given by publication in a newspaper, before the publication of each volume; and that a copy of each volume was deposited in the department of state.

"The complainants charge, that the defendants have lately published and sold, or caused to be sold, a volume called 'Condensed Reports of Cases in the Supreme Court of the United States,' containing the whole series of the decisions of the court, from its organization to the commencement of Peters's reports, at January term 1827. That this volume contains, without any material abbreviation or alteration, all the reports of cases in the said first volume of Wheaton's reports, and that the publication and sale thereof is a direct violation of the complainants' rights; and an injunction, &c., is prayed.

"The defendants in their answer deny that their publication was an infringement of the complainants' copyright, if any they had; and further deny that they had any such right, they not having complied with all the requisites to the vesting of such right under the acts of congress."

The bill of the complainants was dismissed by the decree of the circuit court; and they appealed to this court.(*a*)

The case was argued by *Paine* and *Webster*, for the appellants; and by *Ingersoll*, by a printed argument, and *Sergeant*, for the defendants.

Paine, for the appellants, contended:—

1. An author was entitled, at common law, to a perpetual property in *596] the copy of his works, and in the profits of their *publication; and to recover damages for its injury, by an action on the case; and to the protection of a court of equity. The laws of all countries recognise an author's property in his productions. In England, beyond all question, an author had, at common law, the sole and exclusive property in his copy. This was decided in *Millar* v. *Taylor*, 4 Burr. 2303. This property was placed by its defenders, and they finally prevailed, upon the foundation of natural right; recognised by the laws, ordinances, usages and judicial decisions of the kingdom, from the first introduction of printing.

The opponents of literary property insisted, that an author had no natural right to his copy; and resorting to those laws which are supposed to have governed property before the social compact, they maintained, that because the copy was incapable of possession, it was impossible to have property in it. Mr. Justice YATES, the great opponent of literary property,

(*a*) The case was decided in the circuit court by Judge HOPKINSON, Mr. Justice BALDWIN having been absent on the argument and decision thereof. The opinion of Judge HOPKINSON is inserted in the Appendix, No. II.

and who has probably said all that ever was or can be said against it, urges that it is impossible to appropriate ideas more than the light or air (4 Burr. 2357, 2365); forgetting that books are not made up of ideas alone, but are, and necessarily must be, clothed in a language, and embodied in a form, which give them an individuality and identity, that make them more distinguishable than any other personal property can be. A watch, a table, a guinea, it might be difficult to identify; but a book never. He cited 2 Bl. Com. and Christian's notes, to show the nature of literary property. The court are referred to the able opinions of WILLES, J., ASTON, J., and Lord MANSFIELD, in *Millar* v. *Taylor*, 4 Burr. 2310, 2335, 2395. They agreed, not only that an author had a property at common law, but that it was perpetual, notwithstanding the statute of Anne.

Not long after that decision, however, the question as to the perpetuity of an author's property, was brought before the House of Lords; and it was there decided, that it was not perpetual, its duration being limited by the statute of Anne. Yet even upon this point, the twelve judges were equally divided (if we include Lord MANSFIELD, who did not vote, as he was a peer), and there were eleven out of twelve who maintained, that an author had a property at common law, in his copy. See *Donaldson* v. *Beckett*, 4 Burr. 2408; 2 Bro. P. C. 129.

*The decrees of the star-chamber show, that that court admitted and protected authors, as early as 1556. Maugham 12, 13. Ordinances of parliament, as early as 1641, recognise and protect the owner's property in his copy. These ordinances were several times repealed. Maugham 13, 14. In 1672 and 1679, acts of parliament were passed, prohibiting any person from printing, without the consent of the owner of the copy. Maugham 15, 18. In the reign of Charles II., there were several cases in the courts, in which the ownership of the copy by authors, is treated as the ancient common law; and in one case, that in Croke's reports, the right of the author was sustained, even against the claim of the king's prerogative to publish all law-books. Chief Justice HALE presided. Maugham 19; 4 Burr. 2316. In the reign of Anne, when the perpetual ownership of literary property was thus firmly established, the booksellers, annoyed by the piracy of unprincipled and irresponsible adventurers, applied to parliament for protection. A bill was accordingly brought in for the purpose, entitled "an act to secure the property of authors." In committee, its title was changed to that of "an act to vest authors with their copies, for the times therein mentioned." Maugham 20–27. And the act declared, that authors should have an exclusive right for twenty-one years, and no longer. In this shape it was passed. Notwithstanding the strong and explicit terms of the statute of Anne, both as to vesting the author with his right, and limiting its duration (terms not to be found in our act), the courts, by an uninterrupted series of decisions, from the passing of the statute down to the case of *Donaldson* v. *Beckett*, maintained, that an author still had his original perpetual common-law right and property; and we have seen, that had Lord MANSFIELD voted in that case, the twelve judges would have been equally divided. For a review of the common-law property of an author, and of the legislation upon the subject in England and the United States, he cited, American Jurist. 10, 61, &c. [*597

2. The common-law property of an author is not taken away by the con-

stitution of the United States. The states have not *surrendered to the Union their whole power over copyrights, but retain a power concurrent with the power of congress; so far, that an author may enjoy his common-law property, and be entitled to common-law remedies, independently of the acts of congress. It is one of those concurrent powers, where the power of the state ceases, only when it actually conflicts with the exercise of the powers of congress.

In the constitutional clause relating to the rights of authors and inventors, there are two subjects, distinct enough in themselves, and only united by the form of expression. This comprehensiveness of expression, we know, belongs to the constitution; and that the aim of its framers was brevity. The expression is not so important, for in that instrument we are to look for substance and intention. Although united in this clause, and for the same purpose of being secured by congress, the subjects of patents and of copyrights have little analogy. They are so widely different, that the one is property, the other a legalized monopoly. The one may be held and enjoyed, without injury to others; the other cannot, without great prejudice. The one is a natural right, the other in some measure against natural right. But because they both come from invention or mental labor, and in addition, because they are so joined in the constitution; we have become accustomed to regard them as in all respects alike, and equally dependent on the legislative favor for existence and protection. Upon this point, the counsel for the appellants argued at large, that the principles which applied to copyrights were different from those which regulated the property of inventions secured by a patent. That they were inserted in the clause of the constitution for brevity and comprehensiveness. That the framers of the constitution probably designed to give congress the complete and exclusive power over patents; but it did not follow from this, that the same was introduced in relation to copyrights.

It is important to examine the true rules of construction which are applicable to this clause in the constitution. This is the first instance in which this court has been called upon to pronounce, whether the power given in this clause is an exclusive or a concurrent power; or as to the extent of the *power conferred by it on congress. Consequently, the rules established as to the construction of that instrument, have all been in relation to other powers, and powers of a very different character. All the other powers in the constitution conferred on congress, or yielded by the states, are national or political, and for national and political purposes. This is the only instance of a power being conferred, unless incidentally, over private property. This is a power over private property, not incidental to a national power, but with an immediate, primary and single reference to the property. The rule of construction as to the grant of the political and national powers may not be suited to this. It has been held, as to them, that a rule of strict construction was not to be adopted.

*599]

But the question here is as to private right. And the question is, whether the constitution takes away a private right, or property at common-law? And why should we not apply the same rule of construction to such a constitutional provision, as we do to a statute, in derogation of common-law right? The rule is, that such statutes are to be construed strictly, because they abridge the right. The reason of the rule extends to the constitution,

whenever it is in derogation of common right. For this rule, see 10 Mod. 282 ; 4 Bac. Abr. 550, 650. Other common-law rules in relation to statutes affecting private rights or common-law rights, would seem to be peculiarly applicable to this clause of the constitution ; although they may not be generally referred to as guides in construing the constitution. These will be found in 1 Bl. Com. 87 ; 1 Inst. 111, 115 ; 1 Bl. Com. 89 ; Plowd. 206 ; 13 Mod. 118 ; Plowd. 113 ; 1 Bac. 11, 18, 38 ; Ibid. 3, 5 ; 2 Burr. 803, 805 ; Com. Dig. Action on Stat. C, G ; 1 Salk. 212 ; 19 Vin. Abr. Stat. E, 6 ; 1 Story's Com. 436, 384, 387, 397, 411, 401 ; *Martin* v. *Hunter*, 1 Wheat. 326, 410.

With these general guides of construction, it is inquired, whether the power granted to congress by the constitution transfers the whole subject of property of authors to the exclusive authority and control of congress? so that the property of an author ceases to exist at all, without the legislation of congress ; or whether it leaves the author in the enjoyment of his *pro- [*600
perty, as he had it before the adoption of the constitution ; and merely attempts to improve what was supposed to be an imperfect enjoyment, by authorizing congress to secure it? This is not the question whether the power is concurrent or exclusive. If the author's common-law property is not taken away, nor made wholly dependent upon the legislation of congress ; but if congress possess the mere partial power to secure it, then the property remains as at common law, subject to state legislation, and the auxiliary legislation of congress. The question now is simply as to a right of property. If we take the rules above cited from Mr. Justice STORY'S Commentaries, as guides of interpretation ; can there be a question as to the nature of the delegation of power, or its extent or amount? The delegation is to secure exclusive rights—not to grant property or confirm property, or grant rights or confirm or establish rights, but to secure rights.

We are willing to admit, that this language is broad enough, and is adapted, to transfer to congress the whole legislation and control over patents. There is, at common law, no property in them ; there is not even a legal right entitled to protection. They have a moral or equitable right, but unknown to the law. Congress, therefore, when authorized to secure their rights, are authorized to do everything ; and full power over the subject is delegated to them. But it does not follow, that because congress are authorized to create *de novo*, and to secure the right to patents, by mere force of the word *secure*, that they are, therefore, authorized, by force of that word, to create *de novo*, and then secure copyrights. For a very different process would then take place in relation to the two things. In creating patents, they take nothing away ; they deprive the inventor of no property ; he had nothing, and they gave him all, merely by securing. But if by the word *secure*, they are authorized to give an author all that he is afterwards to possess, the operation affects a total deprivation of his common-law property. So that to allow the word "secure," to confer the same power over copyrights, as over rights to inventions, is to make it a word of a totally different meaning and import in the one case, from the other. The language is not broad enough, nor is it adapted to the taking *away [*601
of property or pre-existing rights. We are, therefore, to reject the argument, that a copyright must exist and be held solely under the constitution ; because patent-rights must be.

What is there, then, in the delegation of the power to *secure* an author's

exclusive rights, which should be construed to deprive him of his property, and make him dependent wholly on the security provided? Are not the words, in themselves, plain and clear? and is not the sense arising from them distinct and perfect? and if so, is interpretation admissible? and if not, is not the question settled? For it never can be pretended, that the naked words, authorizing congress to secure rights, take away or affect the property in which those rights exist. There would seem to be nothing, therefore, in the plain meaning of the word *secure*, which should alter, affect or take away an author's property in his writings. Indeed, it seems too plain, to admit of argument, that when the constitution authorizes congress to secure an acknowledged pre-existing right, and does not authorize them to grant it; it is an express declaration, that it subsists, and is to subsist, independently of their power.

3. But it may be said, that all the author can ask or have, is security for his rights, and that this is all he had at common law; and that the constitutional clause does not take away his security, nor any part of it, but only transfers to congress the power and duty to secure him, which before belonged to the states. We answer, that if this construction is derived from the import of the words themselves, it is strained beyond all bounds allowed by the rules of construction. There is the strongest reason to believe, from the language of the constitution, that those who framed it, adopted it with a particular view to preserve the common-law right to copyrights untouched. If this clause in the constitution is to be construed as taking away the author's common-law right, it deprives him of a part of the security he had at common law; and does more than merely transfer to congress a power and duty which before belonged to the states. It is, then, asked, whether the word *secure* can be found to possess any such meaning as to take away, and diminish and disturb, either by the common-law or constitutional rules of construction.

*602] *The meaning of the clause of the constitution, when tried by the usual rules of interpretation, is shown to be as contended by the appellants. 19 Viner's Abr. 510, E, 6; 2 Inst. 2; Plowd. 113; 1 Chit. Pl. 144; *Almy* v. *Harris*, 5 Johns. 175; *Farmers' Turnpike Road* v. *Coventry*, 10 Ibid. 389. Chief Justice MARSHALL (12 Wheat. 653–4) lays great stress on the framers of the constitution having been acquainted with the principles of the common law, and acting in reference to them. Most of them were able lawyers; and certainly, able lawyers drew up and revised the instrument. Are we, then, to believe, that if they had any design to take away the common-law right, or to authorize congress to take it away, or to impair it, they would, knowing the rules of construction cited, and like common-law maxims, have used the language they have? There is the strongest reason to believe, from the language, it was adopted for the purpose of preserving it, and to reserve from congress any power over it. This probability arises, almost irresistibly, from the language used; and under the circumstances that it was used.

The case of *Donaldson* v. *Beckett* was decided in the house of lords, in 1774. This case, and all the law on this subject, discussed and decided by it, must have been known to the lawyers of the convention. The opinion of the judges in the case of *Millar* v. *Taylor*, must also have been familiar to them. From the statute of Anne, then, down to 1774, there had been in

England a continual contest about the words of that statute, and whether it was a statute to secure a right already existing. It agitated the literary world especially, because it belonged to them ; and it agitated the courts. Cases of unequalled importance arose out of, and were decided upon the use of these words. YATES, J., calls the case of *Millar* v. *Taylor*, a case of "great expectation." This case occurred in 1769, and immediately followed the still greater case of *Donaldson* v. *Beckett*, in which the twelve judges gave each an opinion in the house of lords. These cases, therefore, occurred and were reported a few years before the adoption of the constitution. Had the convention designed to take away, or to authorize congress to take away, the common-law property, they would *have used the words *vest*, or *grant ;* and would have carefully avoided the word *secure*. [*603

But what reason can be discovered why the framers of the constitution should wish, or intend, to take away, or authorize congress to take away. the common-law right. What was the mischief they had in view ? Will it be said, that the public have rights as well as they author ; and that it is impolitic to allow a perpetual right ? Suppose, we grant it. Yet, what has the constitution to do with a mischief like this ? It does not require a national power to cure it. The states were fully adequate to provide a remedy themselves. And the states gave congress no powers, which they could as well exercise themselves. Will it be pretended, that the states could not regulate, limit or take away the right, within their own territories ; and that it was necessary to empower congress to do it ? Will it be said, that it was designed to take from the states their power over copyright, lest, if a state were to protect the rights of authors, the citizens of other states might be curtailed of their rights within that state ? The answer is obvious. No person can have any rights opposed to the author's. He has the property, and it cannot stand in the way of another's property or rights. Besides, the objection goes to the whole of state legislation on any subject : for a state may, by it laws, curtail or affect the rights of citizens of other states, in other particulars, and why be so careful to prevent them in this ? As we have already shown, copyrights have, in these respects, none of the mischiefs attending them, which attend a right to inventions. There could be but one possible motive for making copyrights a national concern ; and that was, because the states might not, or could not, individually, afford them a just protection. From this single motive, what intention are we to infer ? That, and that only, apparent on the face of the constitution—an intention to secure the right. Why is it, however, that if the public good was had in view, by the framers of the constitution, and not the author's benefit singly, either as regards patents or copyrights, that they did not undertake to guard the citizens of the several states against the protection which the states might afford to inventions *introduced from abroad. For that, as well as [*604 for the printing of foreign books, a state might, if it chose, grant monopolies. But this, and other mischiefs to spring from state legislation, it was thought proper to provide against.

It is contended, that the case of copyrights is one within the concurrent powers of the United States, and the states. It is not within either of those kinds of exclusive powers enumerated in the Federalist (No. 34), but belongs to the other class of powers. What is the power here ? A power to *secure* the right of authors. And the question is, whether the states may not pro-

tect and enforce the common-law right, while the United States secure it. Is such a power totally and absolutely contradictory and repugnant? Is it not, on the contrary, perfectly consistent with the other? It is as consistent as a common-law remedy is with a statute remedy; it is the same thing. Both may exist and act in concert, and no conflict can occur, unless the state undertakes to deprive an author of what congress has secured to him. If that were a reason for taking away the state power, it would be a reason for depriving them of all power; for so long as they have power to legislate, they can pass laws to interrupt those of congress. It is impossible to imagine a case, where a power of congress could receive so little interruption from the legislation of the states; because this is a power primarily over private right, and not for national purposes; and it is the only one of the kind in the constitution. The opinions of this court have been uniform, that a concurrent power, in cases like this, might exist and be exercised by the states. See *Houston* v. *Moore*, 5 Wheat. 48–56; also Mr. Justice STORY's Commentaries, 421–433. It is believed, that if the states have resigned to congress their power, over copyrights, and have none remaining in themselves, yet that they have given the power to congress, with a qualification and limitation, and have confined it in their hands, as they had power to do, simply to securing the right of the author. If they have any power besides this, it is merely to abridge the period.

Next, have congress impaired the author's rights? That is, supposing the common-law remedies to be gone, and that *the author can have no remedy, unless he has published the record, and deposited the copy in the secretary of state's office. It is answered, that they have, most essentially. They have entirely changed, and unnecessarily, the whole title which an author had at common law, and the evidence on which it rested. They have taken from him the natural common-law title, and the evidence to support it; and have given him one of a most artificial and difficult character. And is not a man's title to property, his evidence of ownership, a part of the propetry itself—a part of its value? Is it not this which distinguishes real from personal estate, in some measure; and gives it a higher character? Suppose, a man were to lose his title deeds, or one of them, what would be the value of his property? What title had a man before the statute, and what has he now? Before the statute, it was sufficient for him to prove himself the author. This he could do by proof, *in pais*, in a thousand ways. The proof of this is easy and imperishable, because it is the natural proof. The name of the author on the book, possession and claim of title alone, or first publication, would be *primâ facie* sufficient evidence. And these are inherent, and inseparable from almost every case, as a part of its natural incidents. But suppose, he must, as is contended, prove a compliance with the requisites of the statutes. He is driven from all his safe and easy common-law proof. There can be no such thing as *primâ facie* evidence offered. Must he prove the publication for four successive weeks, forty-two years after it was made? Is he to keep a file of newspapers, and if he does, what proof has he of publication? How is he to prove the delivery of the volume? The law provides for no record. He must call a witness, and then he cannot be safe for forty-two years, unless he files a bill to perpetuate testimony. The evidence in the case establishes the difficulty of such proof. Can a statute, which thus loads a right with

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burdensome and needless regulations, and makes it wholly dependent on accidental mistake or omission, where it was free from them both, be said not to impair an author's common-law right of property? If, then, congress have not the power to impair the author's property, and if the requisites as to publication and delivery of *the copy, if made conditions precedent, do impair it; they are so far unconstitutional; and the appellants have a right to claim the benefit of the act without performing them. [*606

4. A citizen of one state has the same common-law property in his copy, in other states, as the citizens of these states can have; and the common-law property exists in the state of Pennsylvania; consequently, the complainants are entitled to a copyright at common law, in that state, and can have a remedy in the circuit court of the United States, for its violation, independently of the provisions of the act of congress; the citizenship of the parties given the state jurisdiction. The constitution of the United States provides, that "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states." The constitution, by this provision, designed to make, and does in fact make us one nation, living under the same laws. It designed to give to all the citizens of the United States, not merely the benefits and privileges secured to them by national laws, but the benefits of all the laws of all the states and the privileges conferred by them. Under this provision, a citizen of New York has all the privileges of the laws of Pennsylvania, whatever they may be. It is this provision which makes us one nation, and this only. It is this alone which gives to all the citizens of the United States, uniform and equal civil rights throughout all the territories of the nation. Other constitutional provisions secure political advantages; but without this, we should be a mere league, and not a nation. We should be several distinct nations. Vattel says (p. 159, lib. 1, ch. 19), "the whole a country possessed by a nation, and subject to its laws, forms, as we have said, its territories, and it is a common country of all the individuals of the nation." In this sense of a nation, this provision of the constitution makes us one; and makes all the states the common country of all the individuals of the nation.

An author, then, who is a citizen of one of the states, is entitled to have his property in his copy protected in every other state, according to the laws of such state; without the aid of any national law. The question is, do the laws of the state give an author a property in his copy; for if they do, who *shall say, he is not entitled to enjoy his property under such laws, as much as any other kind of property? Has not a citizen of New York a right to hold lands, or any other kind of property, under the laws of Pennsylvania? And if that state were to attempt to deprive him of the same rights as her own citizens enjoy, would it not be a violation of this clause of the constitution? The truth is, a citizen of New York is, so far as all his civil rights and privileges are concerned, a citizen of Pennsylvania. See Mr. Justice STORY's Commentaries, 674–5. [*607

An author's copyright at common law exists in Pennsylvania. The American colonists brought hither, as their birthright and inheritance, the common law, so far as it was applicable to their situation. Judge CHASE, in *United States* v. *Worrall*, 2 Dall. 384. Chief Justice MCKEAN, in 1 Dall. 67, says, the common law has always been in force in Pennsylvania. Statutes made before the settlement of the province have no force, unless

convenient, and adapted to the circumstances of the country; all made since, have no force, unless the colonies are named. See also page 74. There never was a statute in Pennsylvania relative to copyright; and the statute of Anne was passed after the settlement of that state: the common law, therefore, prevails there.

5. The publication of the record in the newspapers, and the delivery of the copy to the secretary of state, are not made conditions precedent at all, by the acts of congress, or if at all, only as to the right to the security provided by the acts. A non-observance of the statutory directions in these particulars, does not deprive the author of the ordinary remedies by an action on the case and bill in equity. Besides, the publication of the record, and delivery of the copy, were, at most, intended only as a means of notice of the author's right; and actual notice in this case, abundantly shown, dispenses with those modes of constructive notice.

After stating the particular provisions of the act of 1790, the counsel proceeded to argue, that, on the proper construction of the act, the publication of the record, or the delivery of the copy, is not in any way connected with the right; and the delivery of the copy has nothing to do, even with the penalties *and forfeitures imposed by it. The provisions of the act are, in some respects, similar to those of the statute of Anne; and it must have been drawn with reference to it. Congress, by this law, did not think proper to impose all the penalties which are found in the act of Anne; because they were engaged in discharging their constitutional power of *securing* the author's right. The copy to the secretary of state is a mere donation from the author. Congress give him no equivalent for it. The clerk is paid for the record; and what do government give the author for the copy, but security? Have they a right to sell the security; to put a price on the exercise of their constitutional powers? What right does the constitution give them to require a donation from the author? And will it be believed, that they intended to forfeit his property, if he did not furnish it? The month which may elapse after the right attaches, and before publication, and the six months before depositing the copy, show, that these things are not conditions precedent.

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Natural rights are generally known by their own incidents. Property always carries with it its own *indicia* of ownership; and literary property not less than any other. The super-addition of record evidence, the highest known to law, and all that is required of ownership of real estate, was probably deemed sufficient by congress; and they, therefore, required no other of the right of an author. It would be a fair presumption, that when they had required enough, they would not go on to require a superfluity. But the publication of the record and delivery of the copy have been held, by a very numerous, learned and able court, on full argument (the court of errors in Connecticut, composed of the twelve judges), to be only directory; and to have nothing to do with the author's right. *Nicholas* v. *Ruggles*, 3 Day 145.

But it is said, that although the publication and delivery of the copy, are not conditions precedent, by the act of 1790, they are made so by the act of 1802; and that this has been decided in the case of *Ewer* v. *Coxe*, 4 W. C. C. 487, as to the publication of the record. The counsel then proceeded to comment on the decision of Mr. Justice WASHINGTON, in the

case referred to; denying that *the language said by him to be contained in the first section of the act of 1802, was contained in it; and asserting that the meaning of the words used in the section, had been strained by the judge. He contended, that the act of 1802, was not intended to operate on the provisions of the preceding law, but only to refer to them as established by that law. There is no enacting language in the latter law; and without enacting language, it can be no enactment. It is the duty of this court, before it allows property to be sacrificed, even if the words of an act are clear and free from doubt, on their face, to look carefully at the intention of the legislature, to look at the spirit of the law and its consequences, and at the old law, the mischief and the remedy. The counsel then went into an examination of both the statutes, for the purpose of showing, that, applying these principles, the construction of those acts should be such as was maintained by the appellants. In the course of this examination, he cited, 19 Vin. Abr. 510, E, 6; Plowd. 111; 2 Inst. 200; 1 Bl. Com. 87; *University* v. *Beyer*, 16 East 316; *Postmaster-General* v. *Early*, 12 Wheat. 148.

The act of 1802 does not make the publication and delivery conditions precedent, because it is impossible they should be so. The first act vests the right, on recording the title. It then gives two months to publish the record, and six months to deliver the copy. A condition precedent is an act to be done precedently; and it is impossible to publish the record, until the record is first made, and the right attaches on making the record. The act of 1802 declares, that the author, "before he shall be entitled to the benefit of the act" of 1790, shall, "in addition to the requisites," &c. Now what was the benefit of that act? It is entitled, an act to secure the author's right; and the power of congress is to secure the right, *i. e.*, an existing right. How does the act secure the right? Only by penalties and forfeitures. It gives no action on the case, no bill in equity; and if it had given them, it would have been, as to them, wholly inoperative, for no court had jurisdiction of them. What, then, was meant by, what, in fact, was, the "benefit of that act?" Certainly, the penalties and forfeitures—nothing else. We *claim the benefit of the act of 1819, which expressly gives a bill in equity, and the circuit court jurisdiction. [*610

It is in vain to say, that the acts in question are conditions precedent to the right. The right itself is recognised by the constitution and law, as an existing right; and the right is not given by the act, but is only secured by it. The security, as we have shown, is the penalties and forfeitures, which we do not now claim. The action on the case is a remedy founded on the right, and not on the statute, which gives none. And this bill is founded on the right, and on the act of 1819. We, therefore, get neither the right, nor remedy from the act of 1790; and what benefit do we claim from it? In support of the construction thus contended for, were cited, Rules of Construction found in 6 Bac. Abr. 379, Statute, I, pl. 1; 383, pl. 4, 5; 387, pl. 6; 391, pl. 10; 19 Vin. Abr. 519, Statute, E, 6, pl. 86; 520, pl. 96; 525, pl. 129; 524, pl. 119; 528, pl. 156; 5 Vin. Abr. Condition, 2, a. pl. 2, 3, 4, 5; 528, pl. 154, 158.

It is agreed, that the object of the requisites in the act is to give notice, and statutes, however strong their language or positive their enactments, which require things to be done for notice, are held not to apply; and that

their provisions need not be complied with, where actual notice is proved. Such are the registry acts, and other similar acts, which declare that instruments shall be absolutely void, if not recorded. *Le Nevé* v. *Le Nevé*, 2 Atk. 650; *Jackson* v. *Burgott*, 10 Johns. 460; *Jackson* v. *West*, Ibid. 466. It is fully shown by the evidence, that the defendant had notice; and a part of that evidence shows, that the claim of the appellant, Mr. Wheaton, was admitted. The rule is, that the provisions of the registry acts do not apply, except in cases of *bonâ fide* purchasers. What is a *bonâ fide* purchaser? A purchaser without notice; no matter what his property, or his attempt to get it, has cost him. Is Mr. Peters a *bonâ fide* purchaser?

It is objected, that the record of some volumes is taken out as author and proprietor. In answer, we say, it is the clerk's duty to make out the record; and we cannot be held to forfeit our property, because he has not done it correctly. *But the record is right. As author, and not having parted with the right, Mr. Wheaton was also proprietor. The act is adapted to a proprietor as well as author, and to enable a proprietor, who is not the author, to secure a copyright. In our case, Mr. Wheaton is described as author, and the super-addition of proprietor is mere surplusage. *611]

6. The directions of the acts of congress as to the application of the record and delivery of the copy to the secretary of state; and the renewal of the right of the first volume have been complied with; and the complainants have offered all the proof they are bound to offer of those facts. In support of these positions, the counsel referred to the evidence in the record. As to the delivery of copies to the secretary of state, he stated, that the law is silent as to any proof. It directs no memorandum of the deposit to be made. The presumption, therefore, is, that none is made. And, in fact, they did not begin to make any, until about the close of these volumes. It appears, that certificates were given, sometimes, latterly. But the law does not direct them, does not know them; and why should one take them? Would they be evidence of anything, if he had them? And Mr. Brent proves the greatest irregularity as regards certificates and memoranda. Mr. Carey proves the same thing.

But the law does say, that the secretary of state shall preserve the copies is his office. This, then, is the evidence required by law, that the volumes have always been in his office, since within six months of their publication. And this is proved by Mr. Brent's deposition. The volumes are and have been there. It is for them to show, that they were not placed there by us, under the law. How can we prove, by parol, facts which occurred from sixteen to seventeen years before the proof taken in this cause? The proof must be by parol; and such proof the law presumes to be out of men's power, after the lapse of six years. Without the copies having actually been found there, the law would presume that an act enjoined by law to be performed, was performed, after such a lapse of time. It would presume it, in favor of right and natural justice, against a wrongdoer. See *a case of presumption, even of the enrolment of articles of apprenticeship, against positive evidence to the contrary. *The King* v. *Inhabitants of Long Buckley*, 7 East 45. *612]

But we have proved, positively, by the evidence of Mr. Brent, that eighty copies of every volume were delivered, under the reporter's salary act, within the six months after application. The four acts of congress

allowing the reporter his salary, also provide, that he shall, within six months, deliver eighty copies to the secretary of state; one of which he is to keep and transmit to his successor in office, of course, to be preserved in the office. The fact is, that eighty-one copies were sent, but the law giving the salary, not requiring more than eighty, the papers in the department under these acts speak of but eighty; and all being sent to the department together, is the reason why there was no minute, or memorandum, or certificate, as in some cases under the copyright law. And is not this within the letter of the copyright law—the delivery of the eighty copies alone? And if we have complied with the letter of the law, ought it not to save us from a forfeiture of our property? Is it not within the spirit of the law? The judge in the court below insists it is for notice; the counsel insist it is for notice. And is it not as good notice, if it is there under one law, as under the other? But the judge who decided the case below says, that it is not required, under the salary law, to be kept in the office. It is submitted, that it is as much required to be kept there, under one law as another. At all events, the condition, if it be a condition precedent, is substantially performed by it; and this, as has been shown, is sufficient.

The copyright for the first volume of Wheaton's reports was renewed in New York, the place of residence of the author. This was done, before the publication of any volume of the Condensed reports, containing any of the matter in Wheaton's reports. Mr. Wheaton had not parted with his property in them; and by the third section of the act of 1790, it is required, that the title shall be deposited, and the record made in "the clerk's office of the district court where the author shall reside."

Law reports, like other books, are objects of literary property; *and Mr. Wheaton was the author of the reports in question in this case, and entitled to the copyright in them. The other complainant, [*613
Mr. Donaldson, has a limited property in the copy, by assignment from Mr. Wheaton. It was never doubted in England, that law reports were the subject of copyright. The only question was, whether the prerogative of the crown did not monopolize all law-books, so as to exclude an author's right. *Roper* v. *Streater*, Skin. 234; 4 Burr. 2316, 2403; *Tonson* v. *Walker*, 3 Swanst. 673; 3 Ves. 709; 2 Bro. P. C. 100. The prerogative right, however, is now abandoned, and has long been in England. Maugham, 101, says, "it is now treated as perfectly ridiculous." Godson says the same thing (Patents 322, 323). See 4 Burr. 2415, 2416, as to the reason of the prerogative. It there appears, the king introduced printing into England.

It is not necessary, however, to produce cases, to prove a right so obvious, until cases are produced or principles established which show that it does not exist. There are necessarily but few cases, because the right has not been questioned. One fact is enough, without cases. We know the great price of law reports in England, and we know, of course, that but one person does publish, viz., the proprietor; that there are never contemporaneous editions of the same reports; that a single whole edition is exhausted before another is published, and sometimes lasts half a century. Why is this? Who prevents enterprise and cupidity from participating in this field? What can it be, except the copyright?

As to the objection that the matter of which the report is composed is not original; we answer, this is wholly unnecessary in copyright. There is

no analogy in that respect between copyrights and patents. A man who makes an Encyclopœdia may have a copyright, although he does not write a word of it. And in *Carey* v. *Kearsley*, 4 Esp. 168, where it was attempted to show that the survey in which the copyright was claimed, was made at the expense of the post-office, and that the copyright belonged to the post-office, Lord Ellenborough said, "I do not know that that will protect the defendant. At law, the first publisher, even though he has abused his trust
*614] by *procuring the copy, has a right to it; and to an action against the person who publishes it without authority from him."

The salary of the reporter was never designed to be a compensation in full, and to deprive him of his copyright. Had such an effect been intended, or thought of, it would have been expressed. It stipulates an equivalent for the sum allowed him, or a greater part of it, viz., eighty copies. When congress, by the last reporter's act, reduced the price of the volume to five dollars, the copyright was considered. Mr. Wheaton published his first volume, without a salary. He had been appointed reporter by the court, and was looking to the profits of the copy as his only compensation. But it was found unequal to the labor and time, and in truth no compensation. In this state of things, to enable him to go on, congress give him $1000 (for which he gives them back eighty copies); and say nothing of its being an equivalent for his copyright. The copyright was established in England, and in this country, before the law was passed. And is established property to be taken away by implication? Does any one believe, that Mr. Wheaton would have spent half a year or more in making and publishing these reports, if he had supposed he had not the copyright? After deducting the eighty copies, the $1000 would not leave enough to pay the expenses of a gentleman in Washington during the term, and going and coming. Besides, he took steps to secure his copyright every year. It was considered a copyright book; congress saw this and knew it. Their laws with him were contracts, made under a full knowledge of existing facts. And shall it be said, when they made no exception of the copyright, and knew that he relied on it, that they intended to deprive him of it? It would have been a fraud unworthy of congress; as it would have been disgraceful to an individual. Other reporters in this country, in the state courts, who had salaries, had always secured their copyright (even Mr. Peters has secured his), and the right to do so was never doubted. Mr. Wheaton published the first volume without salary; consequently, this objection cannot apply to that.

As to the cases and abstracts, they are clearly Mr. Wheaton's own composition. He acquired the right to the opinions, by judge's gift. They
*615] invited him to attend at his own expense, *and report the cases; and there was at least a tacit engagement on their part, to furnish him with such notes or written opinions as they might draw up. This needs no proof; it is the course of things, and is always done. The mere appointment proves all this. Was this engagement, this understanding, ever altered? Do not the judges of this court know that Mr. Wheaton believed he was acquiring a property in his reports? Did they not suppose, he would be entitled to it, if he took the necessary steps to secure it?

Were not the opinions of the judges their own to give away? Are opinions matter of record, as is pretended? Was such a thing ever heard of?

They cannot be matters of record, in the usual sense of the term; record is a word of determinate signification; and there is no law or custom to put opinions upon record, in the proper sense of that term. Nor were they ever put on record in this case; they were given to Mr. Wheaton, in the first instance. 1 Bl. Com. 71–2, shows that the reasons of the court are not matter of record. The copy in the opinions, as they were new, original and unpublished, must have belonged to some one. If to the judges, they gave it to Mr. Wheaton. That it did belong to them is evident; because they are bound by no law or custom to write out such elaborate opinions; they would have discharged their duty by delivering oral opinions. What right, then, can be public claim to the manuscript? The reporter's duty is to write or take down the opinions. If the court choose to aid him by giving him theirs, can any one complain? But we allege and prove that Mr. Wheaton was the author of the reports; that he published them. This is enough to entitle him to a copyright, until they prove that he is not; the burden of proof is on them. (See *Carey* v. *Kearsley*, 4 Esp. 168, already cited.)

It is contended, that it is against public policy, to allow reports to be copyrighted. And extravagant suppositions are made, as, that an author might destroy them, or never publish them, or put an unreasonable price on them. Is one to be divested of property, is a common rule of law to be overthrown, because the imagination of man can devise a danger which may arise, however improbable? And besides, in this case, the reporter would lose his salary; and in all cases, *he must lose his place, if he were guilty of any of such absurdities. As to enhancing the price, which [*616 is one of the evils apprehended, if the author were to do it unreasonably, he would lose his place; and he must always do it to his own injury, for he would lose his sales and profit. In England, the statute of 54 Geo. III., amending the statute of Anne, omits the provision in the statute of Anne intended to prevent too high a price. This shows that experience had proved that no such evil was to be apprehended. In Germany, where a free, perpetual copyright exists, books are cheaper than anywhere else in the world. (Maugham 14, 15.) Congress had power to apply the remedy, and they did apply it, when they thought proper, by fixing the price.

It is attempted to put judicial decisions on the same ground as statutes. It is the duty of legislators to promulgate their laws. It would be absurd, for a legislature to claim the copyright; and no one else can do it, for they are the authors, and cause them to be published without copyright. Statutes never were copyrighted; reports always have been. It is said, that one employed by congress to revise and publish the statutes, might as well claim a copyright as a reporter. The difference is, one is employed to act as a mere agent or servant, or clerk of the legislature, to prepare the laws to be properly promulgated. He is engaged to do what it is well understood never is copyrighted, and does not admit of copyright; there is a distinct understanding, a contract, that he is to do the work for his compensation, and not to claim a copyright. But a reporter is not an agent employed by congress; he is, and is understood to be, engaged for himself, as principal; and congress buy eighty copies, and add a salary to his profit from his copy. He was doing, before the act, what it was understood he could copyright, and what he did copyright; and the act does not intimate that there was to be any change; and he went on copyrighting, and they renewed his

salary, without any objection or stipulation. It is the bounden duty of government to promulgate its statutes in print, and they always do it. It is not considered a duty of government to report the decisions of court, and they, therefore, do not do it. The oral pronunciation of the judgments *617] *of courts is considered sufficient. Congress never employed a reporter, and they never gave any one any compensation, before Mr. Wheaton. Mr. Cranch reported without compensation, and relied upon his copyright; and Mr. Wheaton continued, with a full understanding that he was to report in the same way. Are the court prepared to deprive all the authors of reports in this country of their copyrights? Of property which they have labored to acquire, with the full belief, of all others as well as of themselves, that they were to be legally entitled to it?

8. The publication of the defendants is a violation of the complainants' rights. The *quo animo* of the publication is important. An abridgment was not contemplated; and the work was intended to be supplied at less cost. This is stated in the proposals annexed to the bill. The answer admits the decisions contained in the third Condensed reports to have been previously published in Wheaton's reports, and that it is intended to continue the publication of the same. It is denied in these papers, that Mr Wheaton could have a copyright; and if he could, that he has taken the necessary steps to secure it. The actual violation of the complainants' rights consists in having: first, printed the abstracts made by Mr. Wheaton; secondly, in taking the statements of the cases made by Mr. Wheaton, *verbatim*, from Wheaton's reports; thirdly, in having taken points and authorities, and, in some instances, the arguments, and in all cases oral opinions from Wheaton's reports, and for which, of course, no materials could be found elsewhere; fourthly, in having printed the whole of the opinions, which, it is not pretended, were found elsewhere. No resort was had to the records, for the statements of the cases. The Condensed reports are not a fair abridgment. *Butterworth* v. *Robinson*, 5 Ves. 709; 1 American Jurist 157; Maugham 129–36.

The appellees submitted the following points for the consideration of the court. 1. That the books styled "Wheaton's Reports," is not lawfully *618] the subject of exclusive literary property. *2. If the book of the reports of the complainants be susceptible of exclusive ownership, such ownership can be secured only by pursuing the provisions of certain acts of congress. 3. The provisions of the acts of congress have not been observed and complied with, by the complainants, or others, in their behalf. 4. Reports of the decisions of the supreme court, published by a reporter appointed under the authority of the acts of congress, are not within the provisions of the laws for the protection of copyrights. (*a*) 5. The entries of the copyrights by the appellant, claim more than Mr. Wheaton was, in

(*a*) As the court gave no opinion upon this point, and, as the reporter has been informed, did not consider it, when the case was disposed of, a great portion of the arguments upon it by the counsel for the appellees, has been omitted in this report. Should the case be brought again before the court, as it will be, in the event of the issue directed by the court being found for the appellants, this point will be urged to a decision.

fact or in law, entitled to, as "author," "proprietor," "author and proprietor," and were for his cause void. 6. The work styled Condensed reports, is not an illegal interference with the right, whatever it may be, in Wheaton's reports.

J. R. Ingersoll, for the defendants.—The defendants submit the following argument in answer to the complaint exhibited by the bill and testimony of the appellants. They propose to show: 1. That the book styled "Wheaton's Reports," is not lawfully the subject of exclusive literary property. 2. If the book of reports of the complainants be susceptible of exclusive ownership, such ownership can be secured only by pursuing the provisions of certain acts of congress. 3. The provisions of the acts of congress have not been observed and complied with, by the complainants or others in their behalf.

1. The character of the work in which the right to literary property is asserted by the complainants, is sufficiently described in their own bill. It consists, they say, of twelve *books of reports of the decisions of the supreme court of the United States. It was prepared in the due [*619
exercise of the appointment of Mr. Wheaton as reporter, which he derived from the court. The writings or *memoranda* of the decisions were furnished by the judges to Mr. Wheaton, who alone preserved the notes and opinions thus furnished to him, together with other materials compiled by himself; and having retained all these materials in his possession exclusively, he finally destroyed them. The work, agreeable to the description of it in the bill, is composed of "cases, arguments and decisions." However rich it may be in other materials, they are not made the subject of claim; nor is any interference with them alleged, or made in any degree the subject of complaint. The claim and complaint are confined to the *reports* properly so called. If the profession and the country are indebted to the individual exertions of the reporter for valuable notes, which may have been usefully inserted to increase his emoluments, or enlarge his literary reputation, they are not at all connected with the work as described and exclusively claimed in the proceedings before the court.

Reports are the means by which judicial determinations are disseminated, or rather they constitute the very dissemination itself. This is implied by their name; and it would necessarily be their nature and essence, by whatever name they might be called. The matter which they disseminate is, without a figure, the *law of the land.* Not, indeed, the actual production of the legislature; those are the rules which govern the action of the citizen. Bnt they are constantly in want of interpretation, and that is afforded by the judge. He is the "*lex loquens;*" his explanations of what is written are often more important than the mere naked written law itself; his expressions of the *customary law*, of that which finds no place upon the statute book, and is correctly known only through the medium of reports, are indispensable to the proper regulation of conduct in many of the most important transactions of civilized life. Accordingly, in all countries that are subject to the sovereignty of the laws, it is held, that their promulgation is as essential as their existence. Both descriptions of laws are within the principle; the source from which they spring makes no difference; whether legislative acts, or judicial constructions, or decrees, *knowl- [*620

edge of them is essential to the safety of all. A pregnant source of jurisdiction to the enlightened tribunal to which this case is now submitted, is altogether foreign to the enactments of the legislature. The extended principles of national law, and the rules which govern the maritime intercourse of individuals, are fairly and authoritatively known only as they are promulgated from this bench. It is, therefore, the true policy, influenced by the essential spirit of the government, that laws of every description should be universally diffused. To fetter or restrain their dissemination, must be to counteract this policy; to limit, or even to regulate it, would, in fact, produce the same effect. Nothing can be done, consistently with our free institutions, except to encourage and promote it. Everything which the legislature or the court has done upon the subject, is purely of that character and tendency.

The defendants contend, that to make "reports" the subject of exclusive ownership, would be directly to interfere with these fundamental principles and usages. They believe, that no man can be the exclusive proprietor of the decisions of courts or the enactments of the legislature; and that nothing in the light of property in either can be infringed. The two things being analogous, let the illustration of the one in controversy be derived from the one that is not. That a particular act of congress, or any number of acts of congress, could be made any man's exclusive property, has perhaps never been supposed. Yet the same labor is devoted to the construction of them —the same degree of talents is required for the due and proper composition of them. A particular individual receives them for publication, and the manuscripts may be said to belong to him; for "having retained such materials in his possession exclusively," so long as he had occasion for them, in every case it may probably be said, "he finally destroyed the same." This person is specially employed to publish the acts of congress. He does so, under an *appointment*, which has been deemed, by some learned judges, incompatible with the tenure of an office under one of the states. Where, then, does the parallel end? An individual may voluntarily publish an edition of the laws. But he does not, by such publication, make the *laws* his own. It is not necessary to determine, whether he has or has not exclusive property in the *peculiar combination, or in the additional matter which his edition may contain. He certainly does not, by either combination or addition, appropriate to himself that which is neither the one nor the other; and his combination being untouched, and his additions discarded, a stranger may surely use as he pleases, that which at first was public property, and is public property still. Those acts themselves are no more the property of the editors, than the hall in which they were enacted is the property of the members who passed the laws.

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If either statutes or decisions could be made private property, it would be in the power of an individual to shut out the light by which we guide our actions. If there be any effect derived from the assertion, that the judges furnished their decisions to the reporter, the gift would be both irrevocable and uncontrollable, even by the judges themselves. The desires of the court to benefit the public, and the wishes and necessities of the public to receive the benefit, might alike be frustrated by a perverse or parsimonious spirit. A particular case, or a whole series of cases, might be suppressed by a reporter endowed with different feelings from those of the highly

respectable complainant in this cause. It might become the interest of such a person to consign the whole edition to the flames, or to put it at inaccessible prices, or to suffer it to go out of print, before the country or the profession is half supplied. These are evils incident to every publication which can be secured by copyright. Mere individual works, whether literary or religious, the authors can undoubtedly thus control. During the "limited time" for which they are constitutionally secured in an exclusive enjoyment of them, there is no remedy. Their right is perfect during that period. A similar right must exist, if at all, in the publisher of reports. Can such a power be asserted, with all its consequences, over the decisions of the highest judicial tribunal of the land?

We are not to be told, that the interest of the proprietor would secure the country against so great an evil. The law endeavors to prevent the occurrence of any possible wrong, although it may not anticipate the precise mode of accomplishing it. But there are contingencies, readily conceivable, where the interest of a venal reporter might be promoted by the course suggested. A party might feel it to his own advantage, and *therefore, make it to the advantage of the reporter, to suppress a part, or the whole of the edition of his work. The law cannot and ought not to be made the prisoner or the slave of any individual. [*622

It is proper here to draw a distinction between *reports*, the immediate emanations from the sources of judicial authority, and mere *individual dissertations*, or *treatises*, or even *compilations*. These may be of great utility, but they are not the law. Exclude or destroy them, and the law and the knowledge of it still exists. The same fountains from which the authors of them drew, are accessible to others. These private works may be regarded as so many by-paths to the temple of justice, smoothed and straightened by individual labor, and laid out, for greater convenience, over private ground. The owner may close them at his pleasure, and no one can complain. But the entrance to the great temple itself, and the highway that leads to it, cannot be shut, without tyranny and oppression. It is not in the power of any department of the government to obstruct it.

The reports in England used to be printed with the express permission or allowance of the twelve judges prefixed. Probably, it would have been held a contempt of court to print them without. We are told, that four reporters were formerly appointed by the king "to commit to writing, and truly to deliver, as well the words spoken, as the judgments and reasons thereupon given," in the courts of Westminster. Preface to Cro. Jac. When Serjeant Henden *vouched for authority* Dalison's printed reports, Sir HENRY HOBART "demanded of him by what warrant those reports of Dalison's came in print." Preface to Cro. Car. Sir James Burrow rebelled against the habit of receiving a special allowance or recommendation from the judges, preparatory to publication, and actually published without any *allocatur*. His preface (p. 8), which explains all this, also has a reference to the *property of the reporter*. But that has, evidently, no allusion to copyright property, for it refers to a proceeding previous to the publication by the reporter: viz., a surreptitious publication by some other person, "and after the surreptitious edition has been stopped by an injunction, the book has been *published, with consent of the reporter, without leave or license, and no notice taken or complaint made of it." [*623

Reporting, however, in England, as it respects the common-law courts, at least, is a very different thing from reporting in this country. There, the reporter has, with regard to the decisions themselves, a labor to perform which requires experience, talents, industry and learning: and he receives nothing from the judges to aid him in his task. Here (with respect to the opinions), he does nothing more than transcribe, if he does so much. And having received the manuscripts from the judges, if he should not himself publish them, they are withheld from the public, to the infinite detriment of the whole nation.

The cases that have been decided in England have, as it should seem turned on a question of prerogative, and not of copyright. Such was the point in the *Company of Stationers* v. *Seymour*, 1 Mod. 256. "Matters of state, and things that concern the government, were never left to any man's liberty to print that would. And particularly, the sole printing of law-books, has been formerly granted in other reigns." The case in 1 Vern. 120 (*Anonymous*), was a motion by the *king's patentees* for an injunction to stop the sale of English bibles, printed beyond sea. The lord keeper then referred to the circumstance, that a patent to print law-books had been adjudged good in the house of lords. In the case of *Company of Stationers* v. *Parker*, Skin. 233, Holt, arg., "agreed, that the king had power to grant the printing of books concerning religion or law, and admits it to be an interest, but not a sole interest." The court inclined for the defendant (who had pleaded the letters-patent of the king, which granted to the University of Oxford to print *omnes et omni modo libros* which are not prohibited to be printed, &c.), and they said, that "this is a prerogative of power which the king could not grant so, but that he might resume it, but otherwise it is of a grant of an interest." In *Gurney* v. *Longman*, 5 Ves. 506–7, Lord Erskine declared, that he granted the injunction (as to publishing the Trial of Lord Melville), "not upon anything like literary property, but upon this only, that these plaintiffs are in the *same situation, as to this particular subject, as the king's printer, exercising the right of the crown as to the prerogative copies." The cases of *Bell* v. *Walker*, 1 Bro. C. C. 451, and *Butterworth* v. *Robinson*, 5 Ves. 709, are not sufficiently developed, to show whether they turned upon copyright proprietorship, or a proprietorship derived from a prerogative grant.

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It cannot be contended, with any semblance of justice, that the mere *opinions* of the judges, communicated to Mr. Wheaton, as it is alleged they were, could be the subject of literary property. A book composed in part of those opinions, and in part of other matters, does not change the nature of the opinions themselves. An individual who thus mingles what cannot be exclusively enjoyed, with what can, does, upon familiar principles, rather forfeit the power over his own peculiar work, than throw the chain around that which is of itself as free as air. The intermixture, if it affect either description of materials, must render the whole unsusceptible of exclusive ownership. That which is public cannot, in its nature, be made private, but not *é contrà*. The lucubrations of the reporter assume the hue of the authoritative parts of his book, and must abide by the result of a connection so framed, and a color so worn. Whether a stranger could extract the original parts, in the face of a copyright, and publish them alone, it is not necessary to discuss. But upon the principles just asserted, he could give

additional dissemination to the whole, as he finds it connected together. And he could, it is conceived, unquestionably select what is justly public property, and leaving the merely private work of the reporter untouched, publish the rest with entire impunity.

2. Our second point is, that the exclusive ownership of an author can be obtained only by pursuing the provisions of the acts of congress. Upon this particular point, a moment's attention will be usefully given to the celebrated case of *Millar* v. *Taylor*, 4 Burr. 2303, and its companion, *Donaldson* v. *Beckett*, Ibid. 2408. Judgment of the court of king's bench having been entered for the plaintiff, in *Millar* v. *Taylor*, a decree of the court of chancery was founded upon it, in the case of *Donaldson* v. *Beckett and others*. This came before the house of lords on *an appeal, and [*625
the decree of the court of chancery (and of course, *Millar* v. *Taylor* along with it, in principle) was reversed, "the lord chancellor seconding Lord CAMDEN'S motion to reverse." Besides the influence of the decision itself, we have the force of these professional opinions, and that of a majority of the eleven judges, who gave their sentiments, that the existence of the statute deprived the author of any right of action which he may have had at the common law. The question of a common-law right has not been decided favorably to the author; and if it had been, the existence of a statute it thus recognised as superseding both the right and the remedy which may have previously existed. The marginal note of Sir James Burrow to *Millar* v. *Taylor*, 4 Burr. 2303, itself is, "authors have *not*, by common law, the sole and exclusive copyright in themselves or their assigns, in perpetuity, after having printed and published their compositions," &c. If, in England, the source and fountain of the common law, no such right exists, what can be alleged in favor of its existence in these United States? We contend, that there could be no such common-law right here, even if there were no statute; and that if they could be, it is incompatible with the provisions of the statute. All the arguments contained in the powerful and splendid opinion of Mr. Justice YATES in *Millar* v. *Taylor*, 4 Burr. 2354, are of irresistible force here.

Feudal principles apply to real estate. The notions of personal property, of the common law, which is founded on natural law, depend materially on possession, and that of an adverse character, exclusive in its nature and pretensions. Throw it out for public use, and how can you limit or define that use? How can you attach *possession* to it at all, except of a subtile or imaginative character? If you may read, you may print. The possession is not more absolute and entire in the one case than the other. It is an artificial, and therefore, arbitrary rule, which draws the distinction; and in order to render it available, the lesson must be read in the statute, and the means must be resorted to which are there pointed out. Even in the face of a statute, backed by the constitution itself, let an inventor lose his possession, and his privilege is gone. The *decision of this court as to the [*626
patent for fire-hose, was to this effect. *Pennock* v. *Dialogue*, 2 Pet. 1. If the right secured by statute does not enable the owner to reclaim his lost possession, even when aided by the common law (if it be so), how can the common law, independently of all statutes, avail? Analogous rights, if such they may be called, are nothing without actual possession and use. Light and air, and a part of the great ocean, may be claimed and held, as

long as necessary for the occupant ; but abandon the immediate occupation, and the exclusive power and exclusive possession are gone together.

These and similar reasons contribute to show the source of literary property everywhere. They justify the positive provisions, and manifest the wisdom of them which give existence to it among ourselves. It is not to be found in natural law or common law, and the deficiency is wisely and aptly supplied. The inconveniences to the public that would be the consequence of mere common-law assertion of the right would be endless. It would lead to perpetual strife. If the mere individual stamp of authorship would afford even a foundation for a claim, originality might be pretended to by numerous individuals, and a test of truth might not be obtained. If the real author give his work the official stamp of originality, before it goes forth into the world, most of the questions that would otherwise occur are anticipated. The source of exclusive ownership is, therefore, found in positive enactments, and not in any unwritten law.

What is the common law of the United States? To sustain a copyright, it must be a very different thing from what the sages of the American law have supposed. To construe existing laws and contracts, to aid in giving them effect, to furnish lucid definitions, sound principles and apt analogies, it is rich in the most important uses ; for all these, and various other purposes, it is indispensable. Most of the crimes prohibited by statute would be misunderstood, without its assistance ; all of the civil enactments would become obscure, if it did not shed its light in never-failing streams upon them. Yet it cannot originate a single punishment, or create a single crime. *627] It does not give any jurisdiction to the judge, or increase the *number or widen the extent of the subject on which he has authority to decide. When he has a duty to perform, it gives him wisdom and strength to perform it ; but the duty itself it cannot create, enlarge, diminish or destroy. This subject is well treated of by Mr. Du Ponceau in his Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States. In his preface, page xi., he says, "the common law of the United States is no longer the source of power or jurisdiction, but the means or instrument through which it is exercised ; therefore, whatever meaning the words common-law jurisdiction may have in England, with us they have none ; in our legal phraseology, they may be said to be insensible." To them may be applied the language in which the common lawyer of old spoke of a title of the civil law : "*in ceux parolx n'y ad pas entendment.*" Again, preface, pages xiv., xv., "I contend, that in this country, no jurisdiction can arise," from the common law, as a source of power—"while," as a means for its exercise, "every lawful jurisdiction may be exercised through its instrumentality, and by means of its proper application."

The common law would be impracticable in its application to copyrights in the United States. It might vary in every state in the Union from the rest. What is the common law of New York or Pennsylvania? It is the common law of England, as it has been adopted or modified in those respective states. Each state then has, or may have, its own common law as a system, or as it applies to a particular subject of regulation or control. But copyrights, as recognised by the United States, must be uniform. There cannot, therefore, be a state common law for copyrights, for the want of necessary uniformity : and if the United States cannot derive it though the

states, they have it not at all. "This power," says Chancellor Kent (2 Com. 299), "was very properly confided to congress, for the states could not separately make effectual provision for the case."

The states themselves, at no time, ever treated this as a common-law right. Before the adoption of the federal constitution, accordingly, several of them are found to have made special provision by statute on the subject. New Hampshire, Massachusetts, Connecticut, New Jersey, Maryland and North Carolina, *each passed acts of assembly to secure to authors an [*628
exclusive enjoyment for a term of years. Why should they have secured a right already in full existence? They might have merely provided a penalty for an already perfect right. The periods for which an exclusive right is maintained are different in these provincial enactments. In Germany, this difficulty is cured, by rendering them perpetual in each department. But there is no common government in that country to which the subject can be referred.

This is a subject expressly ceded by the states to the general government; it is extinguished with regard to them in all its parts. Whatever power or control the states might have exercised is now gone, and all is vested in the United States. No common-law power, then, of any kind, in relation to copyrights, exists. Not in the states, for they have surrendered the whole subject to the federal government; not in the United States, for they exercise only the jurisdiction which is conferred by the constitution and the laws. Nor have they declined or omitted to fulfil the trust thus confided to them. If some powers are left unexercised (as in the case of bankruptcy), such omission cannot be asserted with regard to the protection of literary property; it is amply provided for. No assistance is needed from any other jurisdiction; no deficiency is even suggested to have been left to be supplied.

Mr. Du Ponceau, in his treatise already cited, page 101, asserts, "that when the federal courts are sitting in and for the states, they can, it is true, derive no jurisdiction from the common law; because the people of the United States, in framing their constitution, have thought proper to restrict them within certain limits; but that, whenever, by the constitution, or the laws made in pursuance of it, jurisdiction is given to them either over the person or subject-matter, they are bound to take the common law as their rule of decision, whenever other laws, national or local, are not applicable. Judge Chase, in the case of the *United States* v. *Worrall*, 2 Dall. 384, uses this comprehensive phrase, "in my opinion the United States, as a federal government, *have no common law!*" "If, indeed, the United States can be supposed for a moment to have a common law, it must, I presume, be that *of England; and yet it is impossible to trace when or how the [*629
system was adopted or introduced."

It would be most strange, if the double jurisdiction did exist. The constitution, and the statutes enacted in furtherance of its provisions, instead of providing or extending rights and remedies, would have greatly limited and restrained them; instead of doing as they were designed to do, much benefit to the author, they have done him much positive harm. He had already, according to the theory we are opposing, rights by the common law. These rights, if they were perfect in their nature, were unlimited on their extent. The patronage of American legislation then abridges the duration

of the right, if it does not curtail its enjoyment, by imposing restraints and prescribing preliminary forms. It does more, it draws a distinction between the stranger and the citizen or resident ; but the distinction, if it mean anything, is in favor of the former, and against the latter. The natural law, or common law, would be unlimited in the duration of the privilege which it would confer ; and the labor and skill exhibited in the composition, would secure the right. This would be an innate privilege of the foreigner. The statute law afterwards comes and confines the security to a term of years, and makes the way to obtain it intricate, or at least perplexed ! How does this consist with the language or the spirit of the eighth clause of the eighth section of the first article of the constitution ? That clause ordains, that congress shall have power "to *promote* the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." It would not be to promote, but to retard, that progress, if it possessed already a more active *stimulus*. There would be no occasion to secure for a limited time, if the exclusive right already existed in perpetuity.

The case of *Ewer* v. *Coxe*, 4 W. C. C. 487, is broad enough to cover all that is now contended for. Judge WASHINGTON having demonstrated the necessity of the proprietor's complying with the provisions of the act of congress, in order to obtain the benefit conferred by that act, declares, "if he has not that right, he can have no remedy of any kind." The right thus referred to was one purely under the statute. But it was the only available one *that could exist ; the only one that could carry with it, or be productive of any remedy. In order to sustain his claim at all, an author who has not complied with the provisions of the statute, must make out these several positions :—1. That a right and a remedy existed independently of the statute, and prior to it. 2. That the provision of redress by the statute does not take away a previous right. We have endeavored to show that the first of these positions is unsound, and if so, the second is altogether inapplicable.

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The language of the supreme court of New York (*Almy* v. *Harris*, 5 Johns. 175 ; see also *Scidmore* v. *Smith*, 13 Ibid. 322, and 1 Roll. Abr. 106, pl. 16), applied to a totally different matter, may be usefully quoted here. "If Harris had possessed a right at common law, to the exclusive enjoyment of this ferry, then, the statute giving a remedy in the affirmative, without a negative expressed or implied for a matter authorized by the common law, he might, notwithstanding the statute, have his remedy by action at the common law. 1 Com. Dig. Action on Statutes, C. But Harris had no exclusive right at the common law, nor any right but what he derived from the statute. Consequently, he can have no right since the statute, but those it gives ; and his remedy, therefore, must be under the statute, and the penalty only can be recovered." "But where a statute gives a right, and furnishes the remedy, that remedy must be pursued." *Gedney* v. *Inhabitants of Tewksbury*, 3 Mass. 309. And, "when a statute creates a new right, without prescribing a remedy, the common law will furnish an adequate remedy to give effect to the statute right. But when a statute has created a new right, and has also prescribed a remedy for the enjoyment of the right, he who claims the right must pursue the statute remedy." *Smith* v. *Drew*, 5 Mass. 515.

The same principles will make it necessary, in order to reach the rights which the statute creates, to pursue the means which it points out. Judge WASHINGTON, in *Ewer* v. *Coxe*, 4 W. C. C. 491, already cited, says, "that the author *must perform all that is pointed out, before he shall be entitled to the benefit of the act. It seems to me," says he, "that the act will admit of no other construction." [*631

The case of *Beckford* v. *Hood*, 7 T. R. 620, has been relied on to show that the directions of the English statute are not necessary preliminaries to the establishment of the right. The judges of the king's bench were construing a very different statute from ours. The second section of the act of 8 Ann., c. 19 (12 Statutes at Large 82), recites, that "whereas, many persons may, through ignorance, offend against this act, unless some provision be made whereby the property in every such book, &c., may be ascertained, &c." and then enacts, that "nothing in this act contained shall be construed to extend, to subject any bookseller, printer or other person whatsoever, to the forfeitures or penalties therein mentioned, for or by reason of the printing or reprinting of any book or books, without such consent as aforesaid, unless the title to the copy of such book or books hereafter published shall, before such publication, be entered in the register book of Stationers' Hall, &c." The corresponding cause of the act of congress of April 29th, 1802, runs thus: "that every person, &c., before he shall be entitled to the benefit of the act, &c., shall, in addition to the requisites, &c." The preliminary in the English statute is connected directly with the penalty. In ours, it is directly associated with the whole benefit of the act. The decision in *Beckford* v. *Hood* cannot affect the present case, even if it be sound. Of the soundness of it, there may be much doubt, when we find Lord HARDWICKE deciding, in *Blackwell* v. *Harper*, 2 Atk. 95, that "upon the act of 8 Ann., c. 19, the clause of registering with the Stationers' Company is relative to the penalty, and the property cannot vest without such entry." A further view is taken by Judge HOPKINSON of this decision in *Beckford* v. *Hood*, which is respectfully submitted as a conclusive reply. It will be found in his printed opinion.(*a*)

Let us look at the statutes themselves. The question here between us seems to be, whether the acts of congress merely provide a remedy, or also constitute a right? The act of 31st of May 1790, would have commenced with *its second section, if it had merely intended to suggest redress for the infringement of an existing right. This second section, however, is only a corollary or incident to the first, which provides, in compliance with what the constitution had authorized, security to authors which they did not in any shape enjoy before. There is nothing declaratory about it. "From and after the passing of this act, the author, &c., shall have the sole right, &c." The right is certainly prospective, and it is (we say) conditional. The right is to arise, at all events, subsequently to the passage of the act, and it is to commence "from the recording the title, &c., in the clerk's office, as is hereinafter directed." It would seem to be quite unnecessary thus gravely to confer in prospect a privilege already enjoyed, and to trammel it with conditions, if it was already unconditional. This is certainly no restraining statute. [*632

(*a*) See Appendix, II.

An argument has already been used, and it will not be formally repeated, that the ostensible or professed encouragement of learning, by securing, &c., during the times mentioned, would be a mere delusion; for the encouragement had been more liberal, the security not less perfect, and the right more comprehensive, because of unlimited extent, if they respectively had any anterior existence whatever. It is no less striking, that congress, who are supposed to be declaring the common law, and merely providing a precise penalty for the infraction of a right under it, could not, by any possible exercise of their power or authority, come up to the supposed common-law right; for the paramount authority of the constitution restrains the exercise of any encouragement to a limited time.

The act proceeds to mark out the preparatory step towards penalty or prohibition, viz., the legal acquisition of a copyright. (§ 1.) And how is the copyright to be legally acquired? Why, only by following the directions of the statute, *i. e.*, depositing the title in the clerk's office, publishing the record, and delivering a copy within six months to the secretary of state, to be preserved in his office. (§ 3.) Judge WASHINGTON was inclined to think, that some of these provisions were merely necessary to enable the author to sue for the forfeitures provided by the second section. But that would be quite an empty satisfaction. The copies forfeited by the invading party are to be destroyed; and the *penalty of fifty cents for every sheet in his possession, belongs one-half to the United States. The author is not much the better for this provision. He might have reserved all the damages for himself, independently of the act, if the right existed previously.

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It is not necessary to rely upon the construction of this act alone, if there be any doubt with regard to the true interpretation of it. The supplementary act, passed April 29th, 1802, is free from all difficulty. It is on this that Judge WASHINGTON relies. This last act provides, § 1, that the author, "before he shall be entitled to the benefit, &c., shall," in addition to the requisites enjoined in the third and fourth sections of said act, &c., "give information, by causing the copy of the record, &c., to be inserted at full length in the title-page, &c." It thus makes those clauses which had before been of doubtful name, *requisites*. It requires him to perform them, not as preliminary to forfeiture or penalty, which are only particular provisions of parts of the act, but as preliminary to the benefit of the act itself. He, therefore, in terms, is denied its advantages, unless he perform the conditions precedent. These, agreeable to a well-known rule, are to be construed strictly, and the party who omits to bring himself within them, can claim no right whatever. The statute becomes a unit; all its benefits are yielded or withheld, exactly as all its requisites have been fulfilled or disregarded.

Requisite is aptly defined by the American lexicographer, Noah Webster, to be "so needful that it cannot be dispensed with; something indispensable." An author must show that he has complied with these affirmative requisitions, or they will not be presumed for him. There are analogies which will fully sustain this position. Take the statute which regulates distresses for rent. Certain provisions are made which justify a landlord for acts which would otherwise amount to a trespass. But he must show that he has performed them strictly, or, as the law at first stood in England,

and does still in Pennsylvania, he is a trespasser *ab initio*, and the statute of Geo. II. only so far alters the rule, as to leave the party to his remedy by action on the *case, for the recovery of the actual damages that may have been sustained. If notice be required by statute, as, for [*634 example, preparatory to a suit against a magistrate for misconduct in office, not only is it never presumed, but nothing can supply his proof; not even knowledge of the design to sue, which might be substantially the same thing. In such case, knowledge is not notice.

There is nothing against our construction, in the principle which requires a strict interpretation of certain statutes. If the act be penal, we are not endeavoring to enforce the penalty. There is nothing penal as to the author claiming the copyright. All the penalties are against other persons. It is to be construed strictly, when it is to be enforced against *them*. He claims the benefit of his copyright, which is a grant to be obtained only on conditions precedent and well-defined. He attempts to enforce with rigor, if not the penal forfeitures, at least, the penal prohibitions of the law against the defendant, whom he alleges to be a wrongdoer. Against the defendant, thus, without (if it be without) bringing himself under the provisions of the law, the alleged proprietor denounces awful consequences. The defendant asks nothing—wants nothing, but to be let alone, until it can be shown that he has violated the rights of another.

Where is the difference between this act and the act respecting patents, as regards the right of the alleged owner? This court has said, that if a defendant sued for the infringement of a patent-right, "shows that the patentee has failed in any of these prerequisites on which the authority to issue the patent is made to depend, his defence is complete. He is entitled to the verdict of the jury and the judgment of the court." *Grant* v. *Raymond*, 6 Pet. 220.

3. There will be little difficulty in showing that the provisions of the acts of congress have not been complied with. The requisites are: 1st. The deposit of a printed copy of the title in the clerk's office of the district court where the author or proprietor resides. 2d. Within two months from the date thereof, the publishing of a copy of the record in one or more newspapers printed in the United States, for four weeks. *3d. Within six [*635 months, the delivery, &c., to the secretary of state of a copy to be preserved in his office.

With regard to the first volume, the bill is defective in not stating either of the two last requisites. The complainants are informed by M. Carey, and believe, that all things which are requisite and necessary to be done, &c., have been done! An inference or conclusion even of the party, would be a sorry substitute for the allegation and proof of the facts themselves. The court must have an opportunity to judge whether all things were done, &c.; and that they can have only when the things which were done are exhibited and proved. But here is double-distilled inference. The parties are informed of Matthew Carey's conjecture; and this is presented to the court as a substitute for proof; while H. C. Carey proves that Matthew Carey knew nothing about it, for all was left to him. It is extraordinary, if Mr. Carey really possessed any information on this subject, that he was not produced as a witness.

Upon the complainants' own allegation, their case must fail. But the

proof is scarcely less defective than the allegations of the bill. Henry C. Carey, the clerk of his father in 1816, states, that they were in the habit of advertising, and from the course of business, he does not doubt it was advertised, but he had no recollection of it. He has no recollection at all of a deposit of a copy in the office of the secretary of state. But he says, that the most probable way in which it was sent, was by Mr. Wheaton. In other words, that it was not sent by himself; and therefore, as to any proof from him, that it was not sent at all. Mr. Brent states, that the eighty copies of the volume of Wheaton's Reports, containing the decisions for February Term 1817, were delivered to the department of state on or before the 4th day of November 1817. This refers, of course, to the second volume, which contains the decisions of that term, and not the first, which is for the previous year. Subsequent volumes had been delivered in the same manner; all of them were received under the acts of congress, giving a salary to the reporter. He adds, that there has always been, according to his recollection, one or more complete sets of said reports, from the time of their publication, in the said department of state. But he is unable to recollect, or state
*636] more *particularly, when the same were first placed in said department, or for what purpose. Both of these particulars, it is conceived, must be made out. The delivery must be within six months. The loose declaration that, according to his recollection, there has always been one or more sets, &c., from the time of publication, if it could have any force by itself, is done away by his acknowledged inability to recollect when they were first placed there. The object of the receipt of them, too, is directly the reverse of that prescribed by the copyright law; for, instead of being delivered to be preserved in the office, &c., they were, if delivered at all, merely a part of a general library, intended to be lent out and used. If delivered to be preserved, the presumption is, that the particular copy so left would be found. It will scarcely be contended, that the second edition of the first volume can cure the defects of the first. It can have no copyright existence by itself.

With regard to the subsequent volumes, the bill is scarcely less defective. The declaration of Robert Donaldson is vague and unsatisfactory. It could not be otherwise; he knew nothing of the subject. The result of the inquiries of the department of state, is evasively set forth; and were it otherwise, he must state the fact, and not the inquiry. The bill proceeds to insist, that the complainants would still be entitled to the benefits of the acts of congress, although they should be unable to prove that a copy was delivered, &c. We say, that such proof is a necessary preliminary.

The proof, with regard to these subsequent volumes, is equally defective. Of the second volume, there is no proof of publication. And of none of the volumes is there either allegation or proof of deposit, agreeable to the provisions of the law. The fourth volume wants publication. It began August 28th, and ended September 17th, instead of 25th. The seventh had but two publications in July, four in August, and one in September. The eighth had one publication in October, five in November, and two in December. Of the ninth, there is no evidence of publication at all. The tenth, eleventh and twelfth are all defective in publication.

*637] *It is not necessary to dwell upon the facility with which proof of delivery might have been preserved and exhibited, if it had been

made. The requisites of the law must be shown. But the certificate of Mr. Van Buren, with regard to the second edition of the first volume, is a specimen of what might have been, and would have been produced with regard to the whole, if the deposit had in fact been made.

In the absence of all right on the part of the complainants, not much difficulty is apprehended, from any supposed possession or enjoyment, by color of privilege. Judge WASHINGTON, in delivering his opinion in *Ewer* v. *Coxe*, disposes of this question to our hand. 4 W. C. C. 489. "I hold it to be beyond controversy," says he, "that if the plaintiff has no copyright in the work of which he claims to be the owner, a court of equity will not grant him an injunction. This was formerly the doctrine of the English court of chancery, and still is, as I conceive, notwithstanding Lord ELDON has, in some instances, granted an injunction and continued it to the hearing, under circumstances which rendered the title doubtful, if the plaintiff had possession under a color of title. But surely, if he has no title at all, or such a one as would enable him to recover at law, even that judge would, I presume, refuse an injunction." The authorities cited by Judge WASHINGTON, support the principle which he maintains. Against whom is this mere naked possession claimed? Not the defendant; for during the period when it has existed, he was only one of the mass of individuals who had not any particular concern in disturbing the complainants' colorable claims. It is, therefore, against the public, who cannot thus be baffled of their rights.

It is, however, a most extraordinary case, that would justify a perpetual injunction, without a trial at law. This is a proceeding which turns aside from the regular and proper mode of ascertaining title, and asks that the existence of it shall be definitely rested upon mere colorable claims. The complainants do not choose to bring their case to the proper test; but assuming as conclusive, what at the utmost is only *primâ facie* evidence in their favor, they propose to hang up for ever, in a state of presumption and doubt, that which is susceptible of a just and satisfactory settlement. All that the defendants *ask, in the dismissal of the bill, is, that their rights may not be prejudged. [*638

Sergeant, for the defendants.—The claim now asserted by the appellants, is to a perpetual right in Wheaton's reports, in Mr. Wheaton and his representatives and assigns. Such a right is necessarily exclusive. It goes beyond the right claimed to be secured under the copyright acts of congress. Such a claim should be clearly established It is asserted for the first time in a court of the United States. It has no precedent in the proceedings of the courts of England; for since the decision in that country, that the statute of Anne took away the alleged right of an author at common law, there can be found no precedent in that country, to sustain such a claim.

The Condensed reports, so far as it is now material to examine them, are made up of statements, which are to be found on the records, and of the opinions of the court. Mr. Wheaton's notes are not interfered with—nor are his reports of the arguments of counsel. These, it might be admitted, are his own; if he can have a property in any of the matters contained in the volumes published as a public officer. Mr. Wheaton's reports are made up as an officer of the court. The court appointed him, under the authority of

a law of the United States, and furnished him the materials for the volumes, not for his own sake, but for the benefit and use of the public; not for his own exclusive property, but for the free and unrestrained use of the citizens of the United States. In relation to the work, he was not an author, but as an officer, as a public agent, selected, authorized and paid for making up the reports of the decisions of the court. In the whole composition, under these views of the facts of the case, not a word in the reports belongs to him. It could not be the intention of the court to give him a perpetual right to the opinions delivered by them. No such purpose could have been entertained by congress, when the appointment of a reporter was directed. The objects of the law, and of the court, were to authorize, enforce and secure the publication of the proceedings and decisions of the court, for public information. Any argument, or course of argument, tending to
*639] *a different conclusion, must be wrong; because contrary to the design of his appointment. It is in derogation of common right. Let us see how the claim of the complainants is made out.

I. The question whether the power to regulate copyrights under the constitution is exclusive, can never arise, until some state shall pass a law interfering with its exercise by congress. 3 Story's Com. 50. Until then, it must be a theoretical question. The law of New York, which was intended to secure exclusive rights in the navigation of the waters of that state by steam, was by this court decided to be unconstitutional. The court decided the case on other grounds, it is true, but still so decided. Up to the present moment, no state has asserted a right to interfere with the power of congress, under the constitution, to regulate copyright. There is no judicial decision which asserts or supposes any such right. There is not a trace, sign or symptom of any such right existing in the legislation, or judicial proceedings of any state. There is, therefore, no collision; no case for judgment; but the contrary is evident.

It is not necessary to inquire, whether states have the power, if they have not chosen to exercise or claim it. It is clear, that there was no such thing in any of the states, prior to the constitution, but by the invitation of congress, under the confederation. Fed. No. 43; 3 Story's Com. 49. Congress found the whole case unprovided for; and the laws made by some of the states, at their instance, and which have been referred to by the counsel for the appellants, ceased, when the constitution was adopted. But supposing that a concurrent power to regulate and secure copyright existed, in the states and the United States; a supposition of exceeding difficulty and doubt; and that the states may act, notwithstanding the exercise of the power by congress; it is for the states to choose whether they will do so or not. They have not so chosen—they leave it to congress. But there are many reasons for considering this power exclusive, as well as reasons which clearly show it ought to be exclusive.

1. It was originally taken up by congress as matter properly belonging
*640] to their cognisance. Early in the progress of the *government, the first law was passed; which was followed by other legislation, thus establishing the present regulations. This power did not exist in congress, under the confederation. None of the provisions in that compact applied to it; and it now rests upon the article in the constitution which gives congress the power to "promote the progress of science and the useful arts."

The whole ground is admitted to have been vacant, on the establishment of the present government. It was a new power. Fed. No. 43 ; 3 Story's Com. 48 ; Rawle on the Const. ch. 9, p. 105–6 ; 2 Kent's Com. 306, &c.

2. The power could only be properly, beneficially and effectually exercised by congress. By vesting the power in the national legislature, the system became uniform and certain. Authors, but for this, would have been subjected to different provisions and conditions in every state ; thus materially affecting the value of all their rights. And the community, throughout the whole nation, were thus, after a certain interval, entitled to the benefits of the writings or compositions of those who availed themselves of the laws, passed under the constitutional provisions. 3 Story's Com. 48–9.

3. There is an absolute incompatibility between the existence of the power in the United States, and in the states. It has been repeatedly said, that the constitution has not occupied the whole ground. That it has provided for the author, and not for the public. But the true state of the case is directly the reverse of this. It has provided for the case of the author, only as instrumental to the provision for the public. The clause in the constitution gives congress the power, not to secure a copyright to the author ; but to "protect the progress of science and the useful arts, by securing for limited times to authors, &c., the exclusive right to their respective writings, &c." It is to be for a limited time, no longer. 3 Story's Com. 49.

4. The state of the law in England was known here, by the adjudications in the courts of that country. These adjudications stood in this way : 1st. That there was a common-law right before the statute of Anne. 2d. That there was no common-law right after that statute. According to those decisions, the effect of legislation was to take away the common-law right. Where the power of legislation over the subject was placed, there was the power over the whole matter.

*5. The same word "secure" is applied in the article in the constitution to inventions, as well as to the works of authors. In inventions, it is admitted, there was no common-law property. The use of the word "secure" cannot, therefore, presuppose an existing right. It would have the same effect, and be equally applicable to both. No benefit can, therefore, be derived from the use of the term ; however ingenious the argument which invokes it in aid of the pretensions of the complainants. See Act of 41 Geo. III. ; Maugham 36–7. [*641

6. The uniform construction, and the practice under it, have been such as is contended for by the defendants. It is true, there was an omission in the laws to give full power to the courts of the United States, in cases of copyrights. But the omission was to no great extent. There was no provision for jurisdiction, when the parties to a suit of which copyright was the subject, were citizens of the same state. *Binns* v. *Woodruff*, 4 W. C. C. 48. But that omission was supplied by the act of 1819. (3 U. S. Stat. 481.)

7. In what state, supposing an author to have a right at common-law, is the right to exist, and be protected. If there is a right of property, it must be governed by, and have the benefit of, all the rules which affect such property. It accompanies the owner everywhere. It is not his, because he is a

citizen of the United States; it derives no additional security from such citizenship. A stranger, who is an author—a foreigner has the same common-law right of proporty; and no foreign book can be printed here. Such has not been the understanding in England, from which the principles to sustain the right are derived. No common-law right extended to Ireland before the union. There, at all times, before the union, the works of authors, however secured under the statute of Anne, in England, were printed and published. If a common-law right existed, or was supposed to exist, we should have found, in the proceedings of the Irish courts, its establishment by judicial decisions.

But supposing it were otherwise, and that a right at common law does exist; upon the laws of what state do the complainants rely? Upon the law of Pennsylvania? In the circuit court, the right was claimed on the common law of the nation. In this court, it is asserted to rest upon the common *law of a state; below, no intimation of such a thing was given. *642] If any such right, under the common law of Pennsylvania, exists, we of Pennsylvania do not know it; strangers have discovered it, and claim the benefit of it, for the first time. Not a trace of its existence can be found in the whole history of that state; no authority from any of the laws, or the decisions of the courts, has been vouched. It is denied that it exists.

It is, then, assumed, without hesitation, that the right of action, whatever it is, which an author has for an infringement of his copyright, arises from the constitution and laws of the United States. The constitution gives congress the power "to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." Art. I., § 8, ch. 8. Until secured by congress, he could have no right under the constitution. When secured, it must be to such extent, and upon such terms as congress may enact.

Some argument has been presented upon the word "securing," as admitting a pre-existing right. But there is no force in the suggestion. There must be a pre-existing state of things, out of which a right to apply to be secured arises. That right is brought into existence by the constitutional provision. It had no existence as a right incident to the fact of the author being a member of the community of the nation, until the constitutional provision. By the agreement of those who made the constitution, the right was brought into existence; and it was to be secured. The language, therefore, is accurate. It has already been observed, that the term "securing" is applied equally to inventions; yet no common-law right to inventions has been asserted. The federal judiciary, at all events, can have no cognisance of claims to copyright, but under the laws of the United States, made in pursuance of the constitution; and to the extent such laws may authorize them to go.

Thus understood, what is the right of an author? There is a difference between a patent and a copyright. A patent, in due form, is *primâ facie* evidence of the right of the inventor. It is, itself, *primâ facie* proof of all the prior acts required by the laws. It rests for its support upon the inven-
*643] tion. But *invention, without a patent, is nothing. A man, without a patent, could not ask the aid of the court to protect his claims. The patent is, therefore, evidence, *primâ facie*, of right. A copyright is quite a different thing. Its existence as a right, depends upon doing certain acts.

The doing of these is the foundation of the right. Their being done, is the only evidence of the right. If they are not done, no right, or even claim exists. These acts, therefore, as to copyright, are as a patent in the case of an invention. There is nothing that performs the office of a patent. The whole acts together establish the right. In the case of an invention, the patent being a *primâ facie* case of right, in the first instance, where the right of the inventor is disputed, it is sufficient to prove the patent, at law or in equity. In the case of a copyright, the title is made out *primâ facie*, at law and in equity, by stating and proving the acts which, by the provisions of the law, constitute the copyright. This distinction is a most material one, and to be always kept in mind. It goes to the root of the whole case. If anything has been omitted or neglected; if any of the requirements of the law, the performance of which are conditions upon which the right rests, and by which the right would be protected by the law, have been neglected; there is no title at all; no title in existence. Such a case is the same with that of an inventor coming into court without a patent; the court will not grant him an injunction. *Ewer* v. *Coxe*, 4 W. C. C. 487. There is nothing in such a case on which to engraft the doctrine of possession. It is only when a *primâ facie* title exists, one made out by showing a compliance with the law, that the doctrine of possession can be applied. *Ewer* v. *Coxe*, 4 W. C. C. 488.

This brings us to the first head of inquiry, which separates itself into two branches. 1. What are the requisites to a copyright, under the laws of congress? 2. Have these requisites been complied with?

1. Upon the first question, we have the light of a judicial decision, and there is no decision to the contrary. It is that of a judge of the highest and the most regarded judicial talents; *one whose opinions have always received the utmost respect. In *Ewer* v. *Coxe*, 4 W. C. C. 487, Judge [*644
Washington held, that to entitle the author of a book to a copyright, he must deposit a printed copy of the title of such book in the clerk's office; publish a copy of the record of his title within the period, and for the length of time, prescribed by the third section of the act of congress of 31st of May 1790; and deposit a copy of the book in the secretary of state's office, within six months after its publication. The requisites of the third and fourth sections of the act of congress of 1790, relative to copyrights, are not merely directory; but their performance is essential to vesting a title to the copyright secured by law. The act of congress of 29th April 1802, declares, that, in addition to the requisites enjoined in the third and fourth sections of the act of 1790, and before the person claiming a copyright shall be entitled to the benefits of the same act, he shall perform all the new requisites; and that he must perform the whole, before he shall be entitled to the benefits of the act. "It seems to me," says the judge, "that the act will admit of no other construction."

The argument upon the two acts taken together is plain and convincing. Act of 1790 (1 U. S. Stat. 124); Act of 1802 (2 Ibid. 171). The question, be it remembered, is, what are the requisites under the act of 1802? 1. When these acts were passed, the whole subject of copyrights was open for legislation. The object of congress was to carry into effect the provisions of the constitution, by establishing a mode of obtaining a copyright; the provisions of the laws have no other view. It is material and reasonable,

then to suppose, that whatever was directed to be done was a requirement. The acts to be performed, were to secure for a limited time to an author, the benefit of his writings; and these acts were directed for that purpose. It is impossible to distinguish, so that one of the acts shall be decreed material, and another not so. The whole, and each of the acts are pointed out in the law, and the most natural course is to deem them all materia.. They do all, in effect, constitute the conditions of the title; they constitute the title itself. *2. Upon the words of the act, it seems impossible *645] to raise a doubt; they are plain, clear, and require no explanation. The acts they require are of easy performance; the evidence that they have been performed, can always be obtained and preserved. The reason of requiring these acts is not here in question.

It is probably true, that when the act of 1790 was passed, congress had before them the statute of Anne, and the decisions of the English courts upon that statute, and on all the litigated questions of literary property, and of copyright. This is equally true of the act of 1802; and this must be considered in reading that act. But the reason of the requirement of the law is obvious. The author "shall deliver a copy to the secretary of state, to be preserved in his office." The copy to be delivered is not to constitute a part of the library of the secretary of state. The books deposited for copyright, never do form a part of the library of the department of state. They are, it is understood, always marked, "deposited for copyright," with the date of the deposit. The books so deposited are not lent out, or ought not to be. They are "to be preserved in the office" of the secretary of state. They are not delivered for the sake of the officer, nor are they like the copies delivered to the Stationers' Company, under the act of Anne.

Why does the law require a copy to be deposited in the office of the secretary of state? It is a material requirement. Why, it is asked, were models and drawings to be deposited in the patent-office, a part of the department of state? That is a kindred subject, and the reason is the same in one case as in the other. If a model, or a drawing of a machine or invention, is required to be deposited in the patent-office, the reasons and the objects of the requirement are, that the public may know what the invention is; and that, after the limited period shall have expired, they may have the use of it, according to the purpose of the provision in the constitution. A book or writing is required to be deposited for the same reason. The matter claimed as original is there to be preserved, in order that the extent and nature of the claim for the limited period may be known. The deposit of the title in the clerk's office, the *publication of the record in the *646] newspapers, give no information of the contents of the work; but the deposit of it in the secretary's office does this: and as it is "to be preserved" there at all times; there the extent of the author's claims can be always known.

The law enjoins on the secretary of state obligations which are consistent with those views of its purposes. It is made his duty to preserve the books deposited in his office. He is thus the trustee of the author and of the public. The court will not suppose this duty is ever neglected. It will always presume the injunctions of the law are complied with. As to the author, he has an easy mode of securing the evidence of his compliance with the law. To his rights, the preservation of the book deposited, is not essential.

He has done all that is required of him, by depositing the copy of his work; and the certificate of the secretary of state, which the secretary has power to give, will be evidence of the deposit.

An examination of the provisions of the act of 1802, must result in the conviction, that the construction contended for by the defendants is the true one. The act must be interpreted, not altered. It must be read in its own words, and according to the common meaning and use of the terms in which it is expressed. The first and second sections of the act are those upon which the construction is to be given; and no better language for the clear interpretation of them can be used than those used by Judge WASHINGTON, in *Ewer* v. *Coxe*.

It is of no importance to the case, whether, by the law of 1790, the acts to be done by an author were conditional or directory. They were enjoined—they were "requisites." The act of 1802 has so declared them, and without this they were clearly so; this cannot reasonably be denied. The construction conceded by Judge WASHINGTON, in *Ewer* v. *Coxe*, of the provisions of the act of 1790, is not satisfactory. Having ascertained to his complete satisfaction, that the act of 1802 left no room to doubt, that the acts imposed on an author, were conditions essential to his copyright; that venerable and learned judge did not consider it necessary to examine the provisions of the law of 1790, with the care and scrutiny he would have done, had the case rested on that law only.

The requirements of the law of 1790 are made of the party himself. It is in his power to perform them all. They are *all, and each of them, parts of a system having reference to the author and publisher. The [*647 act of depositing a copy in the office of the secretary of state, is one of the number of acts by which he evinces his intention to secure a copyright, and by which he executes his intention. Less than the whole does not suffice to prove the intention; less than the whole, is not a copyright. The publication in the newspapers is on the same footing. It will surely be admitted that was material. Yet they are both of the same character. There was no necessity for either, if not for both. Unless both were to be performed, both were nugatory; and the whole provisions of the law might have been a dead letter.

The law of 1802 places the question of construction of the act of 1790 out of doubt or controversy. It declares the acts stated in the law of 1790 to be requirements. He shall, in addition to the "requisites" "enjoined" in the third and fourth sections of the act of 1790, do certain things. Every word of the law must have effect. Each section contains one requisite, and no more; neither, therefore, can be rejected; all must have their full force. The second section is equally clear; it helps to construe the other. These, it will be seen, are words of enactment, not of recital; they make the law; they do not declare or expound it. Whatever the law may have been before 1802, it is now established. The decision in *Ewer* v. *Coxe*, in establishing the construction of the act of 1802, establishes that of both statutes.

Under these views of the law, founded on the fair and sound construction of their provisions, and supported by the decision in *Ewer* v. *Coxe*, copyright is the union of these acts, the "requirements" of the laws by an author. It is *nomen collectivum*, signifying all that confers and constitutes the right.

II. Such being the law, how stand the facts of the case? And now it must be conceded, that the proof of title, and compliance with the law, lies upon the complainant. He must state the facts distinctly in the bill, and he must prove them as stated. Most clearly, this is his duty, when he asks
*648] the extraordinary aid of a court of equity. *Nor can it be deemed unreasonable to require this. The proof of his title to copyright is of such a nature that it may easily be preserved, it may consist of an official certificate of the deposit of a copy of the work—of newspapers to prove the required publication. There is a want of such allegations in the bill, as well as of such proof.

Mr. Sergeant declined going into an examination of the bill and evidence in support of the positions he assumed; considering that they had been fully sustained by the argument of Mr. Ingersoll. He also referred, in support of these positions, to the opinion of the learned judge in the circuit court, by whom the case was decided.(*a*) Upon the point made by the counsel for the appellants, that the delivery of the eighty copies of the reports under the reporter's act, was a compliance with the requisite of copyright acts, o the deposit of a copy in the secretary of state's office; he also referred to the decision of Judge Hopkinson.

The case, as exhibited on the record, and by the examination of it which has been submitted to the court, is one which has no claim to the relief sought by the complainants. Its principal features are repeated, to connect with them other matters deserving the consideration of the court. Mr. Wheaton undertook the preparation and publication of the reports of the decisions of the court, under the appointment of the court. He furnished nothing original from his own mind. All the contents of the reports were the fruits of the minds of others; supplied for the public use; at the public expense; or at the expense of others. There is not a thought of Mr. Wheaton's from the beginning to the end of the work. It was intended for the public, for their use and benefit; and should, therefore, be made as public as possible. In process of time, after the publication of the first volume of his reports, Mr. Wheaton became a public officer; with a salary for his labor as reporter, and obliged to perform the duties of the office. This provision for the reports, it has been said, in the course of the argument for the complainants,
*649] was obtained at the earnest solicitation of Mr. Wheaton. It, *therefore, became a contract on his part, for the sum allowed by the law, to prepare and publish the reports. (See act of 1823.) He became, like the clerk of the house of representatives, keeping the journals. The object of his appointment, the plain purpose of the law, was, to preserve a record of the proceedings and decisions of the court; the highest tribunal in the nation; and to give them circulation. If Mr. Wheaton could have a copyright, this object might be entirely defeated—his book might be a sealed book. Out of this public work, it becomes necessary to compile something less bulky and expensive. The usefulness of such a publication is admitted by all but those interested to deny it. Mr. Peters undertakes to prepare it, and he has completed the work. He announced his intention to do this, publicly; and fully explained his plan. No efforts were made to stay

(*a*) See Appendix, II.

this proceeding, until invited by him; and after he had completed the third volume of his work. If the further circulation of his book is stopped, it will be a public injury. Such a result will limit the knowledge of the law of the land, as determined and established by this court, to but a small portion of the community; while all are interested in knowing it.

But here a question arises, whether books of reports can be copyrighted in England or in the United States? There are no cases decided, in which the principle is established, that reports of the decisions of courts of law are the subjects of copyright. The case of *Streater* v. *Roper*, 4 Bac. Abr. Prerogative (Maugham 101, note) was reversed in parliament. By that decision the prerogative right, the right of the patentee, was established. No right, as author, was sustained by this case; but the contrary. It is true, that Maugham says, the prerogative claim is ridiculous; but it rests on a decision that it is the ancient law. In the case of *Butterworth* v. *Robinson*, 5 Ves. 509, it does not appear how the right was derived. By the decisions of the house of lords, no such right is maintained. No copyright, in any one author, is supported by those decisions. No one could report but by the authority of the chancellor; and this authority was exclusive; it prohibited all others from interfering. *Gurney* v. *Longman*, 13 Ves. 493. *The whole of this subject will be found to be examined in the compilations of Jeremy, Maugham and Godson. The law is not established, at least, it has not been so declared, that reports can be private property. Essentially, their contents are public property. The knowledge of the decisions of courts should not be confined. It is consistent with the views of this court, that copies of their opinions should be multiplied to any extent, and in any form required. Publicity is the very thing required. [*650

The reporter is a public officer, and his duty, by law, is, to publish. He has no liberty to keep back the matter which he collects and prepares, in the performance of his official duties. The act of 1817 (3 U. S. Stat. 376), regards him as a public officer. So, by the subsequent acts (Ibid. 606, 768; 4 Ibid. 205). The court, in 3 Pet. 397, at January term 1830, decided, that the reporter was the proper officer to give copies of the opinions of the court, when required. Could he refuse such copies? Could he refuse to give a copy of a report of a case, when asked for it, on the ground that it was his property, and only to be used by his consent, and for his benefit? The whole purpose of the reporter's act would be defeated, could this be done. That act makes him the officer to give publicity to the proceedings of the court; but upon this view of the matter, it has placed him in a situation to get possession of the official actions of the court; it has given access to the records of the court, and has placed him in a situation by which he has obtained all the materials to accomplish the plain and obvious intention of the law, for his private advantage, and that he may defeat and set at naught that intention. Such cannot be the law; this court will never sanction such pretensions.

The purpose of the appellants is to subject the defendants to all the evils of a violation of the copyright acts, by a proceeding which deprives them of the benefits of a trial by jury. Such a course will not receive the favor of this court. The facts upon which the rights of the complainants must rest, whatever may be the construction of the acts of congress, are not made out. All the essential facts to sustain their claims are denied; and certainly,

it will be admitted, the proof offered to sustain them by the complainants, is imperfect. Will the court, then, give its aid in such a case? Will they *651] reverse the *decision of the circuit court, and order a perpetual injunction? Will they not say to the complainants, If you have rights, go into a court of law and establish them?

Webster, in reply.—There was at one period no regular series of reports of the decisions of this court. Mr. Cranch's reports had been published so far as the sixth volume; the rest of the matter, which afterwards formed the remaining volumes, was in manuscript. In this state of things, Mr. Wheaton proposed a regular annual publication of the decisions, with good type, and to be neatly printed. It was found necessary that there should be some patronage from the legislature, there being so few persons who would purchase the reports. Mr. Wheaton applied to congress, personally solicited its aid, and made a case which prevailed. Congress passed a temporary law, which was renewed again and again. The successor of Mr. Wheaton has had the full benefit of the grant obtained by the personal exertions of Mr. Wheaton.

If the work of the appellee be an interference with the rights of the appellants, it is not a heedless one; it may not be an intentional interference, but the acts which constitute it are intentional. The defendant was well advised of the injury which the appellants foresaw; this is fully proved by the evidence. The publication of the defendant has materially injured the appellants. Many volumes of Wheaton's reports were on hand, unsold, at the time of the publication of the third volume of Condensed reports. The intention of the defendant was not to make an abridgment, but to make a substitute for the whole of the appellant's work. The reports of the appellant were the result of the joint action of congress and the reporter; they set the price. If congress had thought that the people should have them cheaper, they would have lowered the price. The defendant should not have run a risk in accommodating the public; they could judge for themselves.

The question before the court is one for the most enlarged and liberal consideration. Cases which are not in form, but are in substance, an *652] infringement of the author's rights, are to *be viewed, as respects the author, liberally. This spirit pervades all the adjudged cases. Has there been an indefensible use of the appellant's labors? In the Condensed reports there is the same matter as in the reports of the appellant, under the same names. Is this an abridgment? An abridgment, fairly done, is itself authorship, requires mind; and is not an infringement any more than another work on the same subject. In the English courts, there are frequently more reports than one of the same cases. These reports are distinct works. Abridgments are the efforts of different minds. The Condensed reports have none of the features of an abridgment, and the work is made up of the same cases, and no more than is contained in Wheaton's reports.

The attention of the court is called to certain facts. The laws of congress relating to the reporter's office do not bear on the question of copyright. There is no intimation in the statute of such an interference, or that the sum allowed the reporter is in lieu of copyright. The right in the

reporter to fix the price of the volumes, recognises a right to exclude others from publishing. He receives $1000, and gives eighty copies to the United States, of the value of $400. Would he give up the copyright for this sum; this modicum? The law was intended to secure to him the rights he possessed, and to add to them also.

Before the statute of Anne, the copyright of authors was acknowledged. In 1769, it underwent investigation in the courts. The statute of Anne was passed 1711. Pennsylvania was settled in 1682. The common law was carried to Pennsylvania on its settlement; and the statute of Anne did not change or affect it. The copyright of an author existed in the colonies, and exists in the United States; and particularly in Pennsylvania.

It has been said by the counsel for the defendants, that there is no legislation in the state of Pennsylvania, or judgment of her courts recognising the common-law right. Before the revolution, there were few books made; and there are no reports of the decisions of the courts, anterior to that event. The common law is a fountain of remedy, perennial and perpetual; by *its principles, protecting rights when they are infringed, and its principles existing, although not called into action. [*653
The import of the act of congress of 1790 is, that before its enactment, there were legal rights of authorship existing; it provides for existing property, not for property created by the statute; there is nothing for its provisions to stand upon, but the common law. That law is not one of grant or bounty; it recognises existing rights, which it secures. The aim of the statute was to benefit authors, and thereby the public.

The right of an author to the production of his mind is acknowledged everywhere. It is a prevailing feeling, and none can doubt that a man's book is his book—is his property. It may be true, that it is property which requires extraordinary legislative protection, and also limitation. Be it so. But the appellants are entitled to protection under the statute. It is a clear case. All the statutes should be taken together. The decision of Judge WASHINGTON in *Ewer* v. *Coxe*, was not appealed from; and the question is for the first time before this court.

Is the deposit of the copy in the office of the secretary of state a condition precedent or subsequent? There is no question but that it is the latter. There is no need of the deposit being made, until six months after publication. From and after the recording of the title, the right is secured, and the author may immediately bring his action for an infringement. Does this case stand differently from what it would, if the action had been brought within six months after recording the title page? *Ewer* v. *Coxe* says the book must be deposited, before the right arises; the statute says differently.

By the act of 1790, there were certain requisites, not pre-requisites, enjoined on an author. Does the law of 1802 make the requisites of the act of 1790 pre-requisites? There are conclusive reasons against this. It was the intention of the law to add to, but not to change the character of the law of 1790. If this was otherwise, there was a direct repeal of the second section of that law, by which an action is given upon filing the title page in the clerk's office. The act of 1802 is an addition to the first act, but not a repeal of it. This is the hinge of this case. The construction

*contended for will repeal the second section of the act of 1790, and will create a forfeiture.

What reason is there to doubt that the copies were deposited as required by the law? It is the ordinary course of trade to deliver them. Is it an unfair construction, to suppose, that the one copy required by the laws to be delivered, is included in the eighty copies delivered as reporter? Is there not a special provision in the case of the reporter, that he shall deliver eighty copies, while others deliver one copy. The same term of six months is required for the delivery in both.

McLean, Justice, delivered the opinion of the court.—After stating the case, he proceeded: Some of the questions which arise in this case are as novel, in this country, as they are interesting. But one case involving similar principles, except a decision by a state court, has occurred; and that was decided by the circuit court of the United States for the district of Pennsylvania, from whose decree no appeal was taken.

The right of the complainants must be first examined. If this right shall be sustained, as set forth in the bill, and the defendants shall be proved to have violated it, the court will be bound to give the appropriate redress.

The complainants assert their right on two grounds. First, under the common law. Secondly, under the acts of congress.

And they insist, in the first place, that an author was entitled, at common law, to a perpetual property in the copy of his works, and in the profits of their publication; and to recover damages for its injury, by an action on the case, and to the protection of a court of equity. In support of this proposition, the counsel for the complainants have indulged in a wide range of argument, and have shown great industry and ability. The limited time allowed for the preparation of this opinion, will not admit of an equally extended consideration of the subject by the court.

Perhaps, no topic in England has excited more discussion, among literary and talented men, than that of the literary property of authors. So engrossing was the subject, for a long time, as to leave few neutrals, among
*655] those who were distinguished *for their learning and ability. At length, the question, whether the copy of a book or literary composition belongs to the author at common law, was brought before the court of king's bench, in the great case of *Millar* v. *Taylor*, 4 Burr. 2303. This was a case of great expectation; and the four judges, in giving their opinions, *seriatim*, exhausted the argument on both sides. Two of the judges, and Lord Mansfield, held, that, by the common law, an author had a literary property in his works; and they sustained their opinion with very great ability. Mr. Justice Yates, in an opinion of great length, and with an ability, if equalled, certainly not surpassed, maintained the opposite ground. Previous to this case, injunctions had issued out of chancery to prevent the publication of certain works, at the instance of those who claimed a property in the copyright, but no decision had been given. And a case had been commenced, at law, between *Tonson* and *Collins*, on the same ground and was argued with great ability, more than once, and the court of king's bench were about to take the opinion of all the judges, when they discovered that the suit had been brought by collusion, to try the question, and it was dismissed. This question was brought before the house of lords, in the

case of *Donaldson* v. *Beckett and others*, reported in 4 Burr. 2408. Lord MANSFIELD, being a peer, through feelings of delicacy, declined giving any opinion. The eleven judges gave their opinions on the following points.

1st. Whether, at common law, an author of any book or literary composition, had the sole right of first printing, and publishing the same for sale; and might bring an action against any person who printed, published and sold the same, without his consent? On this question, there were eight judges in the affirmative, and three in the negative.

2d. If the author had such right, originally, did the law take it away, upon his printing and publishing such book or literary composition; and might any person, afterwards, reprint and sell, for his own benefit, such book or literary composition, against the will of the author? This question was answered in the affirmative, by four judges, and in the negative by seven.

3d. If such action would have lain, at common law, is it taken away by the statute of 8 Anne; and is an author, by *the said statute, precluded from every remedy, except on the foundation of the said statute, and on the terms of the conditions prescribed thereby? Six of the judges, to five, decided that the remedy must be under the statute. [*656

4th. Whether the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity, by the common law? Which question was decided in favor of the author, by seven judges to four.

5th. Whether this right is any way impeached, restrained or taken away, by the statute 8 Anne? Six to five judges, decided that the right is taken away by the statute. And the lord chancellor seconding Lord CAMDEN's motion to reverse, the decree was reversed.

It would appear from the points decided, that a majority of the judges were in favor of the common-law right of authors, but that the same had been taken away by the statute. The title and preamble of the statute 8 Ann., c. 19, is as follows: "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned." "Whereas printers, booksellers and other persons, have of late frequently taken the liberty of printing, reprinting and publishing, or causing to be printed, reprinted and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families," &c.

In 7 T. R. 627, Lord KENYON says, "all arguments in the support of the rights of learned men in their works, must ever be heard with great favor by men of liberal minds to whom they are addressed. It was probably on that account, that when the great question of literary property was discussed, some judges of enlightened understanding went the length of maintaining, that the right of publication rested exclusively in the authors and those who claimed under them, for all time; but the other opinion finally prevailed, which established that the right was confined to the times limited by the act of parliament; and, that, I have no doubt, was the right decision." And in the case of the *University of Cambridge* v. *Pryer*, 16 East 319, Lord ELLENBOROUGH remarked, "it has been said, that *the statute of 8 Anne has three objects; but I cannot subdivide the two [*657

first ; I think it has only two. The counsel for the plaintiffs contended, that there was no right at common law ; and perhaps, there might not be ; but of that we have not particularly anything to do." From the above authorities, and others which might be referred to, if time permitted, the law appears to be well settled in England, that, since the statute of 8 Anne, the literary property of an author in his works can only be asserted under the statute. And that, notwithstanding the opinion of a majority of the judges in the great case of *Millar* v. *Taylor* was in favor of the common-law right, before the statute, it is still considered, in England, as a question by no means free from doubt.

That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy, endeavors to realize a profit by its publication, cannot be doubted ; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world. The argument that a literary man is as much entitled to the product of his labor as any other member of society, cannot be controverted. And the answer is, that he realizes this product by the transfer of his manuscripts, or in the sale of his works, when first published. A book is valuable on account of the matter it contains, the ideas it communicates, the instruction or entertainment it affords. Does the author hold a perpetual property in these ? Is there an implied contract by every purchaser of his book, that he may realize whatever instruction or entertainment which the reading of it shall give, but shall not write out or print its contents ?

In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine ? In the production of this, his mind has been as intensely engaged, as long, and, perhaps, as usefully to the public, as any distinguished author in the composition of his book. The result of their labors may be equally beneficial to *so-
*658] ciety, and in their respective spheres, they may be alike distinguished for mental vigor. Does the common law give a perpetual right to the author, and withhold it from the inventor ? And yet it has never been pretended, that the latter could hold, by the common law, any property in his invention, after he shall have sold it publicly. It would seem, therefore, that the existence of a principle may well be doubted, which operates so unequally. This is not a characteristic of the common law. It is said to be founded on principles of justice, and that all its rules must conform to sound reason. Does not the man who imitates the machine profit as much by the labor of another, as he who imitates or republishes a book ? Can there be a difference between the types and press with which one is formed, and the instruments used in the construction of the others ? That every man is entitled to the fruits of his own labor, must be admitted ; but he can enjoy them only, except by statutory provision, under the rules of property which regulate society, and which define the rights of things in general.

But if the common-law right of authors were shown to exist in England, does the same right exist, and to the same extent, in this country ? It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states ; each of which may have its local usages, customs and common law. There is no

principle which pervades the Union and has the authority of law, that is not embodied in the constitution or laws of the Union. The common law could be made a part of our federal system, only by legislative adoption. When, therefore, a common-law right is asserted, we must look to the state in which the controversy originated. And in the case under consideration, as the copyright was entered in the clerk's office of the district court of Pennsylvania, for the first volume of the book in controversy, and it was published in that state; we may inquire, whether the common law, as to copyrights, if any existed, was adopted in Pennsylvania.

It is insisted, that our ancestors, when they migrated to this *country, brought with them the English common law, as a part of [*659 their heritage. That this was the case, to a limited extent, is admitted. No one will contend, that the common law, as it existed in England, has ever been in force, in all its provisions, in any state in this Union. It was adopted, so far only as its principles were suited to the condition of the colonies; and from this circumstance we see, what is common law in one state, is not so considered in another. The judicial decisions, the usages and customs of the respective states, must determine, how far the common law has been introduced and sanctioned in each.

In the argument, it was insisted, that no presumption could be drawn against the existence of the common law, as to copyrights, in Pennsylvania, from the fact of its never having been asserted, until the commencement of this suit. It may be true, in general, that the failure to assert any particular right, may afford no evidence of the non-existence of such right. But the present case may well form an exception to this rule. If the common law, in all its provisions, has not been introduced into Pennsylvania, to what extent has it been adopted? Must not this court have some evidence on this subject. If no right, such as is set up by the complainants, has heretofore been asserted, no custom or usage established, no judicial decision been given, can the conclusion be justified, that, by the common law of Pennsylvania, an author has a perpetual property in the copyright of his works. These considerations might well lead the court to doubt the existence of this law in Pennsylvania; but there are others of a more conclusive character.

The question respecting the literary property of authors, was not made a subject of judicial investigation in England until 1760; and no decision was given until the case of *Millar* v. *Taylor* was decided in 1769. Long before this time, the colony of Pennsylvania was settled. What part of the common law did Penn and his associates bring with them from England? The literary property of authors, as now asserted, was then unknown in that country. Laws had been passed, regulating the publication of new works, under license. And the king, as the head of the church and the state, claimed the exclusive *right of publishing the acts of parliament, the [*660 book of common prayer, and a few other books. No such right at the common law had been recognised in England, when the colony of Penn was organized. Long afterwards, literary property became a subject of controversy, but the question was involved in great doubt and perplexity; and a little more than a century ago, it was decided by the highest judicial court in England, that the right of authors could not be asserted at common law, but under the statute. The statute of 8 Anne was passed in 1710. Can it be contended, that this common-law right, so involved in doubt as to divide the

most learned jurists of England, at a period in her history, as much distinguished by learning and talents as any other, was brought into the wilds of Pennsylvania by its first adventurers. Was it suited to their condition?

But there is another view, still more conclusive. In the eighth section of the first article of the constitution of the United States, it is declared, that congress shall have power "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." And in pursuance of the power thus delegated, congress passed the act of the 30th of May 1790. This is entitled "an act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned." In the first section of this act, it is provided, "that from and after its passage, the author and authors of any map, chart, book or books, already printed within these United States, being a citizen, &c., who hath or have not transferred to any other person the copyright of such map, chart, book or books, &c., shall have the sole right and liberty of printing, reprinting, publishing and vending such map, book or books, for fourteen years."

In behalf of the common-law right, an argument has been drawn from the word *secure*, which is used in relation to this right, both in the constitution and in the acts of congress. This word, when used as a verb active, signifies to protect, insure, save, ascertain, &c. *The counsel for the complainants insist that the term, as used, clearly indicates an intention, not to originate a right, but to protect one already in existence.

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There is no mode by which the meaning affixed to any word or sentence, by a deliberative body, can be so well ascertained, as by comparing it with the words and sentences with which it stands connected. By this rule, the word *secure*, as used in the constitution, could not mean the protection of an acknowledged legal right. It refers to inventors, as well as authors, and it has never been pretended by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented. And if the word *secure* is used in the constitution, in reference to a future right, was it not so used in the act of congress?

But, it is said, that part of the first section of the act of congress, which has been quoted, a copyright is not only recognised as existing, but that it may be assigned, as the rights of the assignee are protected, the same as those of the author. As before stated, an author has, by the common law a property in his manuscript; and there can be no doubt, that the rights of assignee of such manuscript would be protected by a court of chancery. This is presumed to be the copyright recognised in the act, and which was intended to be protected by its provisions. And this protection was given as well to books published under such circumstances, as to manuscript copies.

That congress, in passing the act of 1790, did not legislate in reference to existing rights, appears clear, from the provision that the author, &c., "shall have the sole right and liberty of printing," &c. Now, if this exclusive right existed at common law, and congress were about to adopt legislative provisions for its protection, would they have used this language? Could they have deemed it necessary to vest a right already vested. Such a presumption is refuted by the words above quoted, and their force is not lessened by any other part of the act. Congress, then, by this act, instead

or sanctioning an existing right, as contended for, created it. This seems to be the clear import of the law, connected with the circumstances under which it was enacted.

*From these considerations, it would seem, that if the right of the complainants can be sustained, it must be sustained under the acts [*662 of congress. Such was, probably, the opinion of the counsel who framed the bill, as the right is asserted under the statutes, and no particular reference is made to it as existing at common law. The claim, then, of the complainants, must be examined in reference to the statutes under which it is asserted.

There are but two statutes which have a bearing on this subject; one of them has already been named, and the other was passed the 29th of April 1802. The first section of the act of 1790 provides, that an author, or his assignee, "shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the term of fourteen years, from the recording of the title thereof in the clerk's office, as hereinafter directed: and that the author, &c., in books not published, &c., shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the like term of fourteen years, from the time of recording the title thereof in the clerk's office, as aforesaid. And at the expiration of the said term, the author, &c., shall have the same exclusive right continued to him, &c., for the further term of fourteen years: provided he or they shall cause the title thereof to be a second time recorded, and published in the same manner as is hereinafter directed, and that within six months before the expiration of the first term of fourteen years. The third section provides, that "no person shall be entitled to the benefit of this act, &c., unless he shall first deposit, &c., a printed copy of the title in the clerk's office, &c." "And such author or proprietor shall, within two months from the date thereof, cause a copy of said record to be published in one or more of the newspapers printed in the United States, for the space of four weeks." And the fourth section enacts, that "the author, &c., shall, within six months after the publishing thereof, deliver or cause to be delivered to the secretary of state, a copy of the same to be preserved in his office." The first section of the act of 1802 provides, that "every person who shall claim to be the author, &c., before he shall *be entitled to the benefit of the act entitled 'an act for the encouragement of learning, by securing the copies of maps, charts and books, [*663 to the authors and proprietors of such copies, during the time therein mentioned,' he shall, in addition to the requisites enjoined in the third and fourth sections of said act, if a book or books, give information by causing the copy of the record which by said act he is required to publish, to be inserted in the page of the book next to the title."

These are substantially the provisions by which the complainants' right must be tested. They claim under a renewal of the term, but this necessarily involves the validity of the right under the first as well as the second term. In the language of the statute, the "same exclusive right" is continued the second term that existed the first.

It will be observed, that a right accrues, under the act of 1790, from the time a copy of the title of the book is deposited in the clerk's office. But the act of 1802 adds another requisite to the accruing of the right, and that

is, that the record made by the clerk, shall be published in the page next to the title-page of the book. And it is argued with great earnestness and ability, that these are the only requisities to the perfection of the complainant's title. That the requisition of the third section, to give public notice in the newspapers, and that contained in the fourth, to deposit a copy in the department of state, are acts subsequent to the accruing of the right, and whether they are performed or not, cannot materially affect the title. The case is compared to a grant with conditions subsequent, which can never operate as a forfeiture of the title. It is said, also, that the object of the publication in the newspapers, and the deposit of the copy in the department of state was merely to give notice to the public; and that such acts, not being essential to the title, after so great a lapse of time, may well be presumed. That if neither act had been done, the right of the party having accrued, before either was required to be done, it must remain unshaken.

This right, as has been shown, does not exist at common law—it originated, if at all, under the acts of congress. No one can deny, that when the legislature are about to vest an exclusive right in an author or an inventor, they have the *power to prescribe the conditions on which such right shall be enjoyed; and that no one can avail himself of such right who does not substantially comply with the requisitions of the law. This principle is familiar, as it regards patent-rights; and it is the same in relation to the copyright of a book. If any difference shall be made, as it respects a strict conformity to the law, it would seem to be more reasonable, to make the requirement of the author, rather than the inventor. The papers of the latter are examined in the department of state, and require the sanction of the attorney-general; but the author takes every step on his own responsibility, unchecked by the scrutiny of sanction of any public functionary.

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The acts required to be done by an author, to secure his right, are in the order in which they must naturally transpire. First, the title of the book is to be deposited with the clerk, and the record he makes must be inserted in the first or second page; then the public notice in the newspapers is to be given; and within six months after the publication of the book, a copy must be deposited in the department of state. A right undoubtedly accrues, on the record being made with the clerk, and the printing of it as required; but what is the nature of that right. Is it perfect? If so, the other two requisities are wholly useless. How can the author be compelled either to give notice in the newspaper, or deposit a copy in the state department? The statute affixes no penalty for a failure to perform either of these acts; and it provides no means, by which it may be enforced.

But we are told, they are unimportant acts. If they are, indeed, wholly unimportant, congress acted unwisely in requiring them to be done. But whether they are important or not, is not for the court to determine, but the legislature; and in what light they were considered by the legislature, we can learn only by their official acts Judging then of these acts, by this rule, we are not at liberty to say they are unimportant, and may be dispensed with. They are acts which the law requires to be done, and may this court dispense with their performance?

But the inquiry is made, shall the non-performance of these subsequent conditions operate as a forfeiture of the right? *The answer is, that this is not a technical grant on precedent and subsequent condi-

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tions. All the conditions are important; the law requires them to be performed; and, consequently, their performance is essential to a perfect title. On the performance of a part of them, the right vests; and this was essential to its protection under the statute; but other acts are to be done, unless congress have legislated in vain, to render the right perfect. The notice could not be published, until after the entry with the clerk, nor could the book be deposited with the secretary of state, until it was published. But these are acts not less important than those which are required to be done previously. They form a part of the title, and until they are performed, the title is not perfect. The deposit of the book in the department of state, may be important to identify it, at any future period, should the copyright be contested, or an unfounded claim of authorship asserted.

But if doubts could be entertained, whether the notice and deposit of the book in the state department, were essential to the title, under the act of 1790; on which act my opinion is principally founded; though I consider it in connection with the other act; there is, in the opinion of three of the judges, no ground for doubt, under the act of 1802. The latter act declares that every author, &c., before he shall be entitled to the benefit of the former act, shall, "in addition to the requisitions enjoined in the third and fourth sections of said act, if a book, publish," &c. Is not this a clear exposition of the first act? Can an author claim the benefit of the act of 1790, without performing "the requisites enjoined in the third and fourth sections of it." If there be any meaning in language, the act of 1802, the three judges think, requires these requisites to be performed "in addition" to the one required by that act, before an author, &c. "shall be entitled to the benefit of the first act."

The rule by which conditions precedent and subsequent are construed, in a grant, can have no application to the case under consideration; as every requisite, in both acts, is essential to the title. A renewal of the term of fourteen years can only be obtained *by having the title-page recorded with the clerk, and the record published on the page next [*666 to that of the title, and public notice given within six months before the expiration of the first term.

In opposition to the construction of the above statutes, as now given, the counsel for the complainants referred to several decisions in England, on the construction of the statute of 8 Anne, and other statutes. In the case of *Beckford* v. *Hood*, 7 T. R. 620, the court of king's bench decided, "that an author, whose work is pirated, before the expiration of twenty-eight years from the first publication of it, may maintain an action on the case for damages, against the offending party, although the work was not entered at Stationers' Hall." But this entry was necessary only to subject the offender to certain penalties, provided in the statute of 8 Anne. The suit brought was not for the penalties, and consequently, the entry of the work at Stationers' Hall, was not made a question in the case. In the case of *Blackwell* v. *Harper*, 2 Atk. 95, Lord HARDWICKE is reported to have said, upon the act of 8 Ann., c. 19, "the clause of registering with the Stationers' Company, is relative to the penalty, and the property cannot vest without such entry;" for the words are, "that nothing in this act shall be construed to subject any bookseller, &c., to the forfeitures, &c., by reason of printing any book, &c., unless the title to the copy of such book, here-

after published, shall, before such publication, be entered in the register book of the Company of Stationers." The very language quoted by his lordship shows, that the entry was not necessary to an investiture of the title, but to the recovery of the penalties provided in the act against those who pirated the work. His lordship decided, in the same case, that "under an act of parliament, providing that a certain inventor shall have the sole right and liberty of printing and reprinting certain prints, for the term of fourteen years, and to commence from the day of first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints," the property in the prints vests absolutely in the engraver, though the day of publication is not mentioned.

*667] *The authority of this case is seriously questioned in the case of *Newton* v. *Cowie*, 4 Bing. 241. And it would seem, from the decision of Lord HARDWICKE, that he had doubts of the correctness of the decision, as he decreed an injunction, without by-gone profits. And Lord ALVANLEY, in the case of *Harrison* v. *Hogg*, cited in 4 Bing. 242, said "that he was glad he was relieved from deciding on the same act, as he was inclined to differ from Lord HARDWICKE."

By a reference to the English authorities, in the construction of statutes, somewhat analogous to those under which the complainants set up their right, it will be found, that the decisions often conflict with each other; but it is believed, that no settled construction has been given to any British statute, in all respects similar to those under consideration, which is at variance with the one now given. If, however, such an instance could be found, it would not lessen the confidence we feel in the correctness of the view which we have taken.

The act of congress under which Mr. Wheaton, one of the complainants, in his capacity of reporter, was required to deliver eighty copies of each volume of his reports to the department of state, and which were, probably, faithfully delivered, does not exonerate him from the deposit of a copy under the act of 1790. The eighty volumes were delivered for a different purpose; and cannot excuse the deposit of the one volume as specially required.

The construction of the acts of congress being settled, in the further investigation of the case, it would become necessary to look into the evidence and ascertain whether the complainants have not shown a substantial compliance with every legal requisite. But on reading the evidence, we entertain doubts, which induce us to remand the cause to the circuit court, where the facts can be ascertained by a jury. And the case is accordingly remanded to the circuit court, with directions to that court to order an issue of facts to be examined and tried by a jury, at the bar of said court, upon this point, viz., whether the said Wheaton, as author, or any other person, as proprietor, had complied with the requisites prescribed by the third and fourth sections of the said act of congress, passed the 31st day of May 1790, in regard to the volumes of Wheaton's reports in the said bill mentioned, or

*668] in *regard to one or more of them in the following particulars, viz., whether the said Wheaton, or proprietor, did, within two months from the date of the recording thereof in the clerk's office of the district court, cause a copy of the said record to be published in one or more of the newspapers printed in the resident states, for the space of four weeks; and

whether the said Wheaton, or proprietor, after the publishing thereof, did deliver or cause to be delivered to the secretary of state of the United States, a copy of the same, to be preserved in his office, according to the provisions of the said third and fourth sections of the said act. And if the said requisites have not been complied with in regard to all the said volumes, then the jury to find in particular in regard to what volumes they or either of them have been so complied with.

It may be proper to remark, that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.

THOMPSON, Justice. (*Dissenting.*)—It is matter of regret with me, at any time to dissent from an opinion pronounced by a majority of this court, and where my mind is left balancing, after a full examination of the case, my habitual respect for the opinion of my brethren may justify a surrender of my own. But where no such apology is left to me to rest upon, it becomes a duty to adhere to my own opinion; and I shall proceed to assign the reasons which have led me to a conclusion different from that at which a majority of the court has arrived.

It is unnecessary for me to state anything more with respect to the bill and answer, than barely to observe, that the complainants in the court below rest their claim, both upon the statutory and the common-law right. The bill charges, that all the provisions of the acts of congress have been complied with; that everything has been done which was required by those acts, in order to entitle them to the benefit thereof; and that if it were otherwise, the orator, Henry Wheaton, has, as the author of said reports, the property in the copy of the same, and the sole right to enjoy and dispose of the same.

*It would be improper, in the present stage of this cause, to examine the evidence which was before the court below, touching certain [*669 questions of fact which it is alleged are required by the acts of congress in order to entitle the complainants to the benefit of those acts, have been complied with. An issue has been directed to inquire into those matters. Nor is it deemed necessary to examine whether the publication of the Condensed reports by the defendants, is a violation of the complainants' copyright, if they have complied with all the requisites of the acts of congress. This would seem necessarily implied, by the ordering of the issue; for such inquiries would be useless, if the right secured under those acts has not been violated. I shall, therefore, confine myself to an examination of the common-law right, and the effect and operation of the acts of congress upon such right.

I think, I may assume as a proposition not to be questioned, that in England, prior to the statute of Anne, the right of an author to the benefit and profit of his work, is recognised by the common law. No case has been cited on the argument, and none has fallen under my observation, at all throwing in doubt this general proposition. Whenever the question has been there agitated, it has been in connection with the operation of the statute upon this right. The case of *Millar* v. *Taylor*, 4 Burr. 2303, decided in the year 1769, was the first determination in the court of king's bench

upon the common-law right of literary property. In that case, the broad question is stated and examined, whether the copy of a book or literary composition belongs to the author by the common law; and three of the judges, including Lord MANSFIELD, decided in the affirmative. Mr. Justice YATES dissented. But I am not aware, that upon this abstract question, a contrary decision has ever been made in England. This would seem to be sufficient to put at rest that general question, and render it unnecessary to go into a very particular examination of the reasons and grounds upon which the decision was founded. The elaborate examination bestowed upon the question by the judges in that case, has brought into view, on both sides of the question, the main arguments of which the point is susceptible. The great
*670] principle on which the author's right rests, is, that it is the *fruit or production of his own labor, and which may, by the labor of the faculties of the mind, establish a right of property, as well as by the faculties of the body; and it difficult to perceive any well-founded objection to such a claim of right. It is founded upon the soundest principles of justice, equity and public policy. Blackstone, in his Commentaries, 2d vol. 405, has succinctly stated the principle, that when a man, by the exertion of his rational powers, has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases; and any attempt to vary the disposition he has made of it, appears to be an invasion of that right. That the identity of a literary composition consists entirely in the sentiment and the language. The same conception, clothed in the same words, must necessarily be the same composition; and whatever method be taken to exhibit that composition to the ear or to the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited; and no other man, it has been thought, can have a right to exhibit it, especially for profit, without the author's consent. The origin of this right is not probably to be satisfactorily ascertained, and indeed, if it could, it might be considered an objection to its existence as a common-law right; but from the time of the invention of printing, in the early part of the fifteenth century, such a right seems to have been recognised. The historical account of the recognition of the right, is to be collected from the discussions in *Millar* v. *Taylor*. The Stationers' Company was incorporated in the year 1556, and from that time to the year 1640, the crown exercised an unlimited authority over the press, which was enforced by the summary process of search, confiscation and imprisonment, given to the Stationers' Company, and executed by the then supreme jurisdiction of the star chamber.[1] In the year 1640, the star chamber was abolished; and the existence of copyrights, before that period, upon principles of usage, can only be looked for in the Stationers' Company, or the star chamber, or acts of state; and the evidence on this point, says Mr. Justice WILLES, is liable to little suspicion. It was indifferent to the views of government, whether the property of an innocent book licensed, was open or private property.

*671] *It was certainly against the power of the crown to allow it as private property, without being protected by any royal privilege. It

[1] A Knight of the county of Northumberland was fined in a great summ, in the starr chamber, because hee permitted a seditious booke, called "Martin Marprelate" to be printed in his house; 32 Eliz. Star Chamber Cases 29.

could be done only on principles of private justice, moral fitness and public convenience, which, when applied to a new subject, make common law, without a precedent ; much more, when received and approved by usage. And in this case of *Millar* v. *Taylor*, it was found by the special verdict, " that before the reign of her late majesty, Queen Anne, it was usual to purchase from authors the perpetual copyright of their books, and to assign the same, from hand to hand, for valuable consideration, and to make the same the subject of family settlements, for the provision of wives and children." This usage is evidence of the common law, and shows that the copyright was considered and treated as property, transferrible from party to party ; and property, too, of a permanent nature, suitable for family settlement and provisions.

Common law, says Lord COKE (1 Inst. 1–2), is sometimes called right, common right, common justice. And Lord MANSFIELD says, the common law is drawn from the principles of right and wrong, the fitness of things, convenience and policy. And it is upon these principles, that the copyright of authors is protected. After the year 1640, when the press became subject to license, the various ordinances and acts of parliament referred to in *Millar* v. *Taylor*, and collected in Maugham's treatise on the Law of Literary Property, p. 13–16, necessarily imply, and presuppose, the existence of a common-law right in the author.

The common law, says an eminent jurist, 2 Kent's Com. 471, includes those principles, usages and rules of action, applicable to the government and security of person and property which do not rest for their authority upon any express and positive declaration of the will of the legislature. A great proportion of the rules and maxims which constitute the immense code of the common law, grew into use by gradual adoption, and received, from time to time, the sanction of the courts of justice, without any legislative act or interference. It was the application of the dictates of natural justice, and of cultivated reason, to particular cases. In the just language of Sir MATTHEW HALE, the common law of England is not the product of the wisdom of some one man, or society of men, in any *one age, but [*672
of the wisdom, counsel, experience and observation of many ages of wise and observing men. And, in accordance with these sound principles, and as applicable to the subject of copyright, are the remarks of Mr. Christian, in his notes to Blackstone's Commentaries (2 Bl. Com. 406, and note). Nothing, says he, is more erroneous, than the practice of referring the origin of moral rights, and the system of natural equity, to the savage state, which is supposed to have preceded civilized establishments, in which literary composition, and, of consequence, the right to it, could have no existence. But the true mode of ascertaining a moral right, is to inquire whether it is such as the reason, the cultivated reason of mankind, must necessarily assent to. No proposition seems more conformable to that criterion, than that every one should enjoy the reward of his labor, the harvest where he has sown, or the fruit of the tree which he has planted. Whether literary property is *sui generis*, or under whatever denomination of rights it may be classed, it seems founded upon the same principle of general utility to society, which is the basis of all other moral rights and obligations. Thus considered, an author's copyright ought to be esteemed an invaluable right, established in sound reason and abstract morality.

It is unnecessary, for the purpose of showing my views upon this branch of the case, to add anything more. In my judgment, every principle of justice, equity, morality, fitness and sound policy concurs in protecting the literary labors of men, to the same extent that property acquired by manual labor is protected. The objections to the admission of the common-law right of authors, are generally admitted to be summed up, in all their force and strength, by Mr. Justice YATES, in the case of *Millar* v. *Taylor*. These objections may be classed under two heads: the one founded upon the nature of the property or subject-matter of the right claimed; and the other, on the presumed abandonment of the right by the author's publication.

The first appears to me to be too subtle and metaphysical to command the assent of any one, or to be adopted as the ground of deciding the question. It seems to be supposed, that the right claimed is to the ideas contained in the book. The claim, says Mr. Justice YATES, is to the style and ideas of the author's composition; and it is a well-established maxim, that
*673] *nothing can be an object of property, which has not a corporal substance. The property claimed is all ideal; a set of ideas which have no bounds or marks whatever—nothing that is capable of a visible possession—nothing that can sustain any one of the qualities or incidents of property. Their whole existence is in the mind alone. Incapable of any other modes of acquisition and enjoyment than by mental possession or apprehension; safe and invulnerable from their own immateriality, no trespass can reach them, no tort affect them; no fraud or violence diminish or damage them. Yet these are the phantoms which the author would grasp and confine to himself; and these are what the defendant is charged with having robbed the plaintiff of. He asks, can sentiments themselves (apart from the paper on which they are contained) be taken in execution for a debt; or if the author commits treason or felony, or is outlawed, can the ideas be forfeited? Can sentiments be seized; or, by any act whatever, be vested in the crown? If they cannot be seized, the sole right of publishing them cannot be confined to the author. How strange and singular, says he, must this extraordinary kind of property be, which cannot be visibly possessed, forfeited or seized, nor is susceptible of any external injury, nor, consequently, of any specific or possible remedy. These, and many other similar declarations are made by Mr. Justice YATES, to illustrate his view of the nature of a copyright. And he seems to treat the question, as if the claim was to a mere idea, not embodied or exhibited in any tangible form or shape. No such pretension has ever been set up, that I am aware of, by any advocate of the right to literary property. And this view of it would hardly deserve a serious notice, had it not been taken by a distinguished judge. Lord MANSFIELD, in the case of *Millar* v. *Taylor*, in defining the nature of the right or copyright, says, "I use the word copy in the technical sense in which that name or term has been used for ages, to signify an incorporeal right to the sole printing and publishing of something intellectual, communicated by letters;" and this is the sense in which I understand the term copyright always to be used, when spoken of as property.

The other objection urged by Mr. Justice YATES, that the publication
*674] by the author is an abandonment of the exclusive *right, rests upon more plausible grounds, but is equally destitute of solidity. This would seem, according to his view of the case, the main point in the cause.

The general question, he says, is, whether, after a voluntary and *general* publication of an author's work by himself, or by his authority, the author has a sole and perpetual property in that work, so as to give him a right to confine every subsequent publication to himself, or his assigns, for ever. And he lays down this general proposition: That the right of publication must for ever depend on the claimant's property in the thing to be published. Whilst the subject of publication continues his own exclusive property, he will so long have the sole and perpetual righth to publish it. But whenever that property ceases, or by any act or event becomes common, the right of publication will be equally common. The particular terms in which Mr. Justice YATES states his proposition, are worthy of notice. He puts the case upon its being a *general* publication, the meaning of which undoubtedly is, that the publication is without any restriction, expressed or implied, as to the use to be made of it by the party into whose hands it might come, by purchase or otherwise. Unless such was his meaning, the proposition, I presume, no one will contend, can be maintained. Suppose, an express contract made with a party who shall purchase a book, that he shall not republish it; this surely would be binding upon him. So, if the bookseller should give a like notice of the author's claim, and a purchase of a book made, without any express stipulation not to republish, the law would imply an assent to the condition. And any circumstances from which such an undertaking could be reasonably inferred, would lead to the same legal consequences. The nature of the property, and the general purposes for which it is published and sold, show the use which is to be made of it. The usual and common object which a person has in view in the purchase of a book is for the instruction, information or entertainment to be derived from it, and not for republication of the work. It is the use of it for these purposes which is implied in the sale and purchase. And this use is in subordination to the antecedent and higher right of the author; and comes strictly within the maxim, *sic utere *tuo ut alienum non lædas.* But the case is not left to rest on any implied notice of the author's claim, [*675 and the conditions on which he makes it public. This is contained on the title-page of the very book purchased, and cannot be presumed to escape the notice of the purchaser. It is there, in terms, announced, that the author claims the right of publication; and whoever purchases, therefore, does it with notice of such claim, and is bound to use it in subordination thereto. Mr. Justice YATES admits, that every man is entitled to the fruits of his own labor; but that he can be entitled to it only subject to the general rights of mankind, and the general rules of property; and that there must be a limitation to such right, otherwise the rights of others are infringed. The force of such limitation upon the right, is not readily perceived. If the right exist, it is a common-law right, growing out of the natural justice of the case; being the result of a man's own labor. He thinks the statute of Anne fixes a just limitation. But suppose, no statute had been passed on the subject; where would have been the limitation? The right existing, who would have authority to say where it should end? It must necessarily be without limitation, and it is no infringement of the rights of others. They enjoy it for the purpose intended, and according to the nature of the property. The purchaser of the book has a right to all the benefit resulting from the information or amusement he can derive from it. And

if, in consequence thereof, he can write a book on the same subject, he has a right so to do. But this is a very different use of the property, from the taking and publishing of the very language and sentiment of the author; which constitute the identity of his work. Mr. Justice YATES puts the effect of a publication, upon the ground of intent in the author. The act of publication, says he, when voluntarily done by the author, is virtually and necessarily a gift to the public. And he must be deemed to have so intended it. But no such intention can surely be inferred, when the contrary intention is inscribed upon the first page of the book, which cannot escape notice.

The case of *Percival* v. *Phipps*, 2 Ves. & Beam. 19, recognises the implied prohibition against publishing the work of another, arising from the very nature of the property. It was held, in that case, that private let-
*676] ters, having the character *of literary composition, were within the spirit of the act protecting literary property, and that by sending a letter, the writer did not give the receiver authority to publish it; and this is the doctrine of Lord HARDWICKE, in *Pope* v. *Curl*, 2 Atk. 342, where it is said, that familiar letters may form a literary composition, in which the author retains his copyright, and does not, by sending them to the person to whom they are addressed, authorize him, or a third person, to use them for the purpose of profit, by publishing them, against the interest and intention of the author. That by sending the letter, though he parts with the property of the paper, he does not part with the property of copyright in the composition.

But how stands the case, with respect to the effect of publication by the author, according to Mr. Justice YATES's own rule. He says, "in all abandonments of such kind of property, two circumstances are necessary," an actual relinquishing of the possession, and an *intention* to relinquish it. That the author's name being inserted in the title-page is no reason against the abandonment; for many of our best and noblest authors have published their works from more generous views than pecuniary profit. Some have written for fame, and the benefit of mankind. That the omission of the author's name can make no difference; for, if the property be absolutely his, he has no occasion to add his name to the title-page. He cannot escape, it seems, from calling the copyright *property*, although a mere *idea;* and resorts again to his favorite theory, that it has no *indicia*, no distinguishing marks, to denote his proprietary interest therein; and hard, says he, would be the law, that should adjudge a man guilty of a crime, when he had no possibility of knowing that he was doing the least wrong to any individual. That he could not know who was the proprietor of these intellectual ideas, they not having any ear-marks upon them, or tokens of a particular proprietor.

If, as Mr. Justice YATES admits, it is a question of *intention* whether the author meant to abandon his work to the public, and relinquish all private or individual claims to it, no possible doubt can exist as to the conclusion in the present case. Would a jury hesitate a moment upon the question, under the evidence before the court? The right set up and stamped upon the title-
*677] page of the book, shuts the door against any *inference, that the publication was intended to be a gift to the public. Mr. Justice YATES admits, that so long as a literary composition is in manuscript, and remains

under the sole dominion of the author, it is his exclusive property. It would seem, therefore, that the *idea*, when once reduced to writing, is susceptible of identity, and becomes the subject of property. But property, without the right to use it, is empty sound, says Mr. Justice ASTON, in *Millar* v. *Taylor*. And, indeed, it would seem a mere mockery for the law to recognise anything as property, which the owner could not use safely and securely for the purposes for which it was intended, unless interdicted by the principles of morality or public policy.

It is not necessary that I should go into any particular examination of the construction of the statute of Anne, or to what extent it may effect the common-law right of authors in England; because, as I shall hereafter show, that statute was never considered in force in Pennsylvania. The mere common-law right, uninfluenced by that statute, is alone drawn in question under this branch of the case. And the decision in the case of *Millar* v. *Taylor*, would seem to put that question at rest in England, at that day. Mr. Justice YATES, in aid of his opinion, relied much upon that statute; arguing that, from the title, which is an "act for the encouragement of learning, by *vesting* the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned;" and from the provision in the act, that the sole right should be vested, &c. for twenty-one years, and no longer; the right was created, and limited by the act, and did not rest upon the common law. The other three judges, however, maintained, that an author's right was not derived from the statute, but that he had an original perpetual common-law right and property in his work, and that the statute was only cumulative, and giving additional remedies for a violation of the right. That the preamble in the act proceeds upon the ground of a right of property in the author having been violated; and that the act was intended as a confirmation of such right. And that, from the remedy enacted against the violation of the right being only temporary, it might be argued, that it afforded an implication, that there existed no right but what was *secured by the act. To guard against which, there is an express saving [*678 in the ninth section of the art. "Provided, that nothing in this act contained, shall extend, or be construed to extend, either to prejudice or confirm any right, that the said universities or any of them, or any person or persons, have or claim to have to the printing or reprinting, any book or copy already printed or hereafter to be printed." That the words *any* right, manifestly meant any *other* right, than the term secured by the act. It may be observed here, that whatever may be the just weight to be given to the term "vested," and the words "no longer," as used in the statute of Anne, and so much relied on by Mr. Justice YATES, have no application to our acts of congress; no such term or provision being used.

A writ of error was brought in this case of *Millar* v. *Taylor*, but afterwards abandoned, and the law was considered settled, until called in question in *Donaldson* v. *Beckett*, 4 Burr. 2408, which came before the house of lords, in the year 1774, upon an appeal from a decree of the court of chancery, founded upon the judgment in *Millar* v. *Taylor*. Upon this appeal, certain questions were propounded to the twelve judges. Lord MANSFIELD, however, gave no opinion, it being very unusual, as the reporter states, from reasons of delicacy, for a peer to support his own judgment upon appeal to the house of lords. This statement necessarily implies, however, that he

had not changed his opinion. There were, therefore, eleven judges who voted upon the questions. One of the questions propounded was: whether, at common law, an author of any book or literary composition, had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published and sold the same, without his consent? Upon this question, ten voted in the affirmative, and one in the negative. Another question was: if the author had such right originally, did the law take it away upon his printing and publishing such book or literary composition, and might any person, afterwards, reprint and sell, for his own benefit, such book or literary composition, against the will of the author? Upon this question, seven were in the negative, and four in the
*679] affirmative. *The vote upon these two questions settled the point, that, by the common law, the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity.

Another question propounded was: if an action would have lain, at common law, is it taken away by the statute of Anne? and is an author, by the said statute, precluded from every remedy, except on the foundation of the statute, and on the terms and conditions prescribed thereby? Upon this question, six voted in the affirmative, and five in the negative; and it will be perceived, that if Lord MANSFIELD had voted on this question, and in conformity with his opinion in *Millar* v. *Taylor*, the judges would have been equally divided.

That the law in England has not been considered as settled, in conformity with the vote on this last question, is very certain. For it is the constant practice, in chancery, to grant injunctions to restrain printers from publishing the works of others, which practice can only be sustained, on the ground that the penalties given by the statute, are not the only remedy that can be resorted to. In *Millar* v. *Taylor*, Lord MANSFIELD says, the whole jurisdiction exercised by the court of chancery, since 1710, the date of the statute of Anne, against pirates of copies, is an authority that authors had a property antecedent, to which the act gives a temporary additional security. It can stand upon no other foundation. And in the case of *Beckford* v. *Hood*, 7 T. R. 616, it was decided, that an author, whose work is pirated before the expiration of the time limited in the statute, may maintain an action on the case for damages, against the offending party. Lord KENYON says, the question is, whether the right of property being vested in authors for certain periods, the common-law remedy for a violation of it, does not attach within the time limited by the act of parliament? Within those periods, the act says, that the author shall have the sole right and liberty of printing, &c. Thus, the statute having vested that right in the author, the common law gives the remedy by action, in the case for violation of it; and that the meaning of the act in creating the penalties, was to give an accumulative remedy. And in this all the judges concurred. And Mr. Justice GROSE
*680] *observes, that in the great case of *Millar* v. *Taylor*, Mr. Justice YATES gave his opinion against the common-law right of authors; but he was decidedly of opinion, that an exclusive right of property was vested by the statute, for the time limited; and he says, that by the decision in the house of lords, of *Donaldson* v. *Beckett*, the common-law right of action is not considered as taken away by the statute of Anne, but that it

could not be exercised beyond the time limited by that statute: and it is worthy of notice, that this action on the case, for damages, was sustained, although the work was not entered at Stationers' Hall, nor the author's name affixed to the first publication. This, Lord KENYON observes, was to serve as a notice and warning to the public, that none might ignorantly incur the penalties and forfeitures given against such as pirate the works of others. But calling on a party who has injured the civil property of another, for a remedy in damages, cannot properly fall under the description of a forfeiture or penalty.

From this view of the law, as in stands in England, it is very clear, that, previous to the statute of Anne, the perpetual common-law right of authors, was undisputed. That after that statute, in the case of *Millar* v. *Taylor*, it was held, that this common-law right remained unaffected by the statute, which only gave a cumulative remedy. That the subsequent case of *Donaldson* v. *Beckett* limited the right to the times mentioned in the statute. But that for all violations of the right, during that time, all the common-law remedies continued, although no entry of the work at Stationers' Hall had been made, according to the provisions of the statute. Such entry being necessary, only for the purpose of subjecting the party violating the right, to the penalties given by the act.

I do not deem it necessary particularly to inquire, whether, as an abstract question, the same reasons do not exist for the protection of mechanical inventions, as the production of mental labor. The inquiry is not, whether it would have been wise to have recognised an exclusive right to the mechanical inventions. It is enough, when we are inquiring what the law is, and not what it ought to have been, to find that no such principle ever has been recognised by any judicial decision. The argument was urged with great earnestness by Mr. Justice YATES, in *Millar* v. *Taylor*, but repudiated by Lord MANSFIELD and the other *judges. With respect to copy- [*681
rights, however, the law has been considered otherwise; and the original common-law right fully established, though modified in some respects by the statute of Anne.

I shall proceed, now, to some notice of the light in which copyrights have been viewed in this country. It appears from the journals of the old congress (8 Journ. 257), that this question was brought before that body by sundry papers and memorials on the subject of literary property; and which were referred to a committee, of which Mr. Madison was one; and on the 27th of May 1783, the following resolution was reported and adopted. "Resolved, that it be recommended to the several states, to *secure* to the authors or publishers of any new books, not hitherto printed, being citizens of the United States, and to their executors, administrators and assigns, the copyright of such books, for a certain time, not less than fourteen years from the first publication; and to *secure* to the said authors, if they shall survive the term first mentioned, and to their executors, administrators and assigns, the copyright of such books for another term or time, not less than fourteen years; such copy or exclusive right of printing, publishing and vending the same, to be *secured* to the original authors or publishers, their executors, administrators and assigns, by such laws and such restrictions, as to the several states may seem proper." This right is here treated and dealt with as property already existing; and not as creating anything which had

previously no being. It is spoken of as something tangible, that might pass to executors and administrators, and transferable by assignment. And the recommendation to the state was, to pass laws to *secure* such a right.

It must be presumed, that congress understood the light in which this subject was viewed in the mother country. And it is deserving of notice, that Mr. Madison, one of the committee, afterwards wrote the number in the Federalist, where this subject is discussed; and where it is expressly asserted, that this has been adjudged in England to be a right at common law. And it is worthy of remark also, that no mention is here made of any right in mechanical inventions: and although the arts and sciences are connected in the same clause in the constitution *and placed under the
*682] legislative power of congress, it does not, by any means follow, that they were considered as standing on the same footing.

Several of the states had already passed laws on this subject; and many others, in compliance with the recommendation of congress, did the same. The state of Massachusetts, as early as March 1783, passed a law, entitled, "an act for the purpose of *securing* to authors, the exclusive right and benefit of publishing their literary productions for twenty-one years." The preamble to this act shows, in a strong and striking manner, the views entertained, at that day, in this enlightened state, of the value of this right. "Whereas, the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons, in the various arts and sciences; as the principal encouragement such persons can have, to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no *property* more peculiarly a man's own, than that which is produced by the labor of his mind: therefore, to encourage learned and ingenious persons to write useful books, for the benefit of mankind, be it enacted," &c. The act then proceeds to declare, that all books, treatises and other literary works &c., shall be the sole property of the author or authors, being subjects of the United States of America, their heirs and assigns, for the full and complete term of twenty-one years from the date of their first publication. And certain penalties are affixed to a violation of the right, with a proviso, that the act shall not be construed to extend in favor, or for the benefit, of any author, or subject of any other of the United States, until the state of which such author is a subject, shall have passed similar laws for securing to authors the exclusive right and benefit of publishing their literary productions. (1 Laws Mass. 94.) This act recognises in the fullest and most unqualified manner, the natural right which an author has to the productions and labor of his own mind. And it is worthy of notice, that the act does
*683] not recognise as a natural right, or in any manner *provide for the protections of mechanical inventions; thereby showing the distinction between mental and manual labor, in the view of that legislature, although it is now attempted to put them on the same footing.

The state of Connecticut had, previously, in the same year (January 1783), passed an act for the encouragement of literature and genius, containing the following preamble: "whereas, it is perfectly agreeable to the principles of natural justice and equity, that every author should be *secured*

in receiving the profits that may arise from the sale of his works; and such security may encourage men of learning and genius to publish their writings, which may do honor to their country, and service of mankind." Certain provisions are then made for the security of such right, which it is unnecessary here to be particularly noticed. There is a like proviso, as in the Massachusetts act, that the benefit of the law is not to extend to authors, inhabitants of, or residing in other states, until such states have passed laws. (Statutes of Conn. 474.) This law is also confined to literary productions, and in no manner extending to mechanical labors.

In the colony of New York, in the year 1786, a law, "to promote literature" was passed, "whereas, it is agreeable to the principles of natural equity and justice, that every author should be *secured* in receiving the profits that may arise from the sale of his works; and such security may encourage persons of learning and genius to publish their writings, which may do honor to their country, and service to mankind;" and then making provision, for securing to authors the sole right of printing, publishing and selling their works for fourteen years. With a proviso to the fourth section of the act, recognising a common-law right; but leaving it open and unaffected in cases not coming within the act, viz: "Provided, that nothing in this act shall extend to, affect, prejudice or confirm the rights which any person may have to the printing or publishing of any books or pamphlets, at common law, in cases not mentioned in this act."

The state of Virginia also, in the year 1785, passed a similar law, for *securing* to authors of literary works, an exclusive property therein, for a limited time. (1 Rev. Code 534.) Like *laws for the same purpose were passed by other states, which are not necessary here to be noticed; enough having been referred to, to show the light in which literary property was viewed in this country; and that such laws were passed, with a view to protect and secure a pre-existing right, founded on the eternal rules and principles of natural right and justice, and recognised by the common law.[1] [*684

But under the existing governments of the United States, before the adoption of the present constitution, adequate protection could not be given to authors, throughout the United States, by any general law. It depended on the legislatures of the several states; and this led to the provisions in the present constitution, giving to congress power "to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." Const. art. 1, § 8.

It has been argued at the bar, that, as the promotion of the progress of science and the useful arts, is here united in the same clause in the constitution, the rights of authors and inventors were considered as standing on the same footing; but this, I thing, is a *non sequitur*. This article is to be

[1] See the Pennsylvania copyright act of 15th March 1784, P. L. 306, which does not appear to have been noticed, thought more extensive in its provisions than the act of the federal legislature. Possibly, this statute never went into operation, as the 7th section provides, that it shall not take effect until such time as all and every of the states in the Union shall have passed similar laws in conformity to the recommendation of congress. Nevertheless, many Pennsylvania books are extant, which were copyrighted in pursuance of this statute For one instance, see 4 Lloyd's Debates, 1788.

construed distributively, and must have been so understood; for when congress came to execute this power by legislation, the subjects are kept distinct, and very different provisions are made respecting them. All the laws relative to inventions, purport to be acts to promote the progress of the useful arts. They do not use any language which implies or pre-supposes any existing prior right to be secured; but clearly imply, that the whole exclusive right is created by the law, and ends with the expiration of the patent. The first law, passed in the year 1790 (1 U. S. Stat. 109), requires that the specification shall be so particular, as not only to distinguish the invention or discovery from other things before known and used, but also to enable a workman, or other person skilled in the art or manufacture, to make, construct or use the same, to the end that the public may have the full benefit thereof, after the expiration of the patent term. This is the consideration demanded by the public, for the protection during the time mentioned in the patent; and the books furnish no case, that I am aware of, where an *685] *action has been attempted to be sustained upon any supposed common-law right of the inventor. But the case is quite different with respect to copyrights. All the laws on this subject purport to be made for *securing* to authors and proprietors such copyright. They pre-suppose the existence of a right, which is to be secured, and not a right originally created by the act. The security provided by the act is for a limited time. But there is no intimation that, at the expiration of that time, the copy becomes common, as in the case of an invention. The right, at the expiration of the time limited in the acts of congress, is left to the common-law protection, without the additional security thrown around it by the statutes; and stands upon the same footing as it did before the statutes were passed. The protection for a limited time, by the aid of penalties against the violators of the right, proceeds upon the ground, that the author, within that time, can so multiply his work, and reap such profits therefrom, as to enable him to rest upon his common-law right, without the extraordinary aid of penal laws.

In the Federalist, No. 43, written by Mr. Madison, who reported the resolution referred to, in the old congress, this clause in the constitution is under consideration, and the writer observes, "that the utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain, to be a right at common law. The right to useful inventions seems, with equal reason, to belong to the inventors. The public good fully coincides, in both cases, with the claims of individuals. The states cannot separately make effectual provision for either of the cases; and most of them have anticipated the decision of this point, by laws passed at the instance of congress." Although it is here said, that the right to useful inventions seems with equal reason to belong to the inventors, as the copyright to authors; yet it is not pretended, that the common law equally recognises them. But the contrary is necessarily implied, when it is expressly said, that the copyright has been adjudged to be a common-law right, but is silent as to inventors' rights.

The common-law right of authors is expressly recognised by Mr. Jus- *686] tice STORY in his Commentaries. In noticing this *article in the constitution, he says, "this power did not exist under the confederation, and its utility does not seem to have been questioned. The copyright of

authors in their works had, before the revolution, been decided in Great Britain to be a common-law right, and it was regulated and limited under statutes passed by parliament upon that subject." 3 Story's Com. 48. If these statutes do not affect the right, in the case now before the court, it remains and is to be viewed as a common-law right.

The judge in the court below, who decided this case, seems to place much reliance on what he considers a doubt, suggested by Chancellor KENT, as to the existence of the common-law right. Let us see, what he does say. "It was," says he, "for some time, the prevailing and better opinion in England, that authors had an exclusive copyright at common law, as permanent as the property of an estate; and that the statute of Anne, protecting by penalties, that right, for fourteen years, was only an additional sanction, and made in affirmance of the common law. This point came at last to be questioned, and it became the subject of a very serious ligitation in the court of king's bench. It was decided in *Millar* v. *Taylor*, 1769, that every author had a common-law right in perpetuity, independent of statute, to the exclusive printing and publishing his original compositions. The court was not unanimous, and the subsequent decision of the house of lords, in *Donaldson* v. *Beckett*, in February 1774, settled this very ligitated question against the opinion of the king's bench, by establishing, that the common-law right of action, if any existed, could not be exercised beyond the time limited by the statute of Anne (2 Com. 375, 2d ed.). It is here fully admitted, that by the decision in *Millar* v. *Taylor*, every author had a common-law right in perpetuity, to the publishing of his original composition. And, if it was intended to intimate, that the subsequent decision, in *Donaldson* v. *Beckett*, overruled this decision, as to the common-law right, I apprehend, this must be a mistake, according to the report of the case in 4 Burr. I understand the decision there was, by ten of the judges, that at common law, an author had the sole right of first printing and publishing his work, and by seven judges to four, that such right continued after his first publication. It is true, it *was decided by six to five of the judges, that the common-law right of action could not be exercised beyond the [*687 time limited by the statute of Anne. But with the construction of this statute, we have no concern, if it was not in force in Pennsylvania. The settlement of the common-law right is the material point, and that is admitted, by Chancellor KENT, to have been decided in favor of the author. There is certainly considerable obscurity in the report of this case, as to how far it has modified the common-law remedy; this arises, probably, from the manner in which the questions were propounded by the house of lords to the judges.

I do not perceive how it becomes necessary in this case, to decide the question, whether we have here any code of laws, known and regarded as the common law of the United States. This case presents a question respecting the right of property, and in such cases, the state laws form the rules of decision in the courts of the United States; and the case now before the court must be governed by the law of copyright in the state of Pennsylvania. The complainants, though citizens of New York, are entitled to the benefit of those laws, for the protection of their property; and have a right to prosecute their suit in the courts of the United States.

If, by the common law of England, an author has the copyright in his literary compositions, it becomes necessary to inquire, whether that law is in force in the state of Pennsylvania. It was very properly admitted by the court below, on the trial of this cause, that when the American colonies were first settled by our ancestors, it was held, as well by the settlers, as by the judges and lawyers of England, that they brought with them, as a birthright and inheritance, so much of the common law as was applicable to their local situation and change of circumstances; and that each colony judged for itself, what parts of the common law were applicable to its new condition. Mr. Justice STORY recognises the same principle in his Commentaries, vol. 1, 137–40. Englishmen, says he, removing to another country, must be deemed to carry with them those rights and privileges which belong to them in their native country; and that the plantations formed in this
*688] country were to be deemed a part of the ancient dominions, *and the subjects inhabiting them to belong to a common country, and to retain their former rights and privileges. That the universal principle has been (and the practice has conformed to it), that the common law is our birthright and inheritance, and that our ancestors brought hither with them, upon their immigration, all of it which was applicable to their situation. The whole structure of our present jurisprudence stands upon the original foundation of the common law. The old congress, in the year 1774, unanimously resolved, that the respective colonies are entitled to the common law of England. 1 Story's Com. 140, and note.

The colony of Pennsylvania was settled about the year 1682; at which period, and down to the time of the case of *Millar* v. *Taylor*, 1769, the whole course of the British government, as well in parliament, as in the star chamber and court of chancery, proceeded, in relation to the regulation of copyrights, upon the ground of an existing common-law right in authors; and which was so universally acknowledged, that it was not contested in a court of justice until that case; and then solemnly, and upon the most mature deliberation, decided to be a common-law right, notwithstanding the statute of Anne passed in the year 1710. And the subsequent decision of *Donaldson* v. *Beckett*, turned entirely upon the construction of that act, which it was supposed limited the remedy to the time prescribed in the act for the protection of the copyright. So that at the time of the settlement of Pennsylvania, and for nearly a century thereafter, the common-law right, with all the common-law remedies attached to it, was the received and acknowledged doctrine in England. And if the common law was brought into Pennsylvania, by the first settlers, the law of copyright formed a part of it, and was in force there, and has so continued ever since, not having been abolished or modified by any legislature in that state. But the existence of the common law in Pennsylvania, is not left to inference upon the general principles applicable to emigrants, before alluded to; there is positive legislation on the subject.

We find, as early as the year 1718, a law in that colony, with a recital, "whereas, King Charles II., by his royal charter to William Penn, for erecting this country into a province, did declare it to be his will and pleasure,
*689] that the laws for regulating *and governing of property, within the said province, as well for the descent and enjoyment of lands, as for the enjoyment and succession of goods and chattels, and likewise as to

felonies, should be and continue the same as they should be, for the time being, by the general course of the law in the kingdom of England, until the said laws shall be altered by the said William Penn, his heirs and assigns and by the free men of the said province, their delegates or deputies, or the greater part of them; and whereas, it is a settled point, that as the common law is the birthright of all English subjects, so it ought to be their rule in the British dominions. But acts of parliament have been adjudged not to extend to these plantations, unless they are particularly named as such; now, therefore," &c.; and certain statutes relating to crimes are adopted. And this question came under the consideration of the supreme court of that state, in the case of *Morris's Lessee* v. *Vanderen*, 1 Dall. 64, in the year 1782, and Chief Justice McKean, in pronouncing the judgment of the court, says, this state has had her government for above a hundred years, and it is the opinion of the court, that the common law of England has always been in force in Pennsylvania. That all statutes made in Great Britain, before the settlement of Pennsylvania, have no force here, unless they are convenient, and adapted to the circumstances of the country; and that all statutes made since the settlement of Pennsylvania, have no force here, unless the colonies are particularly named; and he adds, that the spirit of the act of 1718 supports this opinion.

With respect to English statutes which have been considered in force in Pennsylvania, we have the most satisfactory evidence, in the report of the judges of the supreme court of that state, made under an act of the legislature passed April 7th, 1807 (3 Binn. 395), by which the judges were required to examine, and report, which of the English statutes are in force in that commonwealth; and upon this subject the report states: "with respect to English statutes, enacted since the settlement of Pennsylvania, it has been assumed, as a principle, that they do not extend here, unless they have been recognised by our acts of assembly, or adopted by long-continued practice in courts of justice. Of the latter description, there are very few; and those, it is supposed, were introduced from a sense of their *evident utility. As English statutes, they had no obligatory force; but, from [*690 long practice, they may be considered as incorporated with the law of our country."

From this view of the law, I think, I have shown, that, by the common law of England, down, at least, to the decision in the case of *Donaldson* v. *Beckett*, an author was considered as having an exclusive right, in perpetuity, to his literary compositions. That this right, as a branch of the common law, was brought into Pennsylvania, with the first settlers, as early as the year 1682. That whatever effect and operation the statute of Anne may have been deemed to have had upon the common law, in England, that statute never having been in force in Pennsylvania, the common-law right remains unaffected by it. And with this view of the law, and the rights of an author, I proceed to consider the acts of congress which have been passed on this subject.

Observing, in the first place, that we are bound to presume that congress understood the nature and character of this claim of authors to the enjoyment of the fruits of their literary labors, and the ground upon which it rested. This is useful and necessary, to conduct us to a right understanding of their legislation. A knowledge of the mischief is necessary, to a just

and correct view of the remedy intended to be applied. But the knowledge of congress on this subject is not left open to presumption. The question, as to its being an exclusive and perpetual right, was brought directly to the view of congress. Three acts have been passed on this subject; and being not only *in pari materiâ*, but connected with each other by their very titles and objects, are to be construed together, and explained by each other. The last act on the subject was passed in the year 1831, and is entitled "an act to amend the several acts respecting copyrights, approved February 3d, 1831." And the report of the judiciary committee, to whom the subject was referred, shows in what point of light the subject was presented to congress.

"Your committee," says the report, "believe, that the just claims of authors, require from our legislation a *protection*, not less than what is proposed in the bill reported. From the first principles of proprietorship in
*691] property, an author has an exclusive *and perpetual right, in preference to any other, to the fruits of his labor. Though the nature of literary property is peculiar, it is not the less real and valuable. If labor and effort in producing what before was not possessed or known will give title, then the literary man has title, perfect and absolute, and should have his reward." The object of the law, and to which the attention of congress was specially drawn, was the *protection* of property, claimed and admitted to be exclusive and perpetual in the author.

It may be useful, preliminarily, to notice a few of the settled rules by which statutes are to be construed. In construing statutes, three points are to be regarded; the old law, the mischief, and the remedy; and the construction should be such, if possible, to suppress the mischief, and advance the remedy. 1 Bl. Com. 87; Bac. Abr. Stat. 1, pl. 31, 32. An affirmative statute does not abrogate the common law. If a thing is at common law, a statute cannot restrain it, unless it be in negative words. Plowd. 113; 2 Kent's Com. 462; 2 Mason 451; 1 Inst. 111, 115; 10 Mod. 118; Bac. Abr. Stat. 9. Where a statute gives a remedy, where there was one by the common law, and does not imply a negative of the common-law remedy, there will be two concurrent remedies. In such case, the statute remedy is cumulative. 2 Bac. 803, 805; 2 Inst. 200; Com. Dig., Action upon Statute 6.

Considering the common-law right of the author established, and with these rules of constructing statutes kept in view, I proceed to the consideration of the acts of congress.

The first law was passed in the year 1790 (1 U. S. Stat. 124), and is entitled, "an act for the encouragement of learning, by *securing* the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned." The first section declares, that the author of any book or books, already printed, being a citizen of the United States, and who hath not transferred the copyright to any other person, and any other person, being a citizen of the United States, &c., who hath purchased, or legally acquired the copyright of such book, in order to print, reprint, publish or vend the same, shall have the sole right and liberty of
*692] printing, reprinting publishing and *vending the same, for fourteen years from the recording of the title thereof in the clerk's office, as hereinafter directed. The like provision is made, with respect to books or

manuscripts, not printed, or thereafter composed. The title, and this section of the act, obviously consider and treat this copyright as property; something that is capable of being transferred; and the right of the assignee is protected equally with that of the author; and the object of the act, and all its provisions purport to be for *securing* the right. Protection is the avowed and real purpose for which it is passed. There is nothing here admitting the construction, that a new right is created. The provision in no way or manner deals with it as such. It in no manner limits or withdraws from the right, any protection it before had. It is a forced and unreasonable interpretation, and in violation of all the well-settled rules of construction, to consider it as restricting, limiting or abolishing any pre-existing right. Statutes are not presumed to make any alteration in the common law, further or otherwise than the act expressly declares. And therefore, when the act is general, the law presumes it did not intend to make any alteration; for if such was the intention, the legislature would have so expressed it. 11 Mod. 148; 19 Vin. 512, Stat. E, 6, pl. 12. And hence, the rule is laid down in Plowden, if a thing is at common law, a statute cannot restrain it, unless it be in negative words. It is, in every sense, an affirmative statute, and does not abrogate the common law.

The cumulative security or protection given by the statute, attaches from the recording of the title of the book in the clerk's office of the district court where the author or proprietor shall reside. If the statute should be considered as creating a new right, that right vests upon recording the title. This is the only pre-requisite, or condition precedent, to the vesting the right. Whatever it is that is given by the statute, and the other requirements in the third and fourth sections, of publishing in the newspaper within two months from the date of the record, and delivering a copy of the book to the secretary of state, within six months from the publication, cannot be construed as pre-requisites or conditions precedent to the vesting. These provisions cannot be considered in any other light than as directory. In no other view can these sections of the law be made consistent with the provisions of the first section. The benefit of the act, so far [*693 as respects the exclusive right, takes effect from the time of recording the title in the clerk's office; but the publication in the newspaper may be made at any time within two months, and the copy delivered to the secretary of state within six months. What would be the situation of the author, if his copyright should be violated, before the expiration of the time allowed him for these purposes? Would he have no remedy? The second section declares in terms, that if any person, from and after the recording the title, shall, without the consent of the author or proprietor, print or reprint, &c., he thereby incurs the penalties given by the act. Both the right and the remedy, therefore, given by the act, attach on the recording of the title. And this construction is not at all affected by anything contained in the third section of the act; which declares, that no person shall be entitled to the benefit of this act, unless he shall have deposited a printed copy of the title in the clerk's office. This is in perfect harmony with the first and second sections; and although the requirement to publish a copy of the record in the newspaper is in the same section, it is in a separate and distinct clause, and no more required to be considered a pre-requisite, than if it was in a distinct section; and so it was considered by Mr. Justice WASHINGTON

in *Ewer* v. *Coxe*, 4 W. C. C. 490; and he also, in that case, considered the requirement in the fourth section, to deliver a copy to the secretary of state as directory, and not as a condition; and indeed, the result of his opinion was, that if the author's copyright depended upon the act of 1790, it would be complete, by a deposit of a copy of the title in the clerk's office. But that the act of 1802 not only added another requisite, viz., causing a copy of the record to be inserted at full length in the title page, but made the publication in the newspaper, and the delivery of a copy of the book to the secretary of state, pre-requisites, although not made so by the act of 1790. Mr. Justice WASHINGTON is fully supported in his construction of the act of 1790, by the case of *Nichols* v. *Ruggles*, 3 Day 145, decided in the supreme court of errors of the state of Connecticut, where it is held, that the provisions of the statute, which require the author to publish the title of his book in a newspaper, and to deliver a copy of the work to the *secretary of state, are merely directory, and constitute no part of the essential requisites for securing the copyright. This case was decided in the year 1808, and I do not find any reference to the act of 1802. This can only be accounted for, upon the supposition, that, in the opinion of the counsel and court, this act did not at all affect the construction of the act of 1790; for had it been supposed, that the act of 1802 made the publication in a newspaper, and a delivery of a copy of the work to the secretary of state, pre-requisites to the vesting of the copyright, it would necessarily have led to a different result on the motion for a new trial. Judge HOPKINSON, who tried the cause now before the court, thinks the act of 1790 will not admit of the construction given to it by Judge WASHINGTON; but that, under that act, the publication in a newspaper and delivery of a copy of the work to the secretary of state, are pre-requisites to the establishment of the right; and such I understand to be the opinion of a majority of this court, by which the construction of the act of 1790 by Judge WASHINGTON is overruled. I have already attempted to show that this construction of the act of 1790 cannot be sustained; nor do I think that the act of 1802 will aid that construction of the act of 1790, and in this I understand my brother MCLEAN concurs; so that upon this question, as to the effect of the act of 1802 upon the act of 1790, the court is equally divided, and the decision of the cause rests upon the act of 1790. A brief notice, however, of the act of 1802 (2 U. S. Stat. 171), may not be amiss.

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It purports, so far as it relates to the present question, to be a supplement to the act of 1790, and declares, that the author or proprietor of a book, before he shall be entitled to the benefit of that act, shall, in addition to the requisites enjoined in the third and fourth section of said act, give information, by causing a copy of the record, required to be published in a newspaper, to be inserted at full length in the title page or in the page immediately following the title page of the book. It is to be observed, that this purports to be a supplementary act, the office of which is only to add something to the original act, but not to alter or change the provisions which it already contains. It leaves the original act precisely as it was, and only superadds to its provisions, the matter of the supplement; and *both, when taken together, will receive the same construction as if originally incorporated in the same act. This is the natural and rational view of the matter. Suppose, this new requisite had been in the original act, how would it stand?

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If it was in a separate and distinct section, it would run thus: that the author, before he shall be entitled to the benefit of this act, shall insert at full length, in the title page of the book, a copy of the record of the title. This could not change the construction of the act as to the publication in the newspaper, or delivery of a copy of the book to the secretary of state. Nor could it have any such effect, if it followed immediately after the pre-requisite of depositing a printed copy of the title of the book in the clerk's office; and this would have been the natural place for the provision, if it had been inserted in the original act.

Judge WASHINGTON, in *Ewer* v. *Coxe*, says, that the supplemental act declares that the person seeking to obtain this right shall perform this new requisition, in addition to those prescribed in the third and fourth sections of the act of 1790, and that he must perform the whole, before he shall be entitled to the benefit of the act. I find no such declaration in the act. The second section, which relates to prints, does contain this declaration, but it has no application to books. If the act of 1802 is intended as a legislative construction of the act of 1790, and is clearly erroneous, it cannot be binding upon the court.

The act of 1831, being *in pari materia*, may be taken into consideration, in construing the previous acts which it purports to amend; and we find in this act only two pre-requisites imposed upon an author, to entitle him to the benefit of the act, viz., to deposit a printed copy of the title of the book in the clerk's office of the district court of the district wherein the author or proprietor shall reside, and to give information of the copyright being secured, by inserting on the title page, or the page immediately following, the entry therein directed, viz., "entered according to the act of congress," &c. And these being pre-requisites under the former laws, it is fairly to be concluded, that they were the only pre-requisites, and that the other requirements are merely directory; and if so, the complainants in the court below have shown all that the acts of *congress require to vest the copy- [*696
right. The title has been recorded in the clerk's office, and a copy of the record inserted in the title page of the book.

But if the complainants in the court below have not made out a complete right, under the acts of congress, there is no ground upon which the common-law remedy can be taken from them. If there be a common-law right, there certainly must be a common-law remedy. The statute contains nothing, in terms, having any reference to the common-law right; and if such is considered abrogated, limited or modified by the acts of congress, it must be by implication; and to so construe these acts, is in violation of the established rules of construction, that where a statute gives a remedy in the affirmative, without a negative expressed or implied, for a matter which was actionable at common law, the party may sue at common law, as well as upon the statute. 1 Chitty's Pl. 144. This is a well-settled principle, and fully recognised and adopted in the case of *Almy* v. *Harris*, 5 Johns. 175.

Whatever effect the statute of Anne may have had in England, as to limiting or abridging the common-law right there; no such effect, upon any sound rules of interpretation, can grow out of our acts of congress. There is a wide difference in the phraseology of the laws. The statute of Anne contains negative words. It declares, that the author shall have the sole right and liberty of printing, &c., for the time contained in the statute, and

no longer; and these are the words upon which the advocates for the limitation of the common-law right mainly rest; and it was, for a long time, considered by the ablest judges in England, that even these strong words did not limit or abridge the common-law right; and the question, at this day, is not considered free from doubt.

This act, and the construction which it had received in England, were well known and understood, when the act of congress was passed, and no such limitation is inserted or intended, or any matter at all repugnant to the continuance of the common-law right, in its full extent. These laws proceed on the ground that the common-law remedy was insufficient to protect the right; and provide additional security, by means of penalties, for the violation of it. Congress having before them the statute of Anne, and
*697] apprised of the doubt entertained in *England as to its effect upon the common-law right, if it had been intended to limit or abridge that right, some plain and explicit provision to that effect would doubtless have been made; and not having been made, is, to my mind, satisfactory evidence that no such effect was intended.

If the present action was to recover the penalties given by the statute, it might be incumbent on the appellants, to show that all the requirements in the acts of congress had been complied with. This would be resorting to the new statutory remedy, and the party must bring himself within the statute, in order to entitle him to that remedy. But admitting that the right depends upon the statute, and is limited to the time therein prescribed, the remedy by injunction continues during that time. This is admitted by Mr. Justice YATES, in *Millar* v. *Taylor*. The author, says he, has certainly a property in the copy of his book, during the term the statute has allowed; and whilst that term exists, it is like a lease, a grant, or any other common-law right; and will equally entitle him to all common-law remedies for the enjoyment of that right. He may, I should think, file an injunction bill to stop the printing. But I may say, with more positiveness, he might bring an action to recover satisfaction for the injury done, contrary to law, under the statute. And the same doctrine is laid down by the whole court, in *Beckford* v. *Hood*, 7 T. R. 620. Lord KENYON says, the statute vests the right in authors for certain periods; and within those periods, the act says, the author shall have the sole right and liberty of printing, &c.; and the statute having vested the right in the author, the common law gives the remedy by action on the case, for a violation of it; and that the act, by creating the penalties, meant to give a cumulative remedy.

The language in the statute of Anne, which is considered as vesting the right, is the same as in the act of congress. In the former, it is considered as necessarily implied in the declaration, that the author shall have the sole right, during such time, &c. And in the act of congress, there is the same declaration, that the author shall have the sole right of printing, &c., from the time of recording the title in the clerk's office. The right being thus vested at the time, draws after it the common-law remedy. And there is
*698] no more reason for *contending, that the remedy given by the statute, supersedes the common-law remedy, under the act of congress, than under the statute of Anne. The statute remedy is through the means of penalties, in both cases.

The term for which the copyright is secured in the case now before the

court, has not expired; and according to the admitted and settled doctrine in England, under the statute of Anne, the common-law remedy exists during that period. Upon the whole, in whatever light this case is viewed, whether as a common-law right, or depending on the act of congress, I think, the appellants are entitled to the remedy sought by the bill; and that the decree of the court below ought to be reversed, the injunction made perpetual, and an account taken according to the prayer in the bill, without directing an issue to try any matter of fact, touching the right.

Baldwin, Justice. (*Dissenting.*)—The bill of the complainants prays for an injunction, an account, and for general relief. The bill states, the answer does not deny, and the fact is admitted, that the complainants have been in the quiet, peaceable and unquestioned possession of a copyright to the twelve volumes of Wheaton's reports, from the time of their first publication till the publication of the third volume of Condensed reports, by the respondents, in February 1831, which possession has been had and continued under claim and color of title. The first volume of Mr. Wheaton's reports was entered for copyright in the office of the clerk of the district court of Pennsylvania, in December 1816, and a copy of the entry duly published on the title leaf; the succeeding volumes were entered in the same manner, in each successive year, till 1827, when Mr. Wheaton ceased to be the reporter of the supreme court.

In May and June 1830, the first volume was again entered in the clerk's office of the southern district of New York, in order to secure the copyright for a further term of fourteen years, and in October following, there was deposited in the department of state a copy of the book; the publication in the newspapers, according to law, was also made immediately after the entry with the clerk. In June 1828, Mr. Peters, one of the respondents, issued his proposals for condensing the reports of cases decided by the supreme court, in which he declared, that "it is not considered that the work now announced, and part of the materials for which are arranged, will interfere with the interests of those gentlemen who have preceded the reporter in the station he has the honor to hold." "The legal rights of the proprietors of those most able and valuable works will be carefully respected." "Nothing will be inserted in the contemplated publication but matters which are of public record, and which, from their very nature, cannot be the subject of literary property." There does not appear in the pleadings, exhibits or evidence in the case, any declaration of any intention by Mr. Peters to invade the legal rights of any former reporters, or any allegation that they had not complied with the requisites of the law, which were necessary to secure to them the benefits conferred; he seems to have viewed his publication as calculated to increase the demand for the original reports, as well as their reputation, and that the nature of his work would not interfere with the rights of those who were their proprietors. His first annunciation of a denial of any right in the complainants, appears to have been on or about the time of publishing the third volume of the Condensed reports, embracing Mr. Wheaton's first volume, which was in February 1831, after the complainants had made claim to a second term of copyright in that volume, by a second entry; Mr. Donaldson claiming as purchaser and proprietor for a valuable consideration; and Mr. Wheaton, claiming, as the author, all

the right not vested in Mr. Donaldson by purchase. They and those claiming under them had been left in the unmolested enjoyment of their claims, under color of right, till that time; since which, the respondents have denied to them any legal or equitable right of property in any of the volumes of reports originally published by Mr. Wheaton. It is not pretended, that these books of reports were not duly entered with the clerk of the district court, nor that a copy of such entry was not duly certified and published on the title leaf of each volume, according to the requisitions of law. The respondents oppose the prayer of the bill, solely on the ground, that there was no publication in the newspapers, when the first record was made, and that no copy of the books was deposited in the office of the secretary of state, as required by the third and fourth sections of the act of 1790; and also because the Condensed Reports do not violate any right of property in the complainants to the reports of the decisions of the supreme court, they not being the subject of copyright.

Conceding, for the present, that no publication or deposit has been proved to have been made, within the time required, the first question which arises is, whether there is any equity in the complainant's bill, which entitles him to any relief? The course and principles of equity, on applications for injunctions to prevent the violation of the rights of literary property, have been clearly defined and well settled by courts of chancery, in England and this country, and are enjoined on the observance of the courts of the United States, by the acts of congress of 1819 and 1831. The uniform rule of courts of equity is, to award an injunction in favor of a party claiming a copyright or a patent, by color of title, if he has been in the long-continued possession, and the injunction will be continued till the party contesting the right shall show that it is mere color. Though the right is doubtful, the court will not dissolve the injunction, at the hazard of the right being established at law. No terms will be imposed on the party applying for protection of his possession, nor will the court permit the possession to be changed, till, on a trial of the right at law, the author or proprietor fails to establish it. The length of time during which an author has been in the enjoyment of his copyright or invention, is very important. If his possession has been only of recent date, he will not be allowed an injunction, in a doubtful case of right, nor entitled to its continuance, unless he proceeds to establish his right at law; but where the possession has been of some duration, especially, where it has been long held and peaceably continued, it will be protected, though no proceeding is had at law. The cases on this subject are full and conclusive, in establishing the course and principles of courts of equity. (6 Ves. 707, 710; 14 Ibid. 132, 136; 3 Meriv. 628; 2 Russ. 401; Coop. Eq. 156; Eden 87, 205, 206; 9 Johns. 567, 570, 583, 589; 4 W. C. C. 260, 489; 1 Paine 449. s. p. 12 Wheat. 198–9.) The rules established in these cases, are of unquestioned authority, and cover the whole ground of the complainant's case as to all the volumes of Wheaton's reports, the last of which was entered for copyright in June 1827, nearly four years before any actual or threatened invasion of the quiet and exclusive enjoyment under color of title. No case has occurred, where such a possession has been held insufficient to entitle the party to an injunction, before any trial at law or suit for damages. The injunction will be perpetuated without any directions to bring an action. (8 Ves. 227; Mitf. Plead. 128–9.) It is in the discretion of the court, to order

a suit or an issue, or not, according to the circumstances of the case. (17 Ves. 424.) But the establishment of the legal right has never been held requisite, unless the copyright is recent, or the author has acquiesced for a long time after the infraction. These are cases peculiarly favored in courts of equity, especially, when purchasers for a valuable consideration, without notice of any dispute about, or doubts of, the right, are concerned. In *Morris* v. *Kelly*, the plaintiff claimed as a purchaser, though he could not prove that the assignment was in writing; but the chancellor said, "I shall assume that your title is regular, until they show the contrary" (1 Jac. & Walk. 481), and granted the injunction, although the court of king's bench had decided, that an assignee could not recover damages, unless the assignment was in writing. (3 M. & S. 7, 9.) In *Mawman* v. *Tegg*, the chancellor observed, "whether the title be a good legal title in them or not, is one question; but it appears to me, they have a complete equitable title, and if the defendants are to have the benefit of the delay which bringing the action may occasion, they ought to be directed to admit the legal title upon the trial of the action, because a court of law cannot try the equitable title." (2 Russ. 335.) The injunction was continued. So, an injunction will be awarded in favor of a purchaser, though it is doubtful whether the defendant's work is a piracy or a fair abridgment. (1 Bro. C. C. 451.) But an injunction will not be granted, in favor of an author, against one who publishes the book under a license from him, or a gift of the manuscript; nor against a party who has been led into the publication by the encouragement and acquiescence of the author. (Jacob 311.)

Adhering to the principle that time and acquiescence shall avail an author, whose long possession under a claim of copyright has been invaded, and entitle him to an injunction, without a trial of the legal right, courts of equity apply it in favor of defendants, when authors suffer time to run on the violation of their rights. "Where ten have been allowed to publish, the court will not restrain the eleventh." "A court of equity frequently refuses an injunction, where it acknowledges a right, when the conduct of the party has led to a state of things which occasions the application, and therefore, will refuse or dissolve an injunction, without saying in whom the right is (Jacob 18), or, when the copyright is admitted, if there has been a violation for fifteen years. (19 Ves. 447–8.)

After such a course of adjudication in equity, I may assume it as a settled rule, that in a case like this, no chancellor would inquire into the legal title of the complainants, but would direct it to be admitted, on an issue to ascertain the extent of the piracy. At all events, it is unprecedented, to refuse all relief, in a suit between a purchaser in quiet possession, claiming by law, on the one side, and on the other, a party who sets up no particular right of his own, but contents himself with a general denial of any right in the other. If the parties in the present case were reversed, and the respondents sought to enjoin the complainants from proceeding to assert their legal rights by suits at law, by actions for the penalties, under the act of 1790, or the destruction of the work which was an alleged piracy, the possession of Messrs. Wheaton and Donaldson would be a complete answer to a bill founded on the common right asserted by Messrs. Peters and Gregg. "An injunction for such a purpose, and under such circumstances, would be unprecedented. The common right must be first legally established, and

the defendants must be first duly ousted of their pretension and possession, by due course of law. (7 Johns. Ch. 165.)

An injunction will not be granted, to restrain a party who has been in possession for any length of time, who claims by a title adverse (7 Johns. Ch. 165), till the right is first settled at law. (6 Ibid. 20 ; 19 Ves. 44, 47–8; 1 Cox 182 ; 6 Ves. 51.) A plaintiff who states such a case, puts himself out of court as to the injunction. (4 Johns. Ch. 22.) It is a proper remedy to protect a possession, till it appears to be against right, but it is never used to disturb a possession under claim and color of right ; especially, a right asserted under an act of parliament. (1 Ves. sen. 476.) There are no cases in which courts of equity administer this remedy more liberally, than in favor of authors and inventors, whose rights are easily invaded, without a possibility of their exhibiting to a jury the whole extent of damage which they may have sustained by their invasion. (17 Ves. 424.) Hence has arisen the fixed rule of equity, that long possession, under claim and color of title, is sufficient to entitle an author or inventor to an injunction, without a decision as to the right ; the great object is, to protect possession, not merely the settled right. Possession is, in all cases, *primâ facie* evidence of a right of possession, and is never disturbed, at law or in equity, until better evidence appears in an adverse party. The evidence of possession varies according to the subject-matter ; the proprietor of a book can have no other evidence of possession or property, than that he has enjoyed the exclusive right of printing and selling it, without any attempt to question or disturb it. This is as much actual possession, as the occupation of land, or the use of a chattel, and gives him all right incident to possession as evidencing a title to property.

Among these rights, none is more undoubted than the remedy by injunction, till his possession is shown to be merely colorable. In resting their case on the legal objections to the copyright claimed by the complainants, the counsel for the respondents seemed to have overlooked these principles, which prevail in all courts of equity, as well as the express directions of the acts of congress, which authorize the federal courts "to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of authors or inventors, secured to them by any laws of the United States, on such terms and conditions as the said courts may deem fit and reasonable." (3 U. S. Stat. 481.) This is an express adoption of the rules by which possession by color and claim of title is protected by injunction, equally with possession by a perfect title acquired by a compliance with all the requisites and directions of the law. No court of equity has ever made any distinction between the two classes of cases, or has ever entered into the inquiry, whether the party has strictly followed the law, if in his bill he presents a case of apparent equity, of *primâ facie* right, accompanied by long possession, peaceable and uninterrupted, while the other party rests merely on his own common right, simply denying the right of the complainant. Nor can a court of the United States refuse an injunction, in such a case, without directly contravening all settled principles. The settled course of equity has also become statute law, leaving no discretion in the court, except to decide whether the case comes before them under such circumstances as bring it within the rules settled by adjudications in equity, and the terms on which the injunction shall be granted.

The acts of congress which secure to authors and inventors their property, superadded penalties in the one case, and treble damages in the other, to the ordinary remedies which are prescribed for the violation of the rights to real and personal property. This arises from the known inadequacy of the ordinary remedies which limit the right of the injured party to a recovery of the amount of actual injury he sustains by the violation of his right. To place the proprietors of literary property on a worse footing in courts of equity, than the owners of other property, would be not only subversive of all priciples of justice, but in direct repugnance to the spirit of the constitution and laws, which make authors and inventors the favorites of national legislation, and deem the violators of their rights public offenders. Literary piracy is an offence subjecting the violator to a penalty, accruing, one-half to the party injured, the other half to the United States. When such is the language and spirit of the laws of 1790, 1802 and 1831, that the violation of this right is deemed a public offence, as well as a private injury, I find a strong assurance that in the eye of equity, literary property is, at least, as sacred as any other; nor can I, for a moment, doubt, that the plain course of its courts, and high duty, is, to impart to it the fullest degree of protection which is afforded to property less exposed to invasion, and to guard from impending danger a class of suiters who, from the nature of their rights, and the mode of their violation, can have no remedy at law, which is at all efficient or adequate.

The present is one of the strongest cases which can occur. As to the first volume of Wheaton's reports, the complainants had been in the quiet enjoyment of the copyright, for the full term of fourteen years; the book had been entered a second time, and every direction of the acts of 1790 and 1802 had been literally and strictly complied with to the letter, before any actual or threatened invasion or denial of their right. The respondents do not deny, that the copyright has been duly secured for a second term of fourteen years, if it was so secured for the first; their whole case rests on their legal exceptions to the validity of their right during the first term. They do not allege the want of notice, or that they have interfered with the rights and possession of the complainants, through any mistake, ignorance or misapprehension, nor do they assert in themselves any exclusive right to the matter taken from Mr. Wheaton's reports, and inserted in their work, or that he had pirated from others what he claims as his own property. Still less do they pretend, that the omission on his part to make publication in the newspapers, or to deposit a copy in the office of the secretary of state, has led them into any error or mistake in relation to the pretentions or claims of Mr. Wheaton to the copyright. The prospectus of 1828 shows the most ample notice in fact. So far from evincing a disposition, or containing a threat, to violate the rights of property in the reports, or to injure their sale, it makes and repeats the assurance, that they will be respected, and the demand for the books enlarged; thus furnishing the most conclusive answer to any allegation of delay in applying for an injunction, or any tacit acquiescence in the violation of the rights of the complainants, which might otherwise have been made, if the prospectus of 1828 had avowed an intention of denying their right. The present suit was brought in about three months after this intention became manifested, by the publication of the third volume of the Condensed reports. So that no such possession in

the respondents, as would afford any objection to the relief sought, can be set up by them.

If this were a suit at law, to recover damages for the piracy of the matter contained in the first volume of Wheaton's reports, I could not doubt, that the court would instruct the jury, that it was too late to contest the copyright during the first fourteen years, after its peaceable enjoyment during the whole term, and that its renewal, after all the requisites enjoined on authors had been fully complied with, some months before an invasion by the defendants, was sufficient to entitle them to some damages. In a suit at law for pirating a book, the first publisher may recover damages, though he has obtained the materials improperly, and procured the copyright by abusing his trust; he has a right to the copy, and to an action against the person who publishes it without his authority. "It may be a ground in equity, as between the person entitled and the person who first published it, but it does not destroy the right of the latter to sue a person pirating that right." (4 Esp. 169.) A tenant who had been in possession of land for fourteen years, under a void lease, but who had received a valid one for a new term, and remained in possession, would, to all intents and purposes, be deemed in law to have been in the lawful possession, during the whole period of his occupation, as well against the lessor, as a stranger or trespasser. On an application to a court of equity, to protect his possession against an adverse pretension, it would not listen to a mere legal technical objections to the title, but would leave the party opposing the injunction to proceed at law to invalidate the right of the complainant; when this would be done, the injunction would be dissolved, of course. In a case of an invasion of the possession of literary property, the call for the interference of a court of equity is much more imperious than in any other, the prompt and summary remedy of injunction being the only adequate one. There is also a powerful reason, in favor of the most liberal allowance of the healing effects of time and acquiescence, in viewing mere legal or formal defects in copyrights and patents for inventions, growing out of the provisions of the acts of congress.

The fourth section of the act of 1802, imposes a penalty of one hundred dollars on any person who shall insert in any book, or impress upon it, that the same has been entered according to the act of congress, if they have not legally acquired the copyright of such book, to be recovered, one-half to the use of the person who may sue for it, and the other half to the use of the United States; provided the action be commenced within two years from the time the cause of action may have arisen. (2 U. S. Stat. 172.) The same provision is contained in the 11th section of the act of 1831. (4 Ibid. 438.) It is thus put in the power of any person to test, by due process of law, the validity of any copyright, before he makes any publication of any matter contained in a book already published with a claim of right under color of law; in the words of the decisions in equity, he can, by these means, "show the claim to be mere colorable," which being done by a recovery of the penalty, an effectual bar is interposed to any proceeding in equity by way of injunction. In the present case, such an action could have been commenced against Mr. Wheaton for the publication of the eleventh volume, at any time previous to the 20th July 1828, for the twelfth, at any time before the 25th June 1829, and for the republication of the first

volume, with the impress of right in a second edition, at any time before the 14th May 1832. If a party is disposed to contest or invade the right of another claiming a copyright of a book, in the mode pointed out by law, he comes into a court of equity with a bad grace, to disturb a long quiet and peaceable enjoyment of a right, by urging only the same objections which remain open to him for two years after the publication of any book, with the impress and claim of copyright, by a process of which he can avail himself at his pleasure, during the time prescribed by congress.

The adjudications in equity have not defined the time of possession which will entitle an author to a continued injunction against a violator of his rights, but I think the acts of congress which limit the suits for this penalty for claiming a copyright, when none has been secured by law, ought to be taken as fixing the longest period during which an opposing party ought to be permitted to make such objections to an injunction, as require a court of equity to examine into the validity of the title. For these reasons, I am clearly of opinion, that there is in the bill of the complainants, and in the case, as it now appears, such manifest equity, as entitles them to the relief prayed for, and that it is contrary to the whole course and best-settled principles of equity, to make that relief dependent on the result of an issue on the fact of publication in the newspapers, or the deposit of a copy in the department of state. These are matters which can, in no case, affect the equity of the claim to an injunction, under the circumstances of this controversy; they are sheer dry legal objections, mere forms affecting only the strict legal right, without impairing the strong equity arising from long and quiet enjoyment.

Should the complainants bring an action for damages, the defendants will have the full benefit of these objections. A court of law is the proper place in which to urge them, and, in my opinion, the only one where they can be available, after this lapse of time. No distinction is better established in equity, than that time and long possession are, in all cases, circumstances of powerful effect, especially, in cases of injunction. The course now taken by this court, not only confounds all distinction between cases of recent and long possession, in opposition to all authority, but by permitting the objections now urged to be available, after such long possession, establishes a universal rule, that an author is bound, after any lapse of time, to be prepared with proof of matters purely *in pais*, on the penalty of forfeiting, not only all his legal, but equitable, remedies for the violation of his right. As the case now stands, the complainants are put to the same proof of their right, as if their book was newly published; they are deprived of all the benefits which time and long possession give to all suitors in a court of equity, and are compelled, while suing there, to assume, in all respects, the attitude of suitors in a court of law, claiming damages. I am utterly mistaken in the first principles of the law of equity, if this comports with justice or good conscience.

The only ground for refusing an injunction in this case, which is examinable on this appeal, is, in my opinion, the allegation that the reports of Mr. Wheaton are not the subject of copyright. The opinions of the court are clearly not so, but the marginal notes, or syllabus of the cases and points decided, the abstract of the record and evidence, and the index to the several volumes, are as much literary property as any productions of the mind.

None require the exercise of more judgment and labor, and they add greatly to the value and utility of the reports, as, without them, they would compel the reader to examine the whole opinion, in order to ascertain the points decided, and the whole book must be searched, before the substance of its contents could be known. Nothing contributes so much to the correct understanding of the adjudications of a court, as a judiciously condensed view of the case in which it is rendered. These summaries, together with the notes and index, indicate the talent of the reporter, as well as relieve the bar and the judges of great labor. They are professional productions of the highest order, which deserve, in an eminent degree, the fulness of protection which the law can afford to literary property. In the present case, it is not denied, in the answer or the argument, that the marginal notes, the summaries and index of Mr. Wheaton, have been very freely copied in the Condensed reports, which, generally speaking, with the exception of the arguments of counsel, and the notes of Mr. Wheaton, at the end of the cases, are a transcript of his reports. There may be exceptions, but such is the general character of the respondent's works. So far, therefore, as it is a publication of what was the subject of copyright, in the reports of Mr. Wheaton, it is a violation of his right of property, the further progress of which ought to be enjoined, and an account of past profits decreed, on such principles as the court may deem equitable.

As, however, I have the misfortune to differ with the court on this part of the case, it is necessary to give my opinion on the other questions which have arisen, as to which I cannot concur in the conclusions to which the majority have arrived. These questions are : 1. The common-law right of authors in their production : 2. Whether, by the act of congress of 1790, the publication in the newspapers, and the deposit of a copy in the office of the secretary of state, are indispensable to vest a copyright. The evidence of there being at common law a right of literary property in the authors of books, after publication, is most plenary, both from the common consent and general understanding in the community—judicial and legislative authority. In *Tonson* v. *Collins*, the jury found a special verdict, "that before the reign of Queen Anne, it was usual to purchase from authors the perpetual copyright of their books, and to assign the same for valuable consideration, and to settle them in family settlements, for the provision of wives and children." (1 W. Bl. 301.) The same fact was found by another special verdict, in *Millar* v. *Taylor* (4 Burr. 2306) ; and Lord Mansfield stated another fact, clearly showing the general understanding that there was such property in authors. "There are many decrees which make these things *assets*." (1 W. Bl. 335.) The court of chancery has uniformly proceeded upon the common-law right. "They considered the act (the statute of Anne) not as creating a new offence, but as giving additional security to a proprietor grieved, and gave relief without regard to any of the provisions in the act, or whether the time was or was not expired." (4 Burr. 2407.) In *Millar* v. *Taylor* also, the court of king's bench solemnly affirmed the common-law right of authors. The defendant, after assigning errors in parliament, suffered a *non pros.* of his writ of error, and the commissioners, who acted in place of the lord chancellor, granted an injunction. (4 Burr. 2408.) A majority of the judges in *Donaldson* v. *Beckett*, affirmed the same principle, four years afterwards

(Ibid. 2417), and it was so considered in this country, as a settled point, before the adoption of the constitution. (Federalist, No. 43, p 241.) The second section of the statute of 8 Ann., c. 19, contains a clear and direct legislative affirmance of an existing right of property in books, after publication. "And whereas, many persons may, through ignorance, offend against this act, unless some provisions be made whereby the property in every such book as is intended by this act to be secured to the proprietor or proprietors thereof, may be ascertained," &c. (4 Ruff. 418.) The preamble of the act is in perfect accordance with this explicit declaration of its intention to secure a right of property existing in proprietors before its passage, and being in affirmance of common usage, which is but another word for common law, leaves no doubt of what the law was before its passage, as well as what it would still be in England, if it had not been held to abrogate the common-law right, and to confine the remedy of authors to cases where they have complied with the requisitions of the statute of Anne. It is not necessary to inquire into the construction which that statute has received in that country, further than as it may elucidate the construction of the acts of congress. The statute of Anne was passed after the settlement of Pennsylvania; it has never been re-enacted or adopted by usage, and is not in force as a part of its law. The rules established by the supreme court, relative to British statutes passed after the colonization, are conclusive on this point. (1 Dall. 67, 74; 3 Binn. 595–6.)

I, therefore, assume it as a point settled by common consent and judicial authority, that by the common law of England, before the American revolution, the author of a book had a property in it, which was protected against violation as much as land or a chattel; it was a right known and recognised, which passed by assignment or other conveyance; it passed to executors as the other estate of a decedent, and was, in his hands assets for the payment of debts, or distribution among the next of kin. There can be no higher evidence of property in anything else than that by common consent; it passes from hand to hand as such, under the sanction of law and the protection of courts and the legislature; the common law knows no distinction of right between one species of property and another; whatever is property is the right of the proprietor, who is entitled to protection in its exclusive enjoyment, by the rules of the common law, which afford a remedy for every violation of right.

It is a principle of universal recognition in the United States, that the common law of England, in relation to what is property, its rights, and the remedies prescribed for injuries to them, was also the common law of the colonies, from their first settlement, and so continued till the revolution. On some subjects, it was not suited to the condition of the colonists; and therefore, not adopted; or was so modified as to conform to local usage or legislation, but as respects the right of property, it was of universal adoption. The sixth article of the charter to Penn contained this provision, "That the laws for regulating and governing of property, within the said province, as well for the descent and enjoyment of lands, as for the enjoyment and succession of goods and chattels, and likewise as to felonies, should be and continue the same as they should be, for the time being, by the general course of the law in the kingdom of England, until the laws

should be altered by the said William Penn, his heirs and assigns, and by the freemen of the said province, their delegates and deputies, or the greater part of them." In the preamble to the act of 1718, is this declaration, "and whereas, it is a settled point, that the common law is the birthright of English subjects, so it ought to be their rule in the British dominions; but acts of parliament have been judged not to extend to these plantations, unless they are particularly named in such acts," &c. (1 Dall. Laws 130; 1 Sm. Laws 105, 110.) The act of 1777 declares, that "the common law, and such of the statute laws of England as have heretofore been in force in the said province, except as is hereafter excepted," shall be in force and binding on the inhabitants of the state. (1 Dall. Laws 722; 1 Sm. Laws 429–30, 432 note; 3 Binn. 595–6.) Such has been the policy of Pennsylvania, from its first settlement to the present time, in relation to the common law in general; but there is one principle of policy which seems to have been a favorite one with its founder and early settlers. In the first frame of government, adopted on the 25th April 1682, art. 12, it is declared, that the governor and provincial council shall erect and order all public schools, and encourage and reward the authors of important sciences and laudable inventions in said province. This was confirmed by the first of the laws agreed upon in England. The same provision was also contained in the frame of government of 2d February 1683, and in that of the 7th of November 1696. (2 Proud, Hist. of Penn., App'x, 11, 15, 24, 37.)

So far, therefore, from repudiating the protection of the literary property of authors, the settlers of that province extended it to inventors, not only adopting the common law as to one, but the principle of the statute of 21 James as to the other. I can look at these provisions in the frames of government in no other light than as most solemn declarations, that the whole course of the law of England, as it existed at the time of the charter, which protected the property of authors or inventors, was suited to the condition of the colonists, and formed a part of their system of jurisprudence. These declarations are a direct negative to the proposition that authors were on a worse footing in the colony than in the mother country, and, coupled with the adoption of the common law as a general rule of property, seem to me conclusive of the existence of the right of authors and proprietors, independently of any statute or act of assembly.

The courts of Pennsylvania have uniformly followed and furthered the policy of the colony, by a free and liberal construction of the acts of the proprietor and legislature, in the application of the rules and principles of the common law, by enforcing them in all cases as to which they have not been abrogated, assuming it as a settled principle, that the common law is the rule of right and remedy, till altered by usage or legislation. In 1782, the supreme court declared, that "the common law of England had always been in force in Pennsylvania. (1 Dall. 67.) Our ancestors, who came out, on the faith of the charter, brought with them the common law in general, although many of its principles lay dormant, until awakened by occasion, *dormit aliquando lex, moritur nunquam.*" The true proposition is, that the common law is general and fundamental, and unless where the common usage of the country has changed it, or it has been altered by acts of assembly, it is the inexhaustible fountain of justice, from which we draw our laws. (9 S. & R. 330, 339, 358.) The first settlers of Pennsylvania

brought with them the common law in general, except such parts thereof as were unfit for colonies. (11 S. & R. 273.) The same remark may be applied to all the states of the Union. I have referred particularly to Pennsylvania, as this cause was instituted in that state, and its decision must be governed by the law of the *forum*. That state, however, was not singular in her attachment to the common law, or in adopting and adhering to it, as the foundation of property and the rule for its government. The first congress of the revolution, in the name of all the assembled colonies, proclaimed in the Declaration of Rights, in October 1774, "that the respective colonies are entitled to the common law of England." (1 Journ. Cong. 28, ed. 1800.) This court has solemnly adjudged, that "we take it to be a clear principle, that the common law in force at the emigration of our ancestors, is deemed the birthright of the colonies, unless so far as it is inapplicable to their situation, or repugnant to their other rights and privileges." (9 Cranch 333.) The same learned judge, who delivered the opinion of the court in that case, thus expresses himself in another place: "When I speak here of the common law, I use the word in its largest sense, as including the whole system of English jurisprudence. (1 Gallis. 493.) The common law of one state, therefore, is not the common law of another, but the common law of England is the law of each state, so far as each state has adopted it, and it results from that position, connected with the judiciary act, that the common law will always apply to suits between citizen and citizen, whether they are instituted in a federal or state court." (2 Dall. 394.)

The whole action of the courts of the United States, is governed by the common law. The constitution, which provides, that "the judicial power shall extend to all cases in law and equity"—"to all cases of admiralty and maritime jurisdiction," refers, of necessity, to the common law, for the rules which ascertain what is a case at law, or a case in equity, as well as what cases are of admiralty or maritime jurisdiction, as neither the local common law, nor statutes of the states, point out the line which separates the several jurisdictions. The seventh amendment to the constitution of the United States, which declares, that "in suits at common law"—"no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law," is an authoritative declaration, that it is the guide for all courts. "At the adoption of the constitution, there were no states in the Union, the basis of whose jurisprudence was not essentially that of the common law, in its widest meaning, and probably, no states were contemplated in which it would not exist." (3 Pet. 446, 448.) The 13th section of the judiciary act gives the supreme court authority to issue certain writs "in cases warranted by the principles and usages of law." The 17th section gives the same power to circuit courts, "agreeably to the principles and usages of law." The 15th section empowers them to compel the production of boods, in cases and under circumstances where they might be compelled to produce the same "by the ordinary rules of proceeding in chancery." The 16th section prohibits suits in equity where plain remedy can be had at law. The 14th authorizes new trials for reasons for which new trials "have been usually granted in courts of law." (1 U. S. Stat. 81.) The circuit and supreme courts have often and uniformly decided, that the constitution and the judiciary act refer to cases at law, and in equity, to the common law, to the usages and principles of law, &c., as they have

been settled; not according to the rules and practice of state courts, but of those of common law and equity in the country whence we derive our jurisprudence. (3 Wheat. 221; 10 Ibid. 20, 56; 5 Cranch 222; 7 Wheat. 45; 1 Pet. 613; 4 Wheat. 116; 7 Ibid. 45; 2 Mason 270; 4 W. C. C. 205, 354.)

The 11th section of the judiciary act gives to the circuit court "original cognisance of all suits of a civil nature, at common law or in equity," &c. An action for damages for violating any right of property recognised by law, is a suit at common law; a bill praying for an injunction and account, is a suit in equity. The objection, then, to the sustaining a suit in either case, and administering the appropriate remedy, is narrowed to the single point—has the plaintiff a right at law or in equity? A circuit court sitting in Pennsylvania, is bound to make the laws of the state the rule of its decision. The unvarying course of the supreme court has been, to pay the same respect to the decisions of the highest law tribunals of a state, in the exposition of the statutes and local usuages or common law of a state, as to an act of assembly. (12 Wheat. 161–2; 4 Pet. 380; 5 Ibid. 154; 6 Wheat. 127; 11 Ibid. 367; 2 Pet. 525, 556.) If they do not reach the case, this and the circuit court resort to the common law of England, as the rule both of right, remedy, and the mode of its adminstration, as a general fundamental principle pervading the whole jurisprudence of the United States, and the action of its courts in all the branches of their respective jurisdictions.

The statutes of Pennsylvania have adopted the common law; the supreme court of the state has invariably expounded these statutes so as to embrace the whole system, except such parts as have been abrogated by statute or local usage. It has been clearly shown in the argument, that authors had, by the common law, a copyright in their books, which was recognised and protected as property. Nor is it pretended, that there is, or ever has been, any statute or common usage in Pennsylvania, which has abrogated, or in any way impaired, any right of property existing at common law, prior to the act of 1777, or any remedy for its violation. Both remain in all their force, unless this court shall adopt the proposition that the protection of literary property was unsuited to the condition of the colonies. As that was a matter of which the colonial and state legislature were the competent judges, and as they have not excluded this species of property from the pale of the law, I think, we are bound to follow the rule laid down by the supreme court of that state, when they decided, that the suffering a common recovery by a tenant for life, works a forfeiture of his estate, by the common law, and destroys all remainders upon it. "It lies upon those, then, who deny the existence of the law of forfeiture in Pennsylvania, to prove it." (9 S. & R. 334.) The reason applies with much more force to those who deny the existence of a common-law right of property in authors.

Whatever force may be given to the argument of novelty, in other states, it has none in that in which it has been often decided that common-law remedies may be applied, though they had never before been used. Thus, in 1809, an assize of nuisance was sustained, though none had ever been carried through a court, at any former period (2 Binn. 194), the court considering "it all along a living remedy, though dormant." (17 S. & R. 211.) No writ of *entry sur disseisin* had ever been brought before 1824, yet the supreme court held it to be an existing remedy. (11 S. & R. 272.) There is no decision of this court which is in hostility to any of the foregoing prin-

ciples; on the contrary, they harmonize with those of the courts of Pennsylvania. There has been, and yet is, a diversity of opinion on the question how far the courts of the United States possess a common-law *criminal* jurisdiction, independently of what is conferred on them by acts of congress. This court, however, in the case of *Coolidge* (1 Wheat. 416), considered the question as open to an argument; and no one who will read the very able opinion of the learned judge of the first circuit (1 Gallis. 488), can deny that it is worthy of the most serious consideration.

But no doubt has ever existed in relation to the common law, as to rights of property and civil remedies, being, by the constitution, the judiciary act, and the settled course of adjudications, the rule both of right and remedy, unless opposed to some local law. I am, therefore, wholly at a loss to know, on what ground a circuit court, sitting in Pennsylvania, in a suit in equity, between citizens of New York, complainants, and citizens of Pennsylvania, respondents, should not adopt the common law of England, which, since 1777, has the same force as statute law, in that state, as the test by which to decide upon the rights of the parties, and the remedy to which the one complaining is entitled by the course and principles of courts of equity. The common law gives him a right of property, as well as an appropriate remedy; no law or usage of the state has impaired it; the statute of 8 Anne has not been adopted, and is not in force; but the common law has been adopted, and it is yet in force, as a rule for the decision of the circuit courts, as well as of this, unless otherwise required by the constitution or laws of the United States. (1 U. S. Stat. 92.)

So far from any act of congress having impaired this common-law right, they seem to me to recognise its existence, and to have been intended to afford it additional security. In 1783, the congress recommended to the states the passage of laws to secure to the authors or publishers of any new books, not hitherto printed, and their executors, a copyright therein. (8 Journ. 189, 2d May.) The powers of the confederation were not competent to the object, but the new constitution having empowered congress to do it, the act of 1790 was passed to effect it.

The first section declares, that the author of a book already printed in the United States, or any other person, his executors, administrators or assigns, who had legally purchased or acquired the copyright thereof, should have the sole right of printing and selling it, for fourteen years from the recording the title in the office of the clerk of the district court, in the same manner as the author of an unpublished book or manuscript. This is a plain recognition of an existing property in a printed book; a declaratory act that it was capable of being transferred and assigned; that the property passed to executors or administrators; that it could be purchased, and a copyright legally acquired to reprint and sell the same, before the law was passed. It is a complete definition of literary property, distinctly giving its attributes and incidents; it is also a direct negative to the proposition, that the publication and sale of the book was either a dedication to the public, or gave to the purchaser the right of reprinting it. The security afforded by this act was not only retrospective, but unlimited as to time; a book published forty years before the passage of the law, was equally within the law as one recently published. The second section imposes the same penalties on persons who shall reprint a book, printed before the law,

as for printing an unpublished manuscript, or for reprinting a book, printed by the author, after the law had passed. This consideration is of the greater importance, when we advert to the history of the controversy concerning literary property. Mr. Justice YATES, while at the bar, admitted that, "an author had a property in his sentiments till he published them, and that he might sell, and give a title to publish them." (1 W. Bl. 333.) In his celebrated opinion, he lays down one position which he apprehends will not be disputed on either side. "While the subject of publication continues his own exclusive property, he will so long have the sole and perpetual right to publish it; but whenever that property ceases, or by any act or event becomes common, the right of publication will be equally common. (4 Burr. 2355.)

The great question was, whether publication made it common: it was as familiar to the profession in this country as in England, and to none more so than to the members of congress, as is most evident from the phraseology of the act. (Federalist, No. 43, p. 141.) In recognising the assignability of a copyright in books already printed, and its transmission to executors, the law is based on the facts found by the special jury in *Tonson* v. *Collins*, and in *Millar* v. *Taylor*, as well as that stated by Lord MANSFIELD, that a copyright was assets. This is a decisive expression of the sense of congress, that a copyright was property, after publication, or it could not have been assignable or transmissible. And it would be derogatory, as well to the wisdom, as to the justice of any legislature, to impute to them the intention of inflicting a heavy penalty on the publisher of a book, which was common property, giving one-half to the author or proprietor, with direction to him to destroy the sheets, and a forfeiture to him of all the books printed in contravention of this copyright.

If this right was a mere creature of the act of congress, if the purchaser of a book had the right to multiply copies at his pleasure, the power of congress to prescribe penalties and forfeitures for the benefit of an author or proprietor, who had no other than a common right of publication, might well be questioned; it would be clearly repugnant to justice and sound legislation, to make it penal to reprint a book in which no one had or could have property. But as there was a property at common law in printed books, congress protected it as effectually as one unpublished. When the law recognises a person as the "proprietor," there must be "property;" when he "purchases" or "assigns," there must be a subject-matter to purchase or assign; his executors can have no right which did not pass from him, and he "cannot legally acquire a copyright," when there is none to acquire.

The difference between the wording of the statute of Anne, and the act of 1790, presents another powerful reason to show that it did not take away any common-law right; the substitution of the word "securing," in place of "vesting," as in the statute of Anne, the omission of the words "no longer," which were deemed so important, must mean something. (See 4 Burr. 2389–90.) There is no provision which excludes the author from the enjoyment of his common-law right; the third section only excludes him from the benefit of the act, if he does not make the entry with the clerk; had it been intended to deny all right, to preclude the existence of any property in the book, it would have excluded him from the benefit of a copyright;

the same remark applies to the first section of the act of 1802. The second section of this act is strongly illustrative of the sense of congress. In providing for the protection of the authors and proprietors of prints, the law is wholly prospective to prints engraved after the passage; its omission of prints previously puplished, while printed books were put on the same footing as unpublished manuscripts, could not have been without a meaning, or a reference to the common-law right. There was no copyright in prints, in England, until 8 Geo. II., c. 13, gave one in prints engraved after the passage of that statute. (6 Ruff. 184.) As it was a mere statutory right in England, congress so considered it, and therefore, made no provision for prints previously published. (2 U. S. Stat. 171.) The act of 1819 makes a plain distinction between the case of an author and inventor—the word *granting*, referring to a right created in the inventor, and the word *confirming*, referring to a right secured to an author; the one word being a negative of a pre existing right, the other necessarily implying it. (3 U. S. Stat. 481.)

For these reasons, and in the absence of any clause in either the act of 1790 or 1802, which in terms, or by fair construction, contains or implies a denial of the common-law right, it seems to me, that the well-settled rule which has been applied in England to the statute 8 Anne, that an affirmative statute does not impair a common-law right, but is uniformly held to be merely cumulative as to the remedy, applies with greater force in this country, to leave the common-law right of authors unquestioned. (7 T. R. 627; 4 Bac. Abr. 641; 19 Vin. 511; Co. Litt. 111, 115; 17 S. & R. 92; 5 Day's Com. Dig. 330.)

The counsel of the respondents have relied much on the analogy between the case of authors and inventors, in order so establish the position, that as the latter had no rights at common law, therefore, there was none in authors. But admitting the full force of their reasoning, it only tends to prove what the common law ought to be as to inventors; it does not disprove the fact found by special juries as to copyrights being property, nor overrule the adjudications at law and in equity which formed the common law of England, and of these states, by adoption. If we adopt as a principle of law, the proposition, that because the common law did not recognise as property, that species of the result of mental labor, ingenuity, or combination of both, which is termed an improvement or invention in mechanics, it, therefore, does not recognise a property in a literary production, we open a wide field of innovation, which will unsettle the best-settled rules of property. On other subjects, it is deemed full evidence of the existing common law, that there has been on a point of question, one adjudication which has received general assent and acquiescence; much more so, when the course of the law has remained unquestioned, after solemn decisions. If authors had not a right of property by the common law, or if that part of the common law has not been adopted here, it becomes a matter of serious inquiry, what the public and the profession are to consider as evidence of the law, and the rules, as to right and remedy, by which other property is to be governed. If the judicial history of the law of copyright does not establish its existence, independent of statutes, in England, and if the acts of congress, passed professedly for the encouragement of learning, by securing the copyright of authors, is, by fair construction, an abrogation of the common-law right,

I am much mistaken, if the opinion of the majority of the court in this case does not, in its consequences, open a new epoch in the history of our jurisprudence. I, for one, must look to other than the accustomed sources of information, to find the common law, to new tests of its adoption here, and new rules of construing statutes, as well in their effect on the pre-existing law of property, as the settled principles by which their provisions are interpreted. There are none more ancient or sacred, than that the common law can be altered only by act of parliament (Litt. § 170; Co. Litt. 115, 116); that statutes and usages which derogate from its rules shall be construed strictly, and not be extended by equity beyond their words or necessary implication (1 Bl. Com. 79; Gilb. Dev. 153; Litt. § 169; Co. Litt. 33 *b*, 58 *b*, 113 *a*; 4 Dall. 64; 2 Binn. 284); and that a statute which gives an additional remedy, or inflicts new penalties and forfeitures for the violation of a right, leaves the injured party the option of appealing to the statute or common law for redress. (4 Burr. 2380–81, 2387; 7 T. R. 627; 4 Bac. Abr. 641, 645; 5 Day's Com. Dig. 331.) In the application of these principles to the acts of congress on copyright, there can be found no one provision, which either professes, or by implication can be construed, to alter the common law. Their titles and enactments are affirmative and remedial, for the security of the right of property in authors, and they carefully exclude the words in the statute of Anne, which have led to the construction it has received in England. Congress has not declared, that the copyright shall exist, and be secured for fourteen years "and *no longer*," as they would have done, if they had intended to limit the right to that term; the omission of these words is, therefore, powerful evidence in itself, that it was not intended to leave the law open to the construction which the statute of Anne had received; and this evidence becomes most conclusive, in the absence of any word, phrase or clause, which can be interpreted to imply any abrogation of the right existing at common law, which was the rule of property adopted from its first settlement by Pennsylvania, and so continues to this day, as the settled law of the state. By every principle of its jurisprudence, the party who alleges that the common-law rules of property of any description are not in force in that state, must, in the language of its supreme court, "prove it." The issue is thus thrown on the respondents, to show that the law of copyright was never adopted. In this they have utterly failed, for they have not offered a *scintilla* of proof of any local usage, of any judicial *dictum*, or a legislative declaration, that the law of literary property has not been adopted in that state, or that it was unsuited to the condition and policy of its inhabitants.

The adoption of the common law "in the general," as a system of civil jurisprudence for the government of property, necessarily throws the burden of proving the exception of any particular description of property on those who affirm the exception; if they fail in this, the general principle must prevail. If a different rule is applied in this case, the sixth article of the charter to Penn, the acts of assembly of 1718 and 1777, as well as the whole course of judicial opinions in the state, from its first settlement to this time, become annulled and reversed. On the other hand, if the established rule prevails, there is in Pennsylvania an ancient fixed rule of property, a law of the *forum*, which is repugnant to no law of the Union, and becomes imperative on the federal courts, as their rule of decision in the

present controversy, that is, the common law as adopted in Pennsylvania, and recognised as well by the constitution and the judiciary act, as by the repeated and solemn adjudications of this court; all in affirmance of the declaration of rights made by the first congress in 1774.

It remains to consider the question arising under the acts of congress on the subject of copyrights, which is, whether the complainants have complied with such of its requisitions as are indispensable to give them a right of property in the reports of Mr. Wheaton? It being admitted, that all the volumes were duly entered in the office of the clerk of the district court, and a copy of the entry printed on the title leaf, the only subject of inquiry is, whether any further acts were necessary to vest the title? Whether there is sufficient evidence of those acts having been done, will depend on the results of the issue of fact directed by the court, which it would be premature to examine at present.

It is an admitted principle of American jurisprudence, that where "English statutes have been adopted into our legislation, the known and settled construction of those statutes by courts of law, has been considered as silently incorporated into the acts, or has been received with all the weight of authority." Though the acts may not be identical with the British statutes, yet "the construction which the latter may have received, the principles and practice which have regulated grants under them, as they must have been known and are tacitly referred to in some of the provisions of our own statutes," afford materials to illustrate it. *Pennock* v. *Dialogue*, 2 Pet. 18.

In commenting on the act of 1793, as to patents for inventions, this court refers to the statute 21 Jac. I., and its construction by Lord Coke and Chief Justice Gibbs, and remarks, "but it can scarcely admit of a doubt, that they must have been within the contemplation of those by whom it (the act of 1793) was framed, as well as the construction which had been put upon them by Lord Coke." (2 Pet. 21.) No sound reason can be assigned, for not applying the same rule to the statute of Anne, and the act of 1790. As no case of copyright has heretofore come before this court, I cannot avail myself of its authority, on the identical question now presented, but cannot omit a reference to that of my predecessor in the circuit court. "In this respect, the act (of 1790) corresponds, and was probably intended to correspond, with the statute 8 Ann., c. 19, which, and the construction given to it in the cases of, &c., and some others, were, no doubt, within the view of the legislature which passed this act." (4 W. C. C. 490.) No one can doubt the fact, that the whole course of the law of England on the subject of copyright was well understood and fully considered by the congress of 1790, among whom were some of the most eminent jurists of that or any other time. The general scope, as well as the detailed provisions of their acts on inventions and copyrights, most manifestly show, that they took pattern from the statutes of James and Anne; while the difference between them evidently arose from the defects in those statutes, or the doubts which had arisen in their expositions.

Applying, then, the principle on which this court acted in the case of *Pennock* v. *Dialogue* to this, I proceed to inquire, what is necessary to secure a copyright, under the acts of 1790 and 1802? The answer is found in the laws. The first section of the act of 1790 declares, that the author

or proprietor "shall have the sole right of printing and reprinting such map, chart or book, for fourteen years from the recording the title thereof in the clerk's office as is hereinafter directed." (1 U. S. Stat. 124.) The third section declares, "that no person shall be entitled to the benefit of this act, unless he shall deposit a copy of the title in the clerk's office of the district court where the author or proprietor shall reside." The clerk is required to record the same in a book, and to give a copy to the author or proprietor, if he shall require it, under the seal of the court, in the form prescribed, and for a specified compensation. This is the only requisite expressly enjoined by the law, to give or secure the sole and exclusive right, for the first term of fourteen years; by the proviso in the first section, it is requisite, to secure the right for a second term, that the author or proprietor "shall cause the title of the book to be a second time recorded and published, in the same manner as is hereinafter directed, and that within six months before the expiration of the first term of fourteen years aforesaid." A distinct and separate direction is contained in the third section: "And such author or proprietor shall, within two months from the date thereof (the recording the title), cause a copy of the said record to be published in one or more newspapers printed in the United States, for the space of four weeks." The fourth section directs, that the "author or proprietor of any book shall, within six months after the publishing thereof, deliver or cause to be delivered, to the secretary of state, a copy of the same, to be preserved in his office." These are all the requisites prescribed by this law to the authors or proprietors of books, whether they are considered as conditions precedent to vesting the right, or as merely directions, which may be omitted without impairing the title.

Assuming, in this view of the case, that there is no copyright, independent of this act of congress, it is evident, that it commences only from the recording the title, the omission of which is fatal to the author's right, because the law has expressly declared it so; but as it does not declare the publishing in the papers to be indispensable for either the commencement of the right, or a continuance of it, for the full term, it could not have been so intended. Such a construction would be in direct contradiction to the express declaration, that the right shall be for the term "of fourteen years from the recording." It vested at that time, as a perfect continuing right of property, for a defined term, without any provision that it should cease or become forfeited by any act of omission whatever. The author was not required to make the publication, before his term commenced; it, therefore, can, by no possibility, be deemed to be a condition precedent, or a requisite indispensable to vest the title, in the first instance, to continue it during the two months allowed for publication, or the six months allowed for delivering the copy to the secretary of state. Thus far, there can be no doubt of the right, nor that, if these requisites are conditions, they are subsequent. Viewing them as such, the utmost legal result of their breach is, that the United States, as the grantors, may take advantage of it, in such mode as they may prescribe by law; but the respondents, who are strangers to the right, cannot avail themselves of it against the complainants, who are in possession under a claim of title, which is good as to all but the grantor, and good against him until he interferes to resume or terminate it. (Shep. Touch. 149; 7 Pet. 606.) To

authorize any other person to interfere with the enjoyment of the property, it must appear, that by the terms or fair interpretation of the law, the condition is made a limitation, which extinguishes the right, by legal operation, on the non-performance of the act, without anything done by the grantor. (Shep. Touch. 141 ; 2 Bl. Com. 155.) No act of congress contains such limitation, or uses words which can be so construed. When the intention of the legislature is, to make the performance of an act essential to the right, it not only declares it to be so, but prescribes that the author shall be furnished with such evidence of its having been done, as shall save him the necessity of proving it by the ordinary rules of evidence, as in recording a copy of the title with the clerk, who is bound to give a certificate thereof, under seal, in the form prescribed by the third section of the act of 1790. The third section of the patent law of 1793, makes the filing a specification in the office of the secretary of state essential to any right, a certified copy whereof shall be competent evidence in all courts, &c. (1 U. S. Stat. 321.) The omission to make a similar provision as to the other matters directed by the act of 1790, or to direct the secretary to make a record, and give a certificate of the delivery of the copy, which should be evidence, is a plain indication of the sense of congress ; and if it was not intended, that the law should be expounded according to the ordinary rules of interpretation, congress would have put all the requisites on the same footing.

The making the benefits of the acts dependent on the performance of some things, and not on others, is conclusive to show the meaning of the legislature. To make them all essential, by mere construction, when the law itself discriminates between what is necessary for the title, and what is merely directory for other purposes, is tantamount to an adjudication, that congress did not understand the legal effect of the provisions of the law ; it is making the fourth section a condition precedent to the continuance of the right, by adding to, and transferring to it, the words of the third section, which make the record of the title indispensable ; thus construing two distinct unconnected sections, as well as the distinct and separate sentences and directions of each, into one entire sentence, and converting mere directions into conditions, by the breach of which an author forfeits an existing right of property, which henceforth becomes common, and he is made liable to the penalties in the fourth section of the act of 1802. So, by the proviso in the first section of the act of 1790, the publication in the newspaper is made necessary to secure the copyright for a second term, in addition to the recording the title again, both of which must be done six months before the expiration of the first term. The effect of a proviso in a law, as a condition precedent to the vesting a right, a limitation, or an exception, as the case may be, operates so as to exclude the case to which it extends, unless the party who claims the benefit of the law, complies with the requisition of the proviso. (3 Day's Com. Dig. 89, A. 2 ; Shep. Touch. 121 ; Co. Litt. 146 *a*, 203 *b* ; 1 Pet. 636.) It is otherwise with a mere directory provision, unless the law declares it necessary to vest a right in the party. (9 Cranch 95 ; 6 Pet. 730.) Nothing, therefore, can more clearly show the meaning of congress, as to the publication of the record, than that it is made indispensable in the case of a renewed copyright, and only directed in case of an original one. Had the last clause in the third section been a proviso, it would have

been otherwise. (2 Co. 70 *b*, 71 *b*, 72 *a*, *b*.) The same rule applies, but with greater force, to the direction in the fourth section, to deposit a copy of the book in the department of state, because it is a direction wholly unconnected with the preceding section; neither is it necessary to entitle the author to the forfeitures and penalties prescribed by the second section. They are incurred by any violation of the copyright, after the recording and publishing the title "within the times limited and granted by this act," without any reference to the deposit of the copy in the office of state. When, therefore, we find that the author or proprietor is expressly authorized to recover the penalties and take advantage of the forfeitures for twenty-eight years, this court cannot limit it to six months, by interpolating the deposit as a condition to the right thus declared absolute; this would be judicial legislation, not construction. In deciding on the construction of state laws and acts of congress, whether their provisions are to be deemed essential to, or affecting a right created or secured by the law, or are merely directory to the officer or party who is to comply with them, this court has uniformly held that it depends on the words or necessary implication of the law itself. (5 Cranch 234; 3 Wheat. 594; 6 Ibid. 577; 9 Ibid. 736; 11 Ibid. 188, 190–1; 1 W. C. C. 11.) The result of these cases is the establishment of the proposition, that unless the act to be done is made essential to the vesting or validity of the right claimed, or the omission of its performance extinguishes one vested, its title is unimpaired, though the act is not performed. Such was the exposition of the patent law of 1793, by the learned judge of the first circuit. The inventor is required to take an oath "that he is the true inventor," &c., but it was decided, that the taking the oath was but a pre-requisite to the granting of the patent, and in no degree essential to its validity. It might as well be contended, that the patent was void, unless the thirty dollars required by the 11th section of the act had been previously paid." (1 Gallis. 433.)

Such, too, was the exposition which Judge Washington, in the circuit court of Pennsylvania, gave to the act of 1790. "But the condition upon which the proprietor is to be entitled to the benefit of the act, cannot, upon any grammatical construction, be extended to the requisition contained in the last sentence of this section, to publish a copy of the record of the title, within the time and the period prescribed. It is entirely a new sentence, and is as much disconnected from the condition expressed in the preceding part of the section, as if it had been contained in the fourth section, to which there is clearly no condition annexed. If, then, the title of an author to a copyright depended altogether upon this act, I should be of opinion, that it would be complete, provided he had deposited a printed copy of the title of the book in the clerk's office, as directed by the third section; and that the publication of a copy of the same would only be necessary to enable him to sue for the forfeitures created by the second section." (4 W. C. C. 490.) The supreme court of Connecticut have decided, that "the provisions of the statute, which require the author to publish the title of his book in a newspaper, and to deliver a copy of the work itself to the secretary of state, are merely directory, and constitute no part of the essential requisites for securing the copyright." (3 Day 158.) These adjudications were in accordance with the course of the English courts in the construction of the statute of Anne, c. 19, § 2, which directed the registry of the book in Stationers' Hall,

and also the fifth section, which required the deposit of nine copies of the book in the same place, for the use of certain libraries. It has uniformly been held, both at law and in equity, that these provisions were directory only, and not essential to the vesting the right, to enable the author to recover damages at law, or to have relief in equity. The right has been considered as vested absolutely during the term, though the directions of these two sections are not complied with. *Buller* v. *Walker*, cited in *Blackwell* v. *Harper*, 2 Atk. 94. "The registry is necessary only to entitle the author to the penalties." (s. c. Barnard. Ch. 211, 213 *a*; 7 T. R. 627; 16 East 322, 333; 4 Bing. 242–3; 1 Camp. 98. s. p. Eden on Inj. 193, 197; 1 W. Bl. 330, 338; 4 Burr. 2380; Jacob 311.) Such was the settled construction of the statute of Anne, in conformity with which the act of 1790 was evidently framed.

The statute (8 Geo. II., c. 13) gives a copyright in prints, for "fourteen years, to commence from the day of the first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints." (6 Ruff. 184.) Lord HARDWICKE, in 2 Atk. 94 (Barnard. Ch. 211), held, that the engraving the day of publication was not necessary to give the copyright, but was only directory. So did Lord ELLENBOROUGH, as to the plaintiff's name, in 1 Camp. 98. Lord ALVANLEY was inclined to a different opinion, yet he held a general allegation of a publication "on or about the 13th of May," to be sufficient to sustain a bill in equity. (2 Ves. jr. 324.) It has, however, been held necessary, to entitle an author to recover damages. (3 Wils. 60, 61; 5 T. R. 45; 7 Ibid. 522; 4 Bing. 239, &c.) But if the plaintiff omits to allege the day in his declaration, it is good after verdict. (7 T. R. 522.) The reason given for this construction is, that the right commences from the day of publication, and that this requisition is contained in the same clause which confers the right.

But no case has been adjudged, in which a literal compliance with the directions of the act has been held indispensable to the right. "It has never been stated on any print which has been published, who was the proprietor, nor in any one of the cases which have been decided in favor of engravers, has the word proprietor ever appeared upon the print;" the words on the print, "Newton del., Gladisin sculp., were held sufficient." The words of the act are "satisfied by the disclosure of the proprietor's name; this is a sufficient indication of the person who is to be applied to for leave to copy the print; coupled with the date, it shows how long the designer had the monopoly, and fully accomplished the two objects of the act. (4 Bing. 242.)

This uniform, unbroken current of authority, is not only in accordance with the settled rules of construing all statutes, which grant or secure rights of property, whether real, personal or literary, but the general policy of the law for the especial protection of the latter as a favored right.

(*a*) The learned judge who decided this case in the circuit court, considers the opinion of Lord HARDWICKE to have been otherwise; but this is owing to a mistake of the report of his opinion in 2 Atk. 95, of the word *property* for *penalty*. This is evident from the report of the same case in Barnardiston, 210, 213, in which the case is better reported. The words of his lordship are, "but that is only a provision that is necessary to be complied with, when the penalty of the act is taken advantage of;" in which he is followed by Judge WASHINGTON, in 4 W. C. C. 490, and by Lord ELDON, in Jacob 311, and all the cases at law.

Lord HARDWICKE denied that the statute of Anne created a monopoly, "and therefore, ought to receive strict construction. I am quite of a different opinion, and that it ought to receive a liberal construction; for it is very far from being a monopoly, as it is intended to secure the property of books in the authors themselves, or the purchasers of the copy, as some recompense for their pains and labor in such works as are of use in the learned world." (2 Atk. 143.) The same spirit prevails in courts of law. "Looking, therefore, at the subject-matter of the law, at the language employed by the legislature, and the practice which has been uniformly followed by engravers, we cannot hesitate to determine that the proprietors of these prints are entitled to the protection which is afforded by the statutes; a decision we have come to with satisfaction, seeing that they exercise a branch of art eminently useful, and which in no slight degree '*emollit mores nec sinet esse feros.*' They contribute also, by the same means, to the circulation of a knowledge of mechanics, so necessary to our manufactures, and so useful to the best interest of the country. (4 Bing. 245.)

I cannot overlook this weight of judicial authority in the construction of the act 1790, and the kindred statutes of England, without violating the words of the act of congress, the plain meaning of the legislature, the established rules and maxims for construing statutes, as well as the numerous adjudications upon them, which form, "according to the course and principles of courts of equity," the rule of our decision on bills of this description, by the express direction of the law of 1819.

Nor can I perceive in the act of 1802 any provision which can vary the construction of the former law; it merely prescribes an additional requisite essential to the right, which is, "to cause a copy of the record to be inserted in the title-page, or in the page immediately following." (2 U. S. Stat. 171, § 1.) It is not denied, that this has been done as to all the volumes of Wheaton's reports; but it is contended, that though the words of this section do not, in terms, make the publishing in a newspaper, or a deposit in the office of state, essential to the title, yet it is a legislative construction of the act of 1790, which this court is bound to adopt. The words are, that "before he shall be entitled to the benefit of the act (of 1790), he shall, in addition to the requisites enjoined in the third and fourth sections of said act, give information, by causing a copy of the record to be," &c. Had congress declared explicitly, that all the requisites enjoined were indispensable to the right, this court would have been bound by it, as a legislative act; but they have neither done this, nor used words which can be so interpreted, according to their true meaning. The intention of the legislature must be manifested in words, competent to make the law in future, expressing their sense as plainly as a declaratory act; and it must be expressed in terms capable of having that effect. "If this interpretation of the words should be too free for a judicial tribunal, yet if the legislature has made it, if congress has explained its own meaning too unequivocally to be mistaken, their courts may be justified in adopting that meaning." But if the language used indicates the opinion of the legislature of what the law was, rather than an intention to change it, their mistaken opinion concerning the law "does not make the law." (*Postmaster-General* v. *Early*, 12 Wheat. 148–50.) In that case, the question arose on the act of 1815, which directed, that the district court of the United States shall have

cognisance, concurrent with the courts and magistrates of the several states, and the circuit courts of the United States, of all suits, where they, or any of their officers, were plaintiffs: this court held, that these words gave jurisdiction to the circuit courts, though it did not exist before; thinking that it was plainly intended as a declaratory act, they felt justified in adopting their meaning. When such cautious language is used on a mere question of jurisdiction, I may safely assume it as a clear principle, that on a question of property, of a favored right, the act of 1802 will not be favorably or benignly construed against it, so as to throw impediments to its vesting or enjoyment, by equitable construction, refined implication, or an adoption of a mere legislative opinion, as a declaratory law. This would be in opposition to the principles laid down in the preceding case, and to all the canons of the law in the exposition of statutes; for the act of 1802 does not profess to prescribe for the future any other rule of construing the act of 1790, than what had prevailed before, or to make any provision essential to the right, which was in its terms only directory. The words amount to no more than a legislative opinion on the effect of a former law, which is not enough to even justify this court in adopting it, unless "congress has explained its meaning too unequivocally to be mistaken," that the act was intended to be a distinct, substantive, prospective law, plainly declaring and enacting a new rule for the future.

There is nothing of this kind in the act. "He shall, in addition to the requisites enjoined," &c. A requisite is merely a thing required, directed or enjoined. The meaning is the same, whether the one or the other mode of expression is used. The direction of a law is as imperative as a requisition or injunction. The question is not, what is a requisite, but for what purpose it is enjoined, to secure, grant or create a right of property, a remedy for its violation, or a right to recover the penalties and forfeitures prescribed by statute. Everything directed by the act of 1790 is a requisite enjoined: the recording the title to secure the copyright, the publishing in a newspaper to give the penalties and forfeitures, and the delivery to the secretary of state a copy "to be preserved in his office." The act of 1802 adds another, to give information by the publication of the record on the title leaf, before he shall be entitled to the benefit of the act; this is the whole effect of the first section, which is intended for no other purpose. Had it been intended to make the delivery of a copy to the secretary of state essential, either to the right of property, under the first section of the act of 1790, or to the penalties, &c., under the second, or to have enacted a declaratory law, making the act which was a requisite only for one purpose, an indispensable condition to any legal security to the copyright; the author would not have been left in the perfect enjoyment of his rights to all the penalties and forfeitures created for his benefit, by the second section of the act of 1790. Something would have been added, which would have made it the declared sense and enactment of congress, that he should enjoy nothing, unless he performed everything required; and that something must be made essential, by an an express provision, by legislation, or what is tantamount. This court is not justified in adopting as a declaratory act, a mere opinion of the legislature, inferred from the use of the words "requisites enjoined;" for such inference, if correct, is only an indication of a mistaken construction, which cannot make a law. A similar question arose on the 5th

section of the statute of Anne, which directed a deposit of nine copies of each book for certain libraries, which had been uniformly held to be merely directory, the right to the copies attaching, though they were not deposited in Stationers' Hall. The statute 41 Geo. III. provided, "that in addition to the nine copies now required by law to be delivered, &c., one other copy shall, in like manner, be delivered," &c. It was contended, that this was a legislative declaration of the construction of that section of the statute of Anne, which was binding on the court; but the king's bench refused to adopt it, as they deemed it an evident "misconstruction, not a positive interpretation of a former act, imposed by the legislature in a subsequent act; but by the provisions which the legislature have made, they seem to have apprehended that such was the construction of the statute of Anne." (16 East 318, 333.)[1] The established rules of law must lead to the same conclusion in the present case.

The question is, whether the act of 1802 either abrogates any right secured to authors by the act of 1790, imposes conditions upon the vesting of any right, not before conditional or limited, or makes it our duty so to construe the former law, as to make it conform to the construction which may seem agreeable to the opinion of the legislature as indicated in the latter. "Acts of parliament ought not, by any constrained construction out of the general words of a subsequent act, to be abrogated, but ought to be maintained and supported with a favorable and benign interpretation, to abrogate as little as may be." (11 Co. 63 *a*, *b*.) "A subsequent act, which may be reconciled with a former one, shall not be a repeal of it." (11 Co. 63 *b*; 1 Bl. Com. 89; 5 Com. Dig., by Day, 325.) "A later statute, general and affirmative, does not abrogate a former, which is particular." (6 Co. 19 *b*.) The bare recital in a statute is not sufficient to repeal the positive provisions of a former statute, without a clause of repeal. (2 T. R. 365.) The sense of words used in an explanatory act is not to be extended by equity, but their meaning, this being a legislative exposition of a former act, must be strictly adhered to. (4 Bac. Abr. 650.) Nor shall a statute be expounded by equity, to overthrow an estate, or to take away a right, *d fortiori*, to expose a party to a penalty. It is to be hoped, that the time is far distant when any court will extend the words of a penal statute beyond their plain uncontroverted meaning, for the purpose of forfeiting an existing right, or the infliction of fines and penalties.

It seems to me, therefore, to be the clear result of these cases, and rules of construction, that the first and second sections of the act of 1790, are in full force; that the right of property, and to the penalties and forfeitures, are neither abrogated or made dependent on the performance of any act not essential to the title by its terms, as judicially expounded, and that the act of 1802 is not declaratory of any new rule for the future, as a legislative act, save in the one additional requisite. Congress have given to it the same practical construction in the act of 1831. The only requisites which it enjoins upon the author are, that he shall record a copy of the title with the clerk of the district court, deposit a copy of the book in his office, and publish a copy of the record on the title leaf. He is not required or directed to make any publication in a newspaper, or to deposit a copy with the secre-

[1] S. P. Jollie *v.* Jaques, 1 Bl. C. C. 618.

tary of state. This is a fair ground of inference that these two requisites were never deemed by the legislature to be essential to the vesting the title, or they would have been retained. Indeed, when we look at the nature of these acts, there appears no reason why they should be so considered. A publication in any newspaper, printed anywhere in the United States for four weeks, would be a compliance with the law; it cannot be pretended, that this would answer any valuable purpose as notice, or for information, to warn any person from invading the copyright. The publishing the copy of the record on the title leaf, as directed by the act of 1802, was to "give information." It was effectual notice, for none who would look at the book would fail to see the impress of copyright on the title-page, or the next succeeding one; so that none could offend ignorantly. Whatever reasons, therefore, there might be for requiring a publication in a newspaper, when no other notice was required, they wholly ceased, when another more efficient notice was prescribed; the former was mere legal implied notice; the latter was a notice in fact, which no man could either overlook or mistake. This affords, to my mind, a conclusive reason why this act should be deemed merely directory, because if the publication was made, it was no notice in fact; if omitted, it injured no one, and the law of 1802 provided an effectual practical substitute, by notice in fact. The delivery of a copy of the book to the secretary of state could not operate as notice, or be of any importance to the public; the law directs no record of the delivery, nor any mark to be affixed to the book, to show that it was delivered in order to secure the copyright, nor could it be distinguished from the mass of books in the library of the department. Congress, no doubt, intended the fourth section of the act of 1790, as the parliament did the fifth section of the statute of Anne, but directed the delivery of only one copy of the book instead of nine, for which there was a sufficient reason, in the complaints of the printers and booksellers in England, of the heavy tax which was imposed on them for the benefit of the libraries of the universities and colleges, the extent of which may be seen in Maugham on Literary Property. In this particular, the act of 1831 is strongly indicative of the sense of the legislature, that the act was not essential to the right, for the author is now required only to deliver a copy to the clerk, who is directed to transmit it to the secretary of state.

This is the more apparent, when we connect this law with the decision of Judge WASHINGTON in *Ewer* v. *Coxe*, which was first published in 1829, and the decision of the supreme court of Connecticut in 1808, which must be presumed to have been well known to the members of the judiciary committee who framed this law. It will be observed, that the fourth section is left open to the same construction that is given in those cases to the third and fourth sections of the act of 1790, which is a legislative adoption of the rule laid down; the direction to the author to deliver the copy to the clerk, as well as to the clerk to transmit it to the secretary of state, are in distinct sentences, wholly unconnected with the preceding part of the sentence, making the record of the title essential to the copyright. On the other hand, the fifth section, which makes the publication on the title leaf an essential requisite, in express terms, is a plain legislative declaration, that the delivery of the copy of the book is not so—*expressio unius, est exclusio alterius*, is a universal maxim in the construction of statutes (6 Pet. 725), thus excluding all grounds for construing the act of 1831 as Judge

WASHINGTON had construed the act of 1802. Taking them in connection with the act of 1790, as laws *in pari materia*, I cannot believe, that it was ever intended by congress, that any publication in a paper, or delivery of the book, should be indispensable to the vesting, as well as enjoyment of the right. These directions are in themselves so entirely unimportant for any practical purpose, especially, in a case like present, where the respondents had the most ample notice in fact of the claim and possession of the copyright by the complainants, that I can perceive no reasonable ground for any other conclusion. Admitting, to its full extent, the obligation of judges to follow the words of a law, however unreasonable, if they are explicit, and do not admit of construction, I cannot overlook general usage, or the reason and rule of the common law, in the construction of laws which are doubtful in their terms, or so construe them against common right or reason, as to make them work a wrong, or where a right is given by particular words, adjudge it to be taken away by subsequent general words. (1 Bl. Com. 91; 19 Vin. Abr. 511, 528; 5 Day's Com. Dig. 326, 330; 4 Bac. Abr. 644, 650.) If reason is to be at all applied to the acts of congress, if the elementary rules of the law are to be guides to the interpretation of the statutes, I am utterly at a loss to divine one, which can authorize the construction which the counsel for the respondents put upon the act of 1802. All semblance of reason for making the delivery of a copy to the secretary of state essential to a copyright in the reports of the decisions of this court, seems to me to disappear before the act of 1817, which requires the reporter to deposit eighty copies in the office. As a matter of notice to the respondents, or of any concern to the public, the difference between the delivery of eighty or eighty-one copies in the same office, is certainly extremely small; if the object of the law was, to have the book identified, it could as well be done by any one of the eighty copies delivered under the reporter's, as by the one delivered under the copyright act. The latter has no ear-mark by which it can be distinguished from the others; and surely it is testing the reason of the law by a very paltry standard, when an important right of property is made to depend on the question, whether a book was placed on the shelves of the library, or in the lumber-room of the department of state, under the one law or the other; in other words, whether it was done by Mr. Wheaton, the author, by Mr. Wheaton, the reporter, or by Mr. Donaldson, the purchaser. The book is where it ought to be, each copy has the impress of copyright on the title-leaf, and human wisdom cannot discover which copy is the one so essential to secure the right; nor has the law directed any mark to be put upon it, a record of the delivery to be made, or a certificate to be given to the author, as is directed in the recording the copy of the title; nor is any notice of the delivery directed to be published.

It is proved and admitted, that eighty copies of the last eleven volumes were deposited, under the act of 1817, in the department of state. Now, a very simple question arises, shall the omission to deliver the one additional copy, annul the right of a reporter to the interference of a court of equity for the protection of a quiet and peaceable possession and enjoyment of property claimed under color of law, during fourteen years, against a party who has acted in the fulness of actual notice. The spirit of the law forbids it. In England, the omnipotence of parliament is not potent enough to

induce its courts to enforce a law which is against common right and reason. The common law shall control and adjudge it void. (5 Day's Com. Dig. 331; 19 Vin. Abr. 512–13, pl. 15; 1 Bl. Com. 91; 8 Co. 118 *a.*) It is enough for the purposes of this case, that such effect be not caused by construction, as to make a law unreasonable, absurd or unjust, when its terms are not too explicit for explanation, or its mandate too imperative to be disregarded.

That the legislature shall never be *presumed* to exact anything as a condition to the vesting or enjoyment of a right, which is repugnant to to reason, justice or the settled rules of the common law, is a rule of universal application, on which this court has acted, against the express words of an act of congress. The 65th section of the collection act of 1799, authorizes the district court to continue a suit on a revenue bond, "until the next succeeding term, and no longer:" yet it has been twice decided, that "the legislature intended no more than to interdict the party from an imparlance, or any other means or contrivances for mere delay;" not to bar the party from any defence to the suit on the merits. "And certainly, we ought not, in common justice, to presume such an intention without the most express declarations." (6 Pet. 644.) I think the present a case which calls for the application of the same principle; there can be none presented for my consideration, in which there is less reason for extending the provisions of a law by equity, so as to defeat a right of property by construction, or in equity, or in which there are more cogent ones for the most liberal and benign interpretation of the laws enacted for its security.

When the law points an author to certain acts, on the performance of which his rights to its benefits are declared to depend, he has notice of his danger, and omits them at his peril; but he is thrown off his guard by a provision, merely directory, explanatory, or constructive of a former law, to which the legislature attach no legal consequence. It would be, in my opinion, an imputation on the faith of the legislature, to presume, that they intended to make anything indispensable to the title, which they had not declared to be so; the author, whose property would be deprived of security, under which it had been placed, might justly complain of the want of notice of his danger; and the duty of a court would seem to me a plain one, not to permit it to become extinct, unless the law compelled them to surrender the justice of the case to its positive commands. I can perceive, in the act of 1802, no such provisions, nor any words which can warrant the construction contended for; considering this and the act of 1790 as involving only a question of property.

But there is another view of the act of 1802, which is inseparably contected with the copyright. By the fourth section, a penalty of one hundred dollars is imposed on any person who publishes a book with the impress of copyright, if he has not legally acquired it. (2 U. S. Stat. 172.) This, then, is a penal law, by which a penalty has been incurred for the publication of every volume of Wheaton's reports, either in a first or second edition. If he has not secured the copyright according to law, the penalty attaches for claiming property in them, for "impressing thereon that the same has been entered according to act of congress, or words purporting the same, or that the copyright has been acquired." The same assertion in print, how

ever strongly the author may be convinced of its truth in law and fact, is made at the peril of a heavy penalty. The law is express: if he has not legally acquired the copyright, the penalty must be paid to a common informer and the United States. The author's copyright, and his money, share a common fate. If, "according to the course and principles of courts of equity," by which the relief asked for is to be granted or refused, we are bound or at liberty to so construe the laws concerning copyright, as to adjudge that the complainants are entitled to no relief, unless they prove, before a jury, the publication of the record of the title, and the delivery to the secretary, we, by the same decree, declare them liable to a penalty, if sued for in two years. So that whatever construction the acts of 1790 and 1802 shall receive on the question of property, becomes fastened on them as a question of a penal forfeiture, and must be made by the same rules.

The whole question then is, whether such laws shall be construed strictly, so as to save both property and a penalty, or liberally, benignly, and by equity, to forfeit a right, and subject the party to a penal action for claiming it; the controversy is narrowed to this point, and the rights of the litigant parties depend upon the rule by which such a statute must be expounded. The foregoing are the reasons on which I have come to the conclusion, that it must be so construed as to avoid all forfeitures and penalties not imposed or incurred by plain, express enactments, the consequence of which ought to be, a decree for an account, and a perpetuation of the injunction.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the eastern district of Pennsylvania, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the judgment and decree of the said circuit court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said circuit court, with directions to that court, to order an issue of fact, to be examined and tried by a jury, at the bar of said court, upon this point, whether the said Wheaton, as author, or any other person, as proprietor, had complied with the requisites prescribed by the third and fourth sections of the said act of congress, passed the 31st day of May 1790, in regard to the volumes of Wheaton's reports, in the said bill mentioned, or in regard to one or more of them, in the following particulars, viz., whether the said Wheaton or proprietor did, within two months from the date of the recording thereof in the clerk's office of the district court, cause a copy of the said record to be published in one or more of the newspapers printed in the resident state, for four weeks; and whether the *said Wheaton, or the proprietor, *699] after the publishing thereof, did deliver or cause to be delivered to the secretary of state of the United States, a copy of the same, to be preserved in his office, according to the provisions of the said third and fourth sections of the said act; and that such further proceedings be had therein, as to law and justice may appertain, and in conformity to the opinion of this court.

Ex parte The UNITED STATES: In the Matter of the UNITED STATES, Plaintiffs, *v.* ANSON G. PHELPS, ELISHA PECK and WILLIAM E. DODGE.

Bond for duties.

Under the 65th section of the duty act of 1799, where a bond has been given for duties, and errors in the calculation thereof are alleged on affidavit, at the first term to which suit has been brought on the bond; a delay of one term is allowed for the purposes of examination and correction. Where there is a real defence to the claim on the bond, an opportunity to obtain evidence by a continuance, according to the circumstances of the case, must be given.

MOTION for a *Mandamus* to the district judge of the United States for the Southern District of New York.

Butler, Attorney-General of the United States, moved for a *mandamus*, to be directed to the district court above mentioned, commanding it to vacate a rule entered on the 12th day of March instant, in a certain cause pending in said court, between the United States of America, plaintiffs, and Anson G. Phelps, Elisha Peck and William E. Dodge, defendants, by which rule the said court ordered the trial of said cause to be continued until the term of August next. The facts disclosed by the affidavits and other papers, on which the motion was founded, were:

The suit of the United States against Phelps and others, was brought to recover the sum of $1678.70, being the ascertained amount of duties due on a custom-house bond, given for an importation of certain lead weights and basins, for the house of Phelps & Peck. The *capias* was issued on the 10th of February last, returnable on the 13th of that month, the February term of that court. On the return-day, a declaration was filed and served, and time allowed to plead until the 15th of February, when the defendants, after *oyer* of the bond and its condition, pleaded *non est factum*, and gave notice that they would prove, that the officers of the customs committed an error in rating the said articles as liable to a duty of three cents per pound, instead *of rating them as liable to an *ad valorem* duty of fifteen per cent.; that the bond, instead of being taken for $1678.70, [*701 ought to have been taken for only $331.07, &c. On the same 15th of February, the defendants made oath, that an error had been committed in the liquidation of the duties demanded on the bond; and that the same had been notified to the collector, prior to the commencement of the said return-term; whereupon, the court granted a continuance until the next succeeding March term.

At the March term, viz., on the 11th of March instant, the plaintiff's attorney moved to proceed to trial, but the defendants, in pursuance of previous notice, moved the district court that a commission be issued to Liverpool, to take the examination of material witnesses residing in Great Britain. The district-attorney objected, that the court was restrained by the act of congress from allowing a continuance for a longer term than the said term of March, the cause having been continued from the return-term of the writ, until that term; but the court being of opinion, that the defendants were entitled to make their defence by witnesses, and to have a reasonable delay of trial, for the purpose of procuring testimony, overruled this

objection, and granted the rule applied for; for the vacating of which by *mandamus*, the present motion was made.

The *Attorney-General* contended, that although a defendant in a suit on a revenue bond has, under the provisions of the 65th section of the duty act of 1799, ch. 128, a full right to procure evidence for his defence, yet this can only be done in conformity with the provisions of the law, after judgment has been entered for the United States. There is an allowance of a term, if an affidavit is made of an error in the calculation of the duties; but at the second term after the institution of the suit, judgment, under the imperative command of the law, must be entered for the United States. Proceedings to obtain testimony will be allowed, and all the relief the defendant asks from the judgment, while procuring the testimony, will be extended to him by the court. But the judgment will remain a security for
*702] whatever shall be ultimately *ascertained to be due to the United States. He cited, *Ex parte Davenport*, 6 Pet. 661.

Maxwell, contrà, denied the construction given to the act of congress by the attorney-general. The right of a party to obtain evidence arose from the great principles of justice; and this right ought not to be, nor could it be, impaired. It was secured by the provision in the constitution, which gives the trial by jury. The true interpretation of the 65th section of the act of congress gives the opportunity to procure testimony. The delay allowed until the next term, when the duties were, on affidavit, alleged to be erroneously estimated, was given to procure testimony, or review the calculations of the duties, to maintain the allegation. This clearly shows that the law intends to afford the opportunity; and the length of the time to be allowed will be in the discretion of the court. In this case, the testimony was to be obtained in Great Britain, where the witnesses resided. The terms of the district court of the southern district of New York are monthly. This suit was instituted on the 13th of February 1834; the first term commenced on the 15th of the same month; the second term began on the 11th of March, and thus, in less than a month, if the law is as claimed for the United States, the defendants, in that brief period, were to collect their testimony, or a judgment be entered for the United States. That a judgment shall be entered to bind the property of the defendants, and thus impose a heavy burden upon them, would not be justifiable or reasonable. The district judge, in ordering the cause to be continued until August next, to allow time to obtain the evidence from England, did not misconstrue the act of congress; but exercised, as he had a right to do, a legal and just discretion upon the matter, with which the court will not interfere.

McLean, Justice, considered, that if the construction of the act contended for by the United States, was correct, he would be disposed to think congress had exercised a power beyond the authority given by the constitution. It would be depriving the party of his right to a trial by jury.

*703] *Marshall, Ch. J.—The court are unanimous in refusing the motion. The object of the section in the duty law is to secure the

prompt collection of duties, indisputably ascertained. When there are errors in calculating the duties, and they are alleged, on affidavit, the delay of one term is allowed. And where there is a real defence, an opportunity to obtain evidence, by a continuance, according to the circumstances of the case, must be given. There cannot be a case of this description, where the opportunity should be denied. *Mandamus* refused, and the motion overruled.

Motion denied.

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APPENDIX.

I.

Argument of MR. CALL, the Counsel for the UNITED STATES, in the Supreme Court, in the cases of the UNITED STATES *v.* GEORGE J. F. CLARKE, JOHN and ANTONIO HUERTAS, JOSEPH H. HERNANDEZ, *et al.*

THE right which Spain acquired by discovery and conquest on this continent, was universally acknowledged and acquiesced in by all the nations of Europe, and has never been denied by the government of the United States. According to the laws and policy of Spain, as well as the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation; and the exclusive power to grant them is declared to reside in the crown, as a branch of the royal prerogative. (White's Compilation 41.) The fee of the crown could only be divested by the king himself, or by the persons to whom his power was specially delegated, and in the form and manner prescribed for their government. The exercise of the granting power by any other person, or in any other manner, would convey no estate in the land to the nominal grantee; it would not divest the fee of the crown, and would be, to all intents and purposes, an absolute nullity.

The 6th section of the act of 1828, gives jurisdiction to the superior courts over all claims to land in Florida, embraced by the treaty. The terms "embraced by the treaty," as employed in the statute, can include only those claims which the treaty imposes an obligation on this government to confirm. The English version of the 8th article has been rejected, and the Spanish version of the treaty has been adopted by the court; and from a proper translation of the language used by the Spanish minister, without regard to the language, understanding and obvious intention of the American negotiator, we must determine, on the one hand, the rights secured to the people of the ceded territory, and on the other, the obligations and responsibilities imposed on the United States.

According to the translation of the 8th article of the treaty, as made *by the translator of foreign languages for this government, "all grants of land made [*706 by his Catholic Majesty, or by his lawful authorities, before the 24th of January 1818, in the said territories, which his majesty cedes to the United States, shall remain ratified and confirmed to the persons who are in possession of them, in the same manner that they would have been, if his majesty had continued in the dominion of the said territories." This clause of the treaty contemplates perfect titles; titles given after the performance of all the conditions of the grant, either expressed or implied in law; grants which, previous to the date of the treaty, had been confirmed and ratified by the king, or by his lawful authority. Any grant, not ratified and confirmed before the date of the treaty, could not remain ratified and confirmed after the date of the treaty. Until it had been ratified and confirmed, it could not remain ratified and confirmed; the confirmation must have had being, before it has continuance and remainder. This appears to be the plain and natural interpretation of the first clause of the 8th article. But for a more perfect illustration of the intention of the Spanish negotiator (and we will at present consider his intentions alone, without regard to

the intentions of the other party to the contract), it is only necessary for one moment to examine the laws and ordinances, rules and regulations, provided by the Spanish government, for the disposal of the royal domain.

Until after the date of the royal order of 1815, there was neither law, ordinance nor local regulation in East Florida, which authorized a grant of land for any other purpose than that of habitation and cultivation. This opinion is advanced with confidence, because the united efforts of numerous and learned counsel, in behalf of the claimants, in this and in the court below, have been unable to produce any authority; and the judge, although he decides otherwise, has been unable to refer to any such law, although specially required to do so in his decree, by the act of 1824.

The laws of the Indies, authorizing grants of land, forbid the investment of title in the grantee, until he shall have inhabited and cultivated the land during four years. (Land Laws, law 1, lib. 4, tit. 12, p. 967; Ibid. law 2, p. 968.) If the grantee failed to comply with the condition of his grant, he acquire no right, and the land was granted to some other individual. (Ibid. law 2, p. 969.) One of those conditions was, that the grantee should take possession of the land, within six months from the date of the grant, and on failure to do this, he lost his right of occupancy. When the condition was not expressed in the grant, it was nevertheless always understood: "That all concessions in which no time is specified, shall become extinct, and shall be considered as null, if the persons to whom they are made do not take possession, and cultivate the same, within six months." (Land Laws, p. 1001, 4th article of the regulations of the 12th October 1803.) That this was the rule governing the grants in
*707] East Florida, is fully *shown by the opinion of Don Ruperto Saavedra, judge of the province, given on the 27th October 1818, at the instance of the agent of the duke of Alagon. In the seventh article of his report, found at page 252 of White's Compilation, he says, "that the concessions made to foreigners or natives, of large or small portions of land, carrying their documents with them (which shall be certificates issued by the secretary), without having cultivated, or even seen the land granted them; such concessions are of no value or effect, and should be considered as not made, because the abandonment has been voluntary, and they have failed in complying with the conditions prescribed for the encouragement of population." Had Florida remained under the dominion of Spain, the grant to the duke of Alagon would have been invalid, and other grants within its limits would have been subjected to the rule above mentioned.

The first article of the instructions given to the surveyor, George Clarke, found at p. 1003 of the Land Laws, shows the distinction taken between perfect and imperfect titles to land in East Florida: "The possessors of lands in this province shall be considered under three classes; 1st, as proprietors; 2d, as grantees; and 3d, as grantees and proprietors. The first are those who hold lands by titles not obtained by grants from the government. (These were English inhabitants who remained in the province after the treaty of 1783, and who held lands by patent from Great Britain.) The second are they who, on compliance of certain conditions of time and labor, will get titles of property. And the third are those who have acquired those titles." The following opinion of the notary of government of the royal domain, whose duty it was to countersign all complete grants, under his official seal, will further show the distinction between a complete and incomplete grant, and will show the usage and custom of tho province, until the month of October 1818, the time when it bears date. It will be found at p. 250 of White's Compilation.

"As I best can and ought to do, I certify and attest, that the conditions prescribed by this government for grants of land to which the decrees of the 2d inst. placed on the proceedings refer, are the same which appears in the foregoing title delivered in favor of Don John McQueen, dated on the 12th of March 1804, which conditions subsisted in all their force until the year 1815, when the then governor of this place, Brigadi Don Sebastian Kinderlan altered them, at his discretion, granting lands under the single circumstance, that when the grantee proves that he has cleared them, built houses, fences, and other things necessary for the improvement of a plan

tation, the title of proprietorship should be delivered to him, as has been done to several who have not passed the ten years' possession poin'ed out in said title of McQueen, as appears from the different proceedings in the archives in my charge, to which I refer; and in compliance with orders in said decree, I sign and seal these presents in St. Augustine, &c., October 1818."

The regulations of Governor White required ten years' residence to *enable [*708
the grantee to obtain a perfect title. Governor Kindelan, in 1815, altered this regulation, and granted the land in absolute property, in proportion to the working hands each family possessed, whenever they could prove satisfactorily that they had performed the conditions of "clearing land, building houses, fences and other things necessary for the improvement of a plantation." This alteration appears to have been the only one made by Governor Kindelan, as the largest grant confirmed by him or his predecessors, up to and inclusive of the year 1815, was the grant of McQueen, for 3275 acres, and that on proof of the number of his family and slaves, and of his having complied with the conditions of cultivation and improvement.

The royal order of 1735 required, that all perfect titles should be given by the king, after the grantee had performed the four years' residence and cultivation required by the laws of the Indies. To remedy the inconvenience arising from this regulation, the royal order of 1754, found at p. 973 of the Land Laws, was issued, which vested the power of appointing sub-delegates and judges for the disposal of the royal domain, in the presidents and viceroys of his American dominions. The fifth article of the royal order authorizes the confirmation of all imperfect grants, where the grantee had complied with the conditions of the grant, and where the quantity claimed was no more than the party was entitled to. By the 81st article of the ordinance of 1768, the power of granting and confirming titles to land was vested in the intendents. (See Land Laws 972.) The royal order of 1774 repealed this article of the ordinance of 1768, and conferred the granting power on the civil and military governors. The royal order of the 22d of October 1798, so far as it regards the provinces of Louisiana and West Florida, invested the intendent with full and exclusive power to grant "all kinds of lands" (see White's Compilation 218). In East Florida, the royal order of 1774 remained unrepealed in every particular, and the granting power continued to be exercised by the governors of that province.

From the preceding laws, ordinances, royal orders and official reports, the court will readily perceive the difference between a title in full property, and an inchoate title, where the fee is yet in the crown, and to be divested only on the performance of a condition precedent of the estate; the difference in the language of the treaty between a grant ratified and confirmed, and a grant to be ratified and confirmed after the performance of the conditions of habitation and cultivation. This difference will be still more fully illustrated by a comparison of the form of the imperfect title, which was always given in the first instance, with the perfect, or "ratified and confirmed" title, given after the performance of all the conditions of the grant. The imperfect title consisted always of the petition of the grantee, and the order or decree of the governor, under which the party was permitted to take possession of the land, and to enjoy its use and possession, until by his habitation and cultivation during the time prescribed, he became entitled to have his *grant confirmed. The petition [*709
and decree or order of the governor, found at pages 6 and 7 of the record, in the case of the United States *v.* John Huertas, No. 82, presents the ordinary form of an inchoate title, or a title intended afterwards to be confirmed, when the conditions should have been performed, with the exception of the following words, which are altogether unusual. "With the precise condition, to use the same for the purpose of raising cattle, without having the faculty to alienate the said tract, either by sale, transfer, contract of retrocession, or by any other title, in favor of a stranger, without the knowledge of this government." These unusual and extraordinary restrictions prove the intentions of the governor to have been, only to grant the use and occupation for the purpose of "raising cattle," and not to give the incipient title, afterwards to be matured into a perfect grant. At page 8 of the same record, will be found the

form of a perfect title, or a "ratified and confirmed" title, such as could only be given, after the performance of the conditions, either expressed in the imperfect grant, which it is intended to confirm, or implied in law. The court will perceive, by comparison, that the concluding part of this instrument conforms almost literally to the latter clause of the fifth article of the royal regulation of 1774, found at p. 974 of the Land Laws, which provides, that "the confirmation of the patents of the possessors of these lands shall be given in my royal name, by which their property and claim in the said lands shall be rendered legal." That this royal order and the several laws of the Indies, to which it relates in the second article, and found from p. 967 to p. 971 of the Land Laws, were in force in East Florida, we have the most conclusive proof, furnished by the royal order of the 8th June 1814, found at p. 1010 of the Land Laws. By the latter order, the king commands the royal order of 1754, and the laws of the Indies, to be observed and obeyed.

The court is respectfully referred to those laws and those royal orders, which, with the royal orders of 1790 and 1815, and the local regulations founded upon them, formed the entire code and system for granting lands in East Florida. All grants made and confirmed according to these laws, royal orders, and local regulations, are, according to the decision of the court in the case of Arredondo and Son, confirmed by the Spanish version of the treaty. All grants made in contravention of these laws, royal orders, and local regulations, are made without authority. They are not made by the "lawful authorities of his Catholic Majesty," and were, therefore, void before, and cannot have been ratified and confirmed by the treaty.

Having shown that the terms, "shall remain ratified and confirmed," as expressed in the first paragraph of the eighth article of the treaty, can be applicable only to those grants which have been confirmed by the Spanish government, before the time limited in the treaty; and having shown from the laws and usages of Spain, what is the nature and form of such a grant; we are now the better enabled to discuss the nature of an imperfect title, and to decide what rights the grantee had under it, *and what responsibility was imposed on the United States to confirm these grants.

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The following is the language of the last clause of the eighth article, which expresses, very clearly, the intention of the Spanish negotiator; at the same time it shows the nature of the imperfect titles, intended to be confirmed on the occurrence of the contingency, on which the right of confirmation might be claimed by the grantee. "But the proprietors who, in consequence of the circumstances in which the Spanish nation has found itself and the revolutions of Europe, have not been able to fulfil all the obligations of their grants, shall be obliged to fulfil them according to the conditions of their respective grants from the date of this treaty, in default of which they shall be null and void." Without perverting the terms employed, and distorting the obvious intention of the negotiator, this clause of the treaty cannot be made to apply to any other than imperfect titles, grants made on conditions which remained to be performed, at the date of the treaty, and which, until the performance of those conditions, entitled the grantee to no estate in the land. It cannot be so construed as to confirm any imperfect grants, by its own action, but imposes an obligation on this government to confirm them, provided the conditions shall have been performed by the grantee, within the time specified in the same clause of the treaty. It proves, as do the laws, ordinances and royal regulations of the Spanish government, that all these grants depended on conditions precedent, and with them, as with us, the condition must be performed, the contingency must occur, before the estate can arise or take effect. If all the conditions be performed, within the time specified in the treaty, an obligation is imposed on the United States, by the treaty, to confirm the title. If all the conditions be not performed, within the time stipulated, then the grant is, by the force and effect of the laws of Spain, no less than by the express provision of the treaty, for ever "null and void."

The first and second clause of the 8th article of the treaty, when taken and construed with each other, according to the translation of the Spanish version, ratifies and confirms all grants ratified and confirmed by his Catholic Majesty, or his lawful

authority, before the 24th of January 1818, and it imposes an obligation on the American government to ratify and confirm all imperfect grants made by his Catholic Majesty, or his lawful authorities, before the 24th of January 1818, to the same extent that they would have been valid, or in the "same manner that they would have been" (ratified and confirmed), "if his majesty had remained in the dominion of the territories." If the Spanish word, "*concesiones*" be translated concession, instead of grant, it cannot vary, in the most remote degree, the construction given to this article of the treaty. In technical phrase, there is with us a difference between concession and grant. The one generally implies an imperfect, the other a perfect grant. But the term, as expressed in the first and second clause of the 8th article, can only mean the grant or the title which the claimant may have. If rendered "concession," in English, and understood to mean imperfect titles which had not been *confirmed by the [*711
Spanish government, then they could not remain ratified and confirmed, because they must have been confirmed and ratified, before they can so remain. If they are ratified and confirmed concessions, they are perfect grants, by which the crown has been divested of the fee, and they remain ratified and confirmed by the treaty. The court will then perceive, that the language of the 8th article of the treaty, gives the best explanation of the term "*concesiones*," and shows that it was intended by the Spanish negotiator, to signify grant or title, perfect or imperfect, or the land granted, as its meaning is varied by other terms with which it is associated in the first and second clause of the treaty. When it speaks of a concession which shall remain confirmed, it means a title which has been confirmed; and when it speaks of a concession to be confirmed on the performance of certain conditions, it means an imperfect or inchoate grant or title.

With this understanding of the 8th article of the treaty, and the distinction and manifest difference between confirmed grants or titles in full property, by which the crown was divested of the fee, and imperfect titles, where the party had obtained only the first decree by which he went into possession of the land, when he was merely progressing in the performance of those conditions imposed by law, and where the fee still continued in the crown, as we have shown by the laws and usages of Spain, and the form of the respective titles given in either case, we shall be prepared to decide, what lands were conveyed to the United States, and what lands were confirmed to the inhabitants of the ceded territory, by the stipulations of the 8th article of the treaty.

The treaty conferred no new or additional right of soil on the inhabitants of the ceded territory, it only secured those rights, to the same extent that they had been conferred by the government of Spain. The United States found them as they had been left by Spain. Some with perfect titles to the soil, granted by the lawful authority of his Catholic Majesty. Some with inchoate titles, to be perfected after proof of performance of the conditions of the grant; and others with titles formal an informal, not made by the lawful authorities of his Catholic Majesty, or any other than the self-created authority of the officer by whom they were made, in anticipation of the change of government, and his relief from responsibility. If then, as we think, we have abundantly shown, that in no case, the fee of the crown was divested, until after the performance of the conditions of the grant, and then, only by that formal deed or grant prescribed by the 5th section of the royal order of 1754, found at p. 974 of the Land Laws; and, according to the 18th article of the regulations of Morales, found at p. 984 of the Land Laws, which refers to other preceding articles that contain the same provision, and declares, that no one of those who have obtained the first decree or imperfect title, "notwithstanding, in virtue of them, the survey has taken place, and that they have been put in possession, can be regarded as owners of land, until their real titles are delivered, complete with all the formalities before recited;" it must follow, as a natural result, that the fee in all *lands within [*712
the ceded territory, not embraced in real titles or formal and complete titles, passed to the United States by virtue of the treaty. The estate must rest somewhere. The king had not conveyed it to the claimant, he held it as a security for the faithful

performance of the conditions on which it was to be given; and if it did not vest in the United States, by virtue of the treaty, the king of Spain is yet the proprietors of millions of acres of land in a territory, which he declares, in the 2d article of the treaty, he cedes in full property and sovereignty to the United States.

We think, then, that the United States is vested with the fee in all lands claimed by imperfect titles, or illegal titles from the government of Spain; that when the claimant under these imperfect titles made by the lawful authority of his Catholic Majesty shall prove a compliance with the conditions of his grant, within the time prescribed by the laws of Spain, and the treaty, the United States will be bound to confirm his title, to the same extent that such title would have been valid under the government of Spain.

The nature of those conditions, and the time within which they must be performed, can only be determined by the laws under which they are imposed, and the provisions of the treaty by which they are recognised and required to be performed. A treaty is a contract between two nations, and may, in many respects, be construed by the rules which govern contracts between individuals. The intention and understanding of the parties, is to be sought in the language in which they have contracted with each other; and they are only bound to the extent of their understanding and intention in creating the obligation. The 8th article of the treaty imposes an obligation on the United States. She contracted, in her own language, and is responsible to the full extent of the obligation which she created, and to which she assented in the negotiation. But can she be responsible under a contract not understood, and to which her consent was never given? On this subject, Vattel observes, at page 310: "But it is asked, which of the contracting parties ought to have his expressions considered as most decisive, with respect to the true sense of the contract; whether we should stop at those of the power promising, rather than at those of him who stipulates? The force and obligation of every contract arising from a perfect promise, and he who promises being no further engaged than his will, is sufficiently declared; it is very certain, that in order to know the true sense of the contract, attention ought principally to be paid to the words of him who promises; for he voluntarily binds himself by his words, and we take for true against him what he has sufficiently declared."

It is provided in the English version of the 8th article of the treaty, that "all grants of land made before the 24th of January 1818, by his Catholic Majesty, or by his lawful authorities in the said territories ceded by his majesty to the United States, shall be ratified and confirmed *to the persons in possession of the land, to the same extent that the same grants would be valid, &c." This is the obligation imposed by the contract, and which, in good faith, she is bound to observe. That which is sought to be enforced against her, is written in a language which she did not comprehend, and to which her assent was never given. It is according to the translation of the Spanish version of the eighth article of the treaty, "all grants of land made by his Catholic Majesty, or by his lawful authorities, before the 24th of January 1818, in the said territories which his majesty cedes to the United States, shall remain ratified and confirmed to the persons who are in possession of them, in the same manner, &c." The term "them" refers to the "grants of land," and it is contended, that the United States are bound, under this stipulation, to confirm the grants to the persons in possession of them (the grants), instead of the persons who are "in possession of the lands;" according to the express stipulation made in the English language. If thus understood, they are separate and distinct obligations; they impose responsibilities essentially different from each other. The United States are not bound by both, and the question arises, which of them her national faith is pledged to redeem? She can only be required to execute her contract: her contract is to confirm the "grants of land" to the persons in possession of the "lands," and not to confirm the grants of land to the persons in possession of the *grants* or title papers. It is believed to be a rule in diplomacy, and one invariably observed by all civil nations, to negotiate in their own language, and to be bound only by the contract expressed in that language. If this principle be correct, then it is obvious, that the

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United States are not bound to confirm the grants or titles to the persons in possession of "them;" but to confirm the grants to the persons in "possession of the land."

The eleventh article of the treaty provides, that the United States shall pay to our merchants, on account of spoliations committed on our commerce, a sum not exceeding $5,000,000. This obligation is clearly expressed in the English language, and shows the will and intention of the negotiator, by which the nation is bound. Suppose, in the Spanish version of the same article, when translated into English, it should be found that the stipulation was to pay the five millions to the king of Spain, would any one seriously contend that the United States are bound to pay this money to the king of Spain, or to pay it to any other person, or in any other manner than she had promised to pay it? The cases are parallel, and the reasons the same. The government has the same legal right, in a controversy with individuals, that it would have in a controversy with a foreign nation, and the treaty must be construed according to the same rules.

There are other reasons why the English version of the treaty should prevail, and be in force. It expresses, beyond doubt, the understanding and intention of both the contracting parties, at the time of the negotiation; as is fully shown by the following extract from the correspondence of Mr. Adams, Don Onis and M. de Neuville. Executive Papers, vol. 1, p. 46, 68, 69; 1819–20.

*"The minutes upon the eighth article, compared with the draft in the project of M. de Onis, with that of the counter-project by the secretary of state, and with the article as finally expressed in the treaty, fully elucidate the understanding of the parties, that the grants of land dated before as well as after the 24th of January 1818, were annulled, excepting those upon which settlements had been commenced; the completion of which had been prevented by the circumstances of Spain, and the recent revolutions in Europe. M. de Neuville's particular attention is requested to the difference between the two projected articles, because it will recall particularly to his remembrance, the point upon which the discussion concerning this article turned. By turning to the written memorandum drawn up by Mr. de Neuville himself, of this discussion, he will perceive that he has noted that M. de Onis insisted, 'that this article could not be varied from what was contained in the chevalier's project, as the object of the last clause therein, was merely to save the honor and dignity of the sovereignty of his Catholic Majesty.' [*714

"It was then observed by Mr. Adams, that the honor and dignity of his Catholic Majesty would be saved by recognising the grants prior to the 24th of January, as 'valid to the same extent as they were binding on his Catholic Majesty,' and he agreed to accept the article as drawn by M. Onis, with this explanation (see M. de Neuville's memorandum). It was on this occasion, that M. de Neuville observed, that if the grants prior to January 24th, 1818, were confirmed only to the same extent that they were binding on the king of Spain, there were many *bonâ fide* grantees, of long standing, in actual possession of their grants, and having actually made partial settlements upon them, but who had been prevented by the extraordinary circumstances in which Spain had been situated, and the revolutions in Europe, from fulfilling all the conditions of the grants; that it would be very harsh, to leave these persons liable to a forfeiture, which might, indeed, in rigor, be exacted from them, but which very certainly never would be, if they had remained under the Spanish dominion. It will be well remembered by M. de Neuville, how earnestly he insisted upon this equitable suggestion, and how strongly he disclaimed for M. de Onis every wish or intention to cover, by a provision for such persons, any fraudulent grants. And it was then observed by M. de Neuville, that the date assumed of 24th of January 1818, was not sufficient for guarding against fraudulent grants, because they might be easily antedated. It was with reference to these suggestions of M. de Neuville, afterwards again strenuously urged by M. de Onis, that the article was finally modified as it now stands in the treaty, declaring all grants subsequent to the 24th of January 1818, absolutely null, and those of prior date valid to the same extent only, that they would have been binding upon the king, but allowing to *bonâ fide* grantees, in actual possession, and

having commenced settlements, but who had been prevented by the late circumstances of the Spanish nation and the revolutions in Europe, from fulfilling *all* the conditions of their grants, time to *complete* them. It is needless to observe, that as these incidents
*715] do not apply to either of the grants to Alagon, *Punon Rostro, or Vargas, neither of those grants is confirmed by the tenor of the article as it stands; and that it is perfectly immaterial in that respect, whether they were dated before or after the 24th of January 1818, it being admitted on all sides, that these grants were not binding upon the king, conformably to the Spanish laws. The terms of the article accord precisely with the intentions of all the parties to the negotiation and the signature of the treaty. If the dates of the grants are subsequent to the 24th of January 1818, they are annulled by the date; if prior to that date, they are null, because not included among the prior grants confirmed."

This shows the sense in which the term grant was expressed and understood by Don Onis, and it shows the persons who were intended to be embraced by the treaty. It was not those persons who had obtained conditional grants, who held "them" in possession, and had not settled on, or even seen the land granted to them; but *bonâ fide* grantees of long standing, in actual possession of their grants and having actually made partial settlements upon them, but who had been prevented by the extraordinary circumstances in which Spain had been situated, and the revolutions in Europe, from fulfilling all the conditions of their grants. No one can read this correspondence and resist the conviction, that it was the intention of both parties to the negotiation, to provide for the confirmation of grants to the persons in possession of the land, and that by the possession of the *grants* was meant the *possession of the land.* To use the expression in any other sense, would involve an absolute absurdity. In propriety of speech, we could not say, that a person had actually made partial settlements upon the grants, unless we understand by the term grants, the lands granted, instead of the title-papers. As this is evidently the sense in which it was understood in the correspondence, we may naturally infer, that the same terms were understood in the same manner, when afterwards adopted by the same parties in the treaty.

The letter and spirit of the whole of the eighth article of the treaty, both in the English and Spanish languages, give further proof that such was the intention of the parties. The terms of the treaty, as well as the laws of Spain, to which we have already invited the attention of the court, show that the grants were made on conditions precedent. These conditions were, that the grantees should, according to the fourth article of the regulations of 1803, found at p. 1001 of the Land Laws, take possession of and cultivate the land granted to them, within six months from the date of the grant, and on failure to do so, that the grant should be void. Habitation and cultivation being the condition required by the laws of Spain, as well as by the treaty; and as the grantee could not inhabit or cultivate, without being in possession of the land, it is self-evident, that the treaty required the claimant to have been in possession of the land, and in progress with the performance of the conditions on which his confirmation of title might be acquired.

Except in the few cases where grants were made for military services, under the
*716] royal order of 1815, all grants made in the *province of East Florida were, in consideration of habitation and cultivation, to be performed by the grantee. Under the government of Spain, those persons would not be entitled to the land, until they proved a performance of all the conditions of the grant. The treaty places them under the government of the United States, on the same conditions; and to say, the possession of the title-papers or grants, shall be substituted for the possession, habitation and cultivation of the land, required no less by the treaty than by the laws of Spain, is to defeat both the treaty and the law, and to confirm titles to millions of acres of land, which, under the Spanish government would never have been confirmed. There is now, and has been, in suit in the courts of Florida, more than ten times the quantity of land to which confirmed titles were given by the Spanish government, and where the claimants are in possession of the grants or title-papers, without ever having seen the land which they claim.

The conditions imposed by the laws and usages of Spain, and enforced by the treaty, were not, that the claimant should have possession of his grant or title-papers, for copies of those, duly certified, were always given to him, at the time of making the concession; but that he should enter into possession of the land, should cultivate and improve it, and make it his home for four years at least; to entitle him to a grant in fee-simple. The truth of this proposition is fully shown by the following laws of the Indies, found at p. 968 of the Land Laws: "To those who shall have lands and lots in the new settlement of any province, there shall not be granted or distributed any lands in another province, unless they shall have left their first residence, and proceeded to reside in the new settlement, except they shall have continued the four years, necessary to acquire property in the lands, &c.;" "and we declare the allotment of lands made contrary to this our law, to be null." As a further evidence that the conditions required to be performed by the treaty, were possession, habitation and cultivation, the court is respectfully referred to law 1, tit. 12, book 4, of the Laws of the Indies, Vol. 2, a translation of which is found at p. 967 of the Land Laws, which provides, that "after a residence in those settlements (referring to the settlements required by the preceding part of the same laws to be made on the land by the grantees) for four years, and labor therein, we grant them power thereafter to sell their possessions, or dispose of them at pleasure, as their own property."

We have already shown, by the royal order of 1814, that these and other laws containing the same provisions, were in force in Florida. That until after the receipt of the royal order of 1814, ten years' habitation and cultivation were invariably required, before the grantee could acquire a title to the land in full property. That in the year 1815, according to the statement of Entralgo, notary of government, found at p. 250 of White's Compilation, Governor Kindelan altered the regulations of Governor White, of the year 1803, which required ten years' habitation and cultivation, and "granted lands, under the single circumstance, *that when the grantees [*717
proved that they had cleared them, built houses, fences and other things necessary for the improvement of a plantation, the title of proprietorship should be delivered to them." This appears to have been the custom ever after, until 1818. Entralgo states, that this alteration was made at the discretion of Governor Kindelan; but the court will perceive, from the time when the alteration was made, that it was under the royal order of the 8th of June 1814, addressed to the governor of St. Augustine (the same Sebastian Kindelan), who made the alteration, commanding him to obey the laws of the Indies and the royal order of 1754, in all things relative to the distribution of lands. This royal order shows, not only that the laws above referred to, were in force in East Florida, but it shows the limited discretion of the governor; and the laws themselves show the limited power conferred on him in making grants of land.

In the case of Percheman, 7 Pet. 87, the court remarked, "had Florida changed its sovereignty, by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government, would have been unaffected by the change." This just and equitable principle is not controverted by the counsel for the United States; on the contrary, it is that for which they contend. We receive the people of the ceded territory with the same "right of property," and none other than that which they possessed under the former government. And the question arises, what is the nature of that right? This court has ever decided that the right of property in lands must be determined by the laws of the country where the land is situated. The law, therefore, must be produced, and by the law individual rights must be determined. We have already referred the court to the laws of Spain, and we have endeavored to show from those laws, that no grants of land in Florida, other than those authorized for military services, by the royal order of 1815, could have been made, except in proportion to the ability of the grantee to cultivate and improve them, and on condition of actual habitation and cultivation. We have endeavored to show by those laws, and we think, not without success, that no "right of property" in land, was conferred on the grantee, until after the performance of all the conditions of the grant, on proof of

which, a title in full property, or "real title," divesting the crown of the fee, was made out and executed, under the hand and seal of the proper officer, and delivered to the grantee. The grant or concession given in the first instance, was ever on conditions precedent, leaving the fee still in the crown, and not to be divested until after the performance of all the conditions. We have shown, that the practice of the province conformed to these laws, at least until the year 1816, without the least variation; that it was continued after that time, until October 1818 (see White's Compilation, p. 250), which creates the strongest presumption against the validity of any grant not made in conformity to those laws, and the long-continued practice under them: a presumption only to be rebutted by producing the authority of the officer by whom the grant is alleged to have been made, not in conformity with that practice.

*718] *With this understanding of the laws of Spain, and the unvaried practice of the provincial government under those laws, until after Don Onis had been commissioned by the king of Spain, to negotiate with the American government for the cession of the Floridas, we cannot be at a loss in understanding what was ceded to the United States, and what is meant by the term "vacant lands" in the second article of the treaty. The term "vacant lands" is well understood to mean the lands of the crown. Law 14, tit. 14, book 4, vol. 2, p. 42, of the Laws of the Indies, a translation of which is found at p. 969 of the Land Laws, declares "that all lands and soil that have not been granted away by the kings our predecessors, or by us in our name, belong to our patrimony and royal crown."

No land or soil was granted, in cases of imperfect titles, where the right of property and of soil was withheld, until after the performance of the conditions prescribed by law, and the lands in all such cases were vacant lands, and passed to the United States; but the claimant came with the lands under this government, with the same right to consummate his title, by a performance of the conditions imposed by law, that he had under the government of Spain. According to the decision of this court in the case of Percheman, p. 87, without the stipulated protection of the treaty, his right of property would "have been unaffected by the change." "It would have remained the same as under the former government." It does remain the same as it was under the former government, by the eighth article of the treaty, which provides, that such claims shall be ratified and confirmed to the persons in possession of the land, to the same extent that the same grants would have been valid, if the territories had remained under the dominion of his Catholic Majesty." The fee not having vested in the grantee, before the treaty, it must have passed to the United States as vacant land, charged with the incipient right of the claimant, under an obligation to perfect that right, and convey the estate in fee-simple, after the performance of the conditions; or the fee is still in the crown of Spain. Nor is this view of the subject changed in the smallest degree, by the enumeration of what is ceded in the second article; "the adjacent islands, dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks and other buildings that are not private property." It never has been contended, that private property was conveyed by the treaty. The king professes to cede only that which belonged to him, and the government claims nothing more. Private property, reserved in the enumeration, refers not to vacant lands, public lots and squares, public edifices, fortifications and barracks; these, from their very terms, show that they were not private property; that they were public property, or property of the crown. But "private property" refers to "buildings." The king ceded all that he had, either of soil or sovereignty, and among other things, "all buildings" that were not "private property."

In the case of Percheman, 6 Pet. 88, the court, in remarking on the difference between the English and Spanish versions of the eighth article of the treaty, observe, "if the English and Spanish parts can, without violence, be made to agree, that con-

*719] struction which establishes *this conformity ought to prevail." From what we have already observed on the subject, it will be shown, that this conformity of construction may be given in all points presented under that article, which affect

materially the interest of the parties. We make this qualification, because we deem it quite unimportant, whether the complete grants, executed with all the legal formality necessary to convey the fee in the land, be considered as ratified and confirmed by the action of the treaty, or whether the treaty requires them to be confirmed. In either case, if the grant was made before the 24th of January 1818, by his Catholic Majesty or his lawful authority, the land was private property, at the date of the treaty, and the government has no interest in it. And in neither case, can the right of inquiry be denied, whether the officer had power to make the grant. This is the first question presented in every case, and if the court is satisfied, that the power has been legally exercised, it must give a decree of confirmation; and if it be not satisfied, the claim must be rejected.

But the other technical variance suggested, is of a more important character; and which, if not reconciled, must operate with peculiar injustice to the government, and defeat the spirit and design of the 8th article, as expressed in both languages. That article was intended to save the validity of grants made by the government of Spain, to the same extent, and no further, than the same grants would have been valid under that government, if Florida had not passed under the dominion of the United States. The English version requires a confirmation to that extent, to the persons in possession of the *land;* the Spanish version requires a confirmation to the same extent, to the persons in possession of the *grants.* By considering the term *grants*, as signifying the land granted, as it was most certainly considered by the negotiators of the treaty, as shown by their correspondence, then the English and Spanish versions of the treaty will correspond with each other, and impose the same obligation on the government of the United States. Both will require the confirmation of grants made by his Catholic Majesty or his lawful authorities, to the same extent that they would have been valid under the former government. If, however, we construe the "possession of the grants" to be the mere possession or custody of the *title-papers*, as contended, then the grants must be confirmed to a greater extent than they would have been valid under the former government. The treaty, in requiring the performance of conditions, evidently contemplates the conditions prescribed by the laws of Spain, and the performance of which must have been precedent to an estate in land. Those conditions were not, as we have shown, the possession of the grants, unless we understand by that term the possession of the land granted. It was not one of the conditions, that the claimant should be in possession of the title-papers, but that he should be in the actual occupancy and cultivation of the land. In common speech, the term *grant* is a figurative expression, from which, in one sense, we understand the land granted; nothing is more common, and nothing better understood; and the sense in which it is intended to be regarded, is to be sought in the expressions with which it is associated. On this subject, Vattel, at p. 315, § 278, remarks, "there are figurative expressions, become so familiar in the common use of language, that *they take place, on a thousand occasions, of the proper terms, so that we ought to take them in [*720 a figurative sense, without paying any attention to the orignal, proper and more direct signification. The subject of the discourse sufficiently indicates the sense that should be given to them." According to this rule of interpretation, the possession of the *grant* in the Spanish version of the eighth article of the treaty can, without "violence," be construed to agree and correspond with the possession of the land granted, as expressed in the English version of the same article. "The subject of discourse," as expressed in that article, in both languages, shows this to have been the sense in which it was understood. The condition required to be performed by both, was habitation and cultivaiion. Actual possession of the land was an essential pre-requisite to habitation and cultivaiton. If we dispense with the first, we cannot require the second, although it constitutes the entire condition required by the language of both the contracting parties, and without the performance of which, both declare the grant to be null and void. If we reject this interpretation, then we depart from all the well-established rules of construction, we do not arrive at the intention and understanding of the parties, from what they have said on the subject; but we take one isolated expression of one of the parties, and give it a meaning by which the whole

force and character of the contract were perverted. If we construe the term, "possession of the grant," in the translation from the Spanish version of the 8th article, to mean the possession of the title-papers, then that term not only defeats the stipulation of the English version, which requires the possession of the land, but it destroys the spirit and letter of the residue of the article, in the language in which it is written.

The interpretation for which we contend, restores harmony and correspondence between the Spanish and English versions of the 8th article of the treaty, and agrees with the letter and spirit of both. We believe it will be adopted by the court, and that in all cases in which the crown of Spain had not been divested of the fee, by a grant in fee-simple, made by his Catholic Majesty or his lawful authority, the first inquiry will be, was the party in possession of the land, at the time contemplated by the treaty; and secondly, has he performed all the conditions required by the treaty and the laws of Spain? if he has, his title must be confirmed, if not, it must be rejected.

When the party had acquired a perfect title, after the performance of all the conditions expressed or implied, the laws of Spain did not require him to remain in possession. The land was his in full property, and he could do with it as he thought proper. The treaty requires no more than was required by the laws of Spain, and the United States require no more than is required by the treaty. The law and the treaty are the tests by which the rights of the United States, and the rights of her adopted citizens are to be determined. The court will administer the law, and the law will dispense justice. But if the fixed and stable principles of the law are to yield to the vague and uncertain presumption drawn from the exercise of power unknown to the law; if we are to presume the law to which we have *referred the court, repealed, because the act of the office is contrary to the law; if we are to presume the existence of other laws, in order to sustain the exercise of the granting power; then the law may not be administered, and justice may not be done. If the law, as known and understood, commands one thing, and another be done, apparently contrary to law, we ask, whether the natural presumption, arising from such premises, be not in favor of the supremacy of the law, and against the validity of the act? If it be, as we believe it is, we respectfully submit to the court, whether both the presumption and the law be not opposed to the claim of each of the present petitioners. We further most respectfully ask of the court, whether the royal order of 1790, which constituted the only authority, and under which all grants professed to have been made, except those for military services, and which authorized "grants of land to be made in proportion to the working hands each family may have," will authorize a grant for fifteen, twenty, and twenty-six thousand acres of land, when the petitioners, by their own showing, prove that the grants were not made "in proportion to the working hands they had." And we ask, whether any other authority, save the apparently illegal act of the officer making the grant, has been produced in favor of the claims presented, and professing to have been made under this royal order?

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We make the same inquiry with regard to the claims presented for military services, all of which expressly profess to have been made under the royal order of the 29th of March 1815, which appears to have been the only authority delegated by the king for that purpose, and we ask, whether the provisions of this order, which effectually limits the exercise of the granting power in favor of the soldiers of the three companies of white militia, of the city of St. Augustine, and the married officers and soldiers of the third battalion of Cuba, can be extended so as to include persons who, by their own showing, prove, beyond the existence of doubt, that they were not soldiers, or married officers, of either of those corps? And we ask, whether the royal order, providing in express terms for a grant of only "a certain quantity of land, as established by regulation in this province, agreeably to the number of persons composing each family," can be so construed, as to confer authority on the governor of the province to grant 25,000 acres of land to one not embraced in this royal order, and who shows that he did not receive the grant agreeable to the number of persons composing his family, and according to the quantity established by regulations in

this province? The regulation referred to is found at p. 1001 of the Land Laws, and authorizes a grant of fifty acres of land to each head of a family, and twenty-five acres for each child or slave above the age of sixteen years, and fifteen acres for each child or slave between the age of eight and sixteen years. To have authorized a grant of land for 25,000 acres, under the royal order of 1790 and 1815, the family of the grantee must have consisted of 998 persons above the age of sixteen years. This extraordinary possession is a fact, in the absence of all proof, which cannot be presumed, to sustain the *granting power, which appears, independently of this, to have [*722
been illegally exercised. The royal order of 1815 proves, that the regulation of the province to which it refers, was in force, and must have continued in force, so long as the royal order by which it was adopted, for it became, and by adoption constituted an essential part of that order. The grants themselves, by referring to this royal order, as the source of power under which they were made, prove that it was in force at their respective dates, and that the governor who made the grant, considered that he had neither power nor discretion beyond that conferred by this order, to make a grant for military services. This proves, most conclusively, that no other law, ordinance or royal order could have been in force at the same time, inconsistent with the provisions of the royal order of 1815. The same remarks are applicable to the royal order of 1790, and the same results ensue. The court will find, on examination, that each of the grants refer to one or the other of these royal orders, as constituting the power of the governor to make the grant. His express reliance on this source of power, repels the presumption that these orders were repealed, or that there were other grants of power which he might legitimately have exercised. We have, then, the evidence of Governor Coppinger himself, to prove, that these royal orders were in force; that in making the grants, he acted under them; and if, according to the ordinary rules of construction, these royal orders do not sustain the authority of the governor in making the grant; then it must follow, that they were made without authority, and are, therefore, void.

In the case of Soulard and others, the court observed, it was important, in order to make a satisfactory decision of the case, that the power of the officer to make the grant, should be produced. That case has been postponed three years, for the production of this authority. The cases now under consideration have been pressed on the court by the learned counsel of the petitioners, and a decision required. If, after the unremitted researches of ten years, with all the facilities and assistance given by the government, they have been unable to find the least authority for making grants of this magnitude, and they still persist in having a decision, it would seem that the decision should be against the validity of the grants.

The time when made, no less than the quantity of the land embraced in the grant, and the persons to whom they were made, all concur in creating a presumption of fraud, designed against this government. They were made in anticipation of the transfer of the province to the United States. They were made about the same time with those of the Duke of Alagon and others, which Don Onis admits were fraudulent and a disgrace to his country. When we have detected the fraudulent design of the monarch himself, in exercising the granting power; when we have compelled him to revoke the grants which he had fraudulently made; can we give greater faith and credit to the acts of his subordinate officers than we give to his, and greater than we are required, by the treaty, to give to the requisitions of the laws and ordinances of Spain? The court will find, on examination, that Don Onis was commissioned *by the king to negotiate with the American government, in September 1816. [*723
And it will find, by an examination of the transcript from the archives of East Florida, that there was near ten times the quantity of land granted, in the year 1817, and from that time until the year 1821, that had been granted, previously, during the whole period of the occupation of that province by Spain, commencing in the year 1783.

The position taken by the learned counsel, in the several cases now before the court, is worthy of remark. He says, "the grantees whose names are herein stated,

and whose cases are now before the court, did not belong to either of the corps mentioned; and in referring to that article, as one of the motives for giving the grants, only intended to indicate the royal sanction to gifts of lands to soldiers for their fidelity in the recent insurrection. It does not say, that his majesty forbids his governors to grant to any other portion of his loyal and faithful subjects; it does not limit the quantity, nor indicate the loyal will that no larger quantity shall be given to those who suffered losses, advanced money, or rendered distinguished services. The recital, therefore, in these grants, that, "whereas, his majesty has been pleased to grant the favors and gratifications proposed by Governor Kindelan to certain officers and soldiers, in land," does not change that pre-existing power under the laws of Spain, nor confine it to that class of subjects alone. It will not be denied, that those embraced by the royal order, are restricted by its provisions, and that they are entitled to no more land than the order authorizes to be granted to them.

Now, if the learned counsel is correct in his conclusions, what an unparalleled instance of injustice and inconsistency is presented by the royal order of 1815! The claimants under the provisions of that order are admitted not to be embraced by the same, and it is, therefore, contended, that they are not restricted to the quantity which the order authorizes to be granted for military services. It is further argued, that the governor had unlimited power, before the date of the order, although no such power has been shown, and yet he has requested grants to be made to the gallant officers and soldiers who served in a protracted and harassing siege, for a few acres of land only, when, without the order, he might, in his own discretion, have rewarded each according to his merit, by giving him such quantity of land as he thought proper. The natural conclusion resulting from these erroneous premises, is, that in consequence of the fidelity, gallantry and patriotism of those who rendered important services during the siege, the governor made a suggestion by which his power to reward them was restricted; and that they are, therefore, entitled to a less reward than others who rendered less important services. This proposition, we think, involves an absolute absurdity, and cannot be sustained by the court. It is evident, there was no power vested in the governor, before the date of the royal order of 1815, to grant lands for military services. If that unlimited power existed before, why should it have been restricted? Why should the soldiers of the three companies of militia of the city of St. Augustine, and *the married officers and soldiers of the third battalion of Cuba, by royal order, be denied the same reward, which, it is contended, the governor had power, both before and after the order, to bestow on others; particularly, when the order professes to grant a reward for their fidelity, and not to deprive them of a bounty, which, before the date of the order, they might have received under the power of the governor?

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*II.

Wheaton *v.* Peters.

Circuit Court. In Equity.

OPINION OF JUDGE HOPKINSON.

It is not necessary, at this time, to set forth all the details contained in the bill of complaint. It is sufficient, for the present purpose, to say, that the complainants claim to have a copyright, under the statutes of the United States, or by the common law thereof, in and to the twelve books or volumes of the reports of cases argued and adjudged in the supreme court of the United States, commonly known as Wheaton's Reports; and they charge, that the defendants have violated their rights, by printing and publishing a certain book or books, entitled "Condensed Reports of Cases in the Supreme Court of the United States;" in consideration whereof, the complainants pray, among other things, that the defendants may be restrained from the further threatening to print and publish, and from the further printing, publishing, and selling, or exposing to sale the said Condensed Reports; that they may be decreed to account and pay to the complainants what shall be found coming to them; and generally for further relief, &c.

The defendant, R. Peters, denies that the book called Condensed Reports is any violation of the complainants' rights; he further denies, that the Condensed Reports contain anything that is the exclusive property of the complainants, or which, being also in Wheaton's Reports, is susceptible of being made the subject of literary property. He further avers, that by an act of congress, passed on the 31st of May 1790, it is enacted, that no person shall be entitled to the benefit thereof, unless he shall deposit a printed copy of the title of his book in the clerk's office of the district where he shall reside; shall publish it in one or more newspapers for four weeks; and shall, within six months after the publishing thereof, deliver or cause to be delivered to the secretary of state, a copy of the *same, to be preserved in his office. He calls for proof from the complainants that these requisites of the act have been complied with. [*726

In the bill, as well as the answers, many circumstances are set forth which it is not necessary to repeat. Connecting the pleadings with the argument of the case, it may be generally stated, that the complainants claim a copyright in the twelve volumes of Wheaton's Reports, under the statutes of the United States and at common law. The defendants deny that their book is a violation of the complainants' rights, if they have any, in Wheaton's Reports. They further deny, that they have any such right, because they have not performed the requisites of the acts of congress of the United States on the subject of copyrights; because there is no common-law copyright in the United States; and because Wheaton's Reports is not a work entitled to the benefit of copyright, either by the statute or by the common law.

I shall first consider the complainant's right, under a statute of the United States. The deficiency in their title most relied upon is, that they did not, according to the requisition of the fourth section of the act of 1790, deliver or cause to be delivered to the secretary of state, a copy of their book, to be preserved in his office; other omissions as to some of the volumes are also alleged. The question is, whether this injunction or direction to an author of a work seeking to obtain a copyright for it, is an essential part of his title, so that he cannot claim the benefit of the act, unless he has complied with it? This is not a new question in this court. It arose in the case of Ewer *v.* Coxe, decided in 1824, on the construction of the third section of the law of 1790, which stands, in this respect, on the same footing with the fourth section of the same act, now under consideration. In that case, the fact was admitted by the

plaintiff, that a copy of the record of the title of his work had not been published as the acts of congress required, but insisted, that it was not necessary, to vest a copyright in the proprietor of the work. In that case, therefore, the mere question of law was presented to the court, on the construction of the acts of congress.

In the case now before the court, the fact, as well as the law, has been a subject of controversy between the parties; and the complainants have endeavored to show by evidence, that they have complied with the terms and directions of the section of law in question. This question of fact must be first disposed of. Have the complainants made satisfactory proof that they did, within six months of the publication of their work, deliver or cause to be delivered, a copy thereof, to the secretary of state, to be preserved in his office? No official certificate, no record of any such delivery has been produced, nor could such record be required, as we cannot say that any such record was kept, and the act of congress does not require it. The fact of delivery is open for proof by any legal and satisfactory testimony. With a view to establish it, the complainants have produced two witnesses, Mr. H. C. Carey, examined at the bar of this court, and Daniel Brent, Esq., whose disposition was taken at the city of Washington. In substance, Mr. Carey has testified, that, in 1816, the first volume of Wheaton's Reports was published by his father, who then did business alone; the witness then did his *father's business as his clerk; in 1821, he became a partner with him. When he did his business as his clerk, he, the witness, was conversant with his business as to copyrights; says they were in the constant habit of advertising, but not of keeping a copy or record of the advertisements, until within the last ten years; he says, the next step towards securing a copyright was to deposit a copy in the office at Washington. "We were always accustomed to do it, but never deemed it necessary to have a certificate from Washington, because we had never seen one. We supposed, a record was kept at the office, of the deposit of books, and could always be furnished, if necessary. The earliest certificate we have, is dated in 1820. I don't doubt, that a copy was deposited, although we have no evidence of it." On his cross-examination, he says, that he has no recollection at all of a deposit of a copy of this work in the office of the secretary of state; that nine-tenths of the books they have deposited were put in the post-office, addressed to the department of state; does not pretend to recollect, that this was the course in 1816. He cannot positively say, that with regard to all publications made by them, a copy was sent to the department of state. Does not know whether there was or was not a record kept in the department; has never inquired there, nor had any occasion to make the inquiry. He adds, that it was always their intention to send a copy of all works to the department of state, whose titles were recorded in the clerk's office, but he won't pretend to say, that it was always done.

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In regard to the books in question, there is no direct proof of the delivery of any one of them to the secretary of state; there is no circumstantial proof of it—there is no proof of such an uniform custom of the trade in general, or of Mr. Carey's business in particular, from which we can infer it, with that degree of certainty which constitutes proof in a court of justice. As to the books in question, Mr. Carey has no knowledge; he pretends to none. He has no more proved, or even conjectured, the delivery of Wheaton's Reports, in the manner and for the purposes prescribed by the act, nor in any manner, or for any purposes, than he has proved the same thing for all the many hundred works, in mass, published by him in the same period of more than ten years. But he does show us, that the most satisfactory proof was in his power, and in the power of the complainants, and could be had simply by asking for. He got a certificate of the delivery of a work for copyright, as early as 1820, seven years before the conclusion of Wheaton's Reports. He further says, that until Mr. Clay came into the office, there was no order in it as to sending certificates. This was in 1825; after which, we are to presume, that order did exist in the office on this subject; but no certificates are shown for the volumes of Wheaton's Reports published after this period. We may advert here to the certificates produced by the defendants, some of them of a very high number, upwards of one thousand; from which we

may infer, that these certificates were not unknown or unusual, when the copy was actually delivered to the secretary of state.

The complainants ask what evidence they are to produce of this fact? If the law makes the delivery of the volume to the secretary a requisite, *a necessary part [*728
of a plaintiff's title, he must prove it by legal and satisfactory evidence, when he founds a claim on this title in a court of justice. In this case, however, nothing is required of him, that is impossible, unreasonable or difficult; nothing but what has been done by others, at least, in a thousand cases, and by Mr. Carey himself, in many. He has obtained and produced evidence of the same nature as to the delivery of eighty copies under another law; he might have had the same evidence of the delivery of the one copy under the copyright law. If he chose to rely on transitory and uncertain testimony, it was at his peril. He got the certificate in the one case, to obtain his salary; he should have gotten it in the other, to secure his copyright.

The deposition of Mr. Brent serves the complainants no better in this part of their case. He proves the regular deposit of the eighty copies, under the direction of the reporter's law; but says, that there does not appear any evidence that the successive volumes of said reports, or copies of them, were deposited in the department of state, by the maker or publisher of the same, agreeable to the provisions of the laws of congress for securing copyrights to authors, &c., though the memorandum of similar deposits was kept in the patent-office, a branch of the department of state, and not at the department. The deponent believes that, for several of the first years, the memorandum and giving receipts were often neglected, during the period referred to. So far as a negative may be proved, I should conclude from this testimony, that no copy ever was delivered in conformity with the provisions of the act of 1790; no evidence of it appears in the department, either by record, or by finding the book there, or of any other kind, although the memorandum of similar deposits was kept in the patent-office, a branch of the department of state. I will add, on this subject, that as the law makes it the duty of the secretary of state to preserve the copy delivered to him in his office, we are bound to presume, in the absence of contradictory evidence, that he did perform his duty, and that the mere circumstance that the book is not found there, is *primâ facie* evidence that it was never delivered there.

This view of the evidence brings us to the conclusion, that the complainants have failed to prove, that within six months, or indeed, at any time, they did deliver to the secretary of state, a copy or copies of the work in which they claim a copyright, according to the provisions of the fourth section of the act of 1790, and it must now be taken, that they did not so deliver a copy. I will here notice an argument which has been pressed on the court with great ingenuity and force. It is, that after so long an enjoyment of the right, after so long a possession undisturbed, it should be presumed, that everything was done which was necessary to be done, to make it perfect; and that the evidence may have been lost by the lapse and accidents of time. Any presumption of this sort is much weakened by the negative testimony of Mr. Brent; it is also weakened, if not destroyed, by another circumstance. If the deficiency existed only in the earlier volumes of the work, which were published fourteen, fifteen and sixteen years ago, the argument might receive *some favor, although the [*729
lapse of time is not very considerable; but we find the same defect in relation to the last, as the first volumes of this work; the same in 1827, as in 1816, which gives rise to another presumption, that the same course was pursued as to all of them, and a copy of none delivered, according to the fourth section of the act. However the possession may have aided the complainants, in their application for an interlocutory decree of injunction, until hearing, the parties now stand on their legal rights.

This view of the evidence brings us to a much more important and difficult question, that is, to the very question decided in the case of Ewer *v.* Coxe, and if that decision was right, it must prevail now. The counsel on both sides have accordingly directed their most strenuous efforts, on the one side to sustain, on the other to overthrow, the authority of that decision. In that case, the plaintiff claimed a copyright in a certain book, under the acts of congress of 1790 and 1802 for securing copyrights

to authors, &c. The third section of the act of 1790 enacts, that no person shall be entitled to the benefit of the act, unless he shall, before publication, deposit a printed copy of the title of his book in the clerk's office of the district court; the section, after giving the form of the record to be made in the office, proceeds, "and such author or proprietor shall, within two months from the date thereof, cause a copy of the said record to be published in one or more newspapers printed in the United States, for the space of four weeks." The plaintiff admitted, that he had not thus published a copy of the record of the title of his book; and the question was, whether it was a matter essential to this title—whether he could have a copyright without it? The question in the present case arises on the fourth section of the same act, but the principle of decision is the same in both cases.

In deciding the case of Ewer *v.* Coxe, the learned judge thought it material to settle whether the requisitions of the third and fourth sections of the act are merely directory, or whether their performance is essential to the vesting of a title to the copyright secured by the law; he recites the several sections of the act, and reasons upon them severally. He says, "it is perfectly clear, from the language of the second section, that the proprietor can acquire no title to the copyright, for the term of the first fourteen years, unless he shall deposit in the clerk's office a printed copy of the title of the book; for the section declares, that he shall not be entitled to the benefit of this act, *unless* he shall make such deposit." The judge, therefore, considers this to be a condition of the grant of the right; but he thinks that this condition cannot, "upon any grammatical construction, be extended to the requisition (he cannot avoid calling it a requisition) contained in the last sentence of the section, to publish a copy of the record, within the time and for the period prescribed." From this reasoning, the judge concludes, that if the title of an author to a copyright depended altogether upon this act, he should be of opinion, that it would be complete, provided he had deposited a printed copy of the title of the book in the clerk's office, as directed by the second section; and that the *publication of a copy of the same would only be necessary to enable him to sue for the forfeitures created by the second section. The judge then passes to the act of April 1802, which is a supplement to the former act, and declares, that every author or proprietor of a book who shall thereafter seek to obtain a copyright for the same, before he shall be entitled to the benefit of the act to which this is a supplement, shall, in addition to the requisites enjoined in the third and fourth sections of the said act, give information, by causing a copy of the record, which by the said act he is required to publish, to be inserted at full length in the title page, or in the page immediately following the title. As to this additional requisite, the judge remarks, that it is obvious, the proprietor can acquire no title to the copyright, unless it is complied with. He then reasons, that as this new requisite is an addition to those prescribed by the third and fourth sections of the act of 1790, he must perform the whole, before he can be entitled to the benefit of the act. This reasoning appears to be logical enough, and, as we shall see, the objection to it is, that it is not legal—it is not technical. The judge says, that the act—that is, the act of 1802 (which we must observe)—will admit of no other construction; and that the meaning could not have been more clear and intelligible, if the act, that is, the supplement, had declared, "that the proprietor, before he should be entitled to the benefit of the act of 1790, should cause a copy of the record of the title to be published; and shall deliver a copy of the book to the secretary of state, as directed by the third and fourth sections of that act; and shall also cause a copy of the said record to be inserted in the title page, &c." The judge proceeds, "that this was the intention of the legislature, is strongly illustrated by the second section of this act," &c. Of what act? what intention? Certainly, the intention of the act of 1802, not of the act of 1790. The whole of the judge's reasoning is on the act of 1802, and its meaning, and not the act of 1790. If this be so, the objection made to his opinion entirely fails in point of fact. The objection is, that he was not authorized to give a construction to the first act of congress, by the enactment of the second; that the legislature cannot give constructions to their own laws; that if, in a second

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act, the legislature has supposed the first had a meaning which, in truth, it has not this opinion of the legislature could not give such meaning to the first. To sustain this objection, a single sentence in the case of the Postmaster-General *v.* Early, 12 Wheat. 148, has been relied on: the chief justice there says, "it is true, that the language of the section indicates an opinion that the jurisdiction existed in the circuit courts, rather than an intention to give it; and a mistaken opinion of the legislature concerning a law does not make law." There is nothing but what is perfectly reasonable and familiar in this principle, and we can hardly suppose that it was unknown to, or disregarded by, Judge WASHINGTON, in the case of Ewer *v.* Coxe. When he assented to it in the supreme court, he never imagined that he had overlooked or violated it on his circuit. Did he, in Ewer *v.* Coxe, adjudge, that the publishing of the record of the title was essential to the right, under and by the act of 1790, because congress, in 1802, had indicated *that such was their opinion of its meaning? [*731
Did he adopt their meaning of the provisions of that act, and surrender his own? By no means. He says not a word about the meaning or construction of the first act, nor what congress had thought or indicated about it; he leaves it with the construction he had just before given to it. His opinion proceeds on his construction of the law of 1802, and of what was enacted by that law; he thinks that this law, not the law of 1790, makes the requisites of the third and fourth sections of the act of 1790 conditional and indispensable to the copyright; he finds that these requisites, by the law of 1802, are connected to, and put upon the same footing with a newly-created requisite, which is clearly essential to the right, and then and therefore says, the whole must be performed, before the author shall be entitled to the benefit of that act. But why must the whole be performed? Is it by virtue of a construction different from his own, which he puts upon the first act, in deference to the indication of the opinion of the legislature? Not at all. He says, that it seems to him, that the act, that is, the supplemental act, will admit of no other construction. That the meaning would not be more clear, if the act, still the supplemental act, had declared, &c.; that is, had re-enacted the third and fourth sections of the original act, giving them the same force, effect and character which is given to the new and additional requisite, of which it is expressly declared, that it must be performed by the proprietor, "before he can be entitled to the benefit of the act of 1790." In the whole argument of the judge, he confines himself strictly to the meaning and construction of the act of 1802, looking only to its own provisions and language for that meaning. He asserts, that the intention of the legislature in passing the second act, was, to re-enact the third and fourth sections of the first, with the additional force given to the additional requisite, which he illustrates, by a reference to the second section of the supplement. His reasoning on this subject is quite satisfactory to my mind, and does not interfere with the opinion of the supreme court in the case of the Postmaster-General *v.* Early.

In this endeavor to show that Judge WASHINGTON has grounded his judgment in Ewer *v.* Coxe entirely on his construction of the law of 1802, I would not be understood to indicate an opinion, that he would not have been perfectly correct, if he had taken both acts together in forming his opinion of either. They are both on the same subject; the latter is a declared supplement to the former. We may consider them, to many purposes, as one act, and look to the whole, in judging of the intention of any part; and in doing this, we should not fall under the interdiction of the principle, that "a mistaken opinion of the legislature concerning a law, does not make the law."

This being my understanding of the opinion of Judge WASHINGTON, I might rest upon it for my judgment on this part of the case, until it is overruled by a higher authority; but it is proper, at least, it is not a work of supererogation, to proceed one step farther on this subject. If Judge WASHINGTON was mistaken in his construction of the act of 1802, and I am so in following him, how would the case stand on the law of 1790? *May not the judge have been too strict in his grammatical construction of the provisions of that act? [*732

When a statute creates a right, confers a benefit, a privilege on any individual, and

at the same time, although not grammatically connected, by being in the same sentence or clause, enjoins upon him to do certain things in relation to the right or privilege granted, can we separate them, unless they are expressly or clearly separated by the donor? May we sustain the one, and suppress the other? Shall we do this, by mere use of phrases? Is it enough, to say, that the first is a grant, and the other directory, and therefore, they are independent of each other? Because it is true, that such cases may occur; that a statute may be so worded, that we may clearly see, that something is directed to be done, which may be well separated from other enactments or provisions in the law, shall we, therefore, be allowed to get up a rule of construction for every case of a direction in a statute, and make a severance between a grant and everything directed to be done in relation to it, but not grammatically joined to it, merely by saying it is directory? May the favored individual take the benefit and neglect the duty? May he claim the grant as a vested right, and refuse to do that which the donor, in the same instrument, enjoins upon him to do? To distinguish between an immaterial disjoined direction in a statute, and one which is truly not so, we should look not so much to their positions in the statute, to a strict grammatical construction, for Lord HARDWICKE, in 2 Atk. 95, disclaims it—but to the whole scope and design of the legislature, as manifested by all the provisions of the statute. If the several parts form one whole, create a system, are members of one plan and design, they should all be taken together, to be of equal importance, to be dependent one on the other, to co-exist as one body or being. The duty imposed on the grantee is as imperative, is as much a part of the creation, as the grant to which it relates; it is a modification, a limitation, a regulation of the grant, by and according to which only it can be claimed or enjoyed. The public, the citizens of a community, acting by their representatives, confer upon an author certain privileges or rights for his exclusive benefit, and to protect him in the enjoyment of them, they impose certain penalties, or give certain remedies against any person who shall violate these rights. But some protection is also due on the other side, that innocent and ignorant invaders of the privilege may not be involved in suits and penalties, by the want of accessible means of information of the subject and extent of the grant. With this wise and just object in their view, the legislature, at the same time, and in the same instrument by which they confer the privilege, enjoin or direct the person who would enjoy it, to do certain things on his part, and among others, to deliver a copy of his work to the secretary of state, to be preserved in his office, that all may know where to go to be correctly and precisely informed of what it is he claims, what is his right, and that thus they may avoid any infringement of it. This is an essential part of the scheme for the encouragement of authors, so as not to bring others innocently into trouble, or, it may be, ruin. If this be so, shall we defeat or change the whole design, because the different parts of it
*733] are not grammatically *connected in one clause or sentence or section; or by calling one part of it a grant, and the other directory? Could it have been intended, that the author should take and enjoy the benefit, and omit to do on his part what he is clearly and expressly enjoined to do, and this because it is called directory, and does not stand in this or that part of a section? Judge WASHINGTON thinks, that to deposit a printed copy of the title of the book in the clerk's office is essential to the right, because it is grammatically connected with the words, "that no person shall be entitled to the benefit of this act unless," &c. In a subsequent part of the same section, it is declared, that the author shall cause a copy of the record to be published; and the next section enacts, that he shall deliver a copy of his book to the secretary of state. The first requisite the judge thinks essential, for the reason given; and the last two not to be so, but to have reference only to the remedy, by reason of a grammatical construction of the clauses, and their disconnection, by position, from the condition expressed in the preceding part of the section. I would rather look at the subject-matter of all the clauses, and their connection with each other as component portions of one object or design. In this point of view, the publication in the newspapers, and the delivery of a copy of the book to the secretary of state are, at least, as important, and more exact and diffusive in their information to the public, as the deposit of a

printed copy of the title in the clerk's office. In answer to the obvious reason and justice of this view of the law, it is said, that these provisions or requisites are but directory. How did this term get the restricted interpretation which seems to be fastened on it? How came the enactment of a statute to be thought less obligatory, because it is directory, or directs something to be done? Blackstone says, "the directory part of a statute is that whereby the subject is instructed and enjoined to observe." &c. In the case of the Postmaster-General *v.* Early, the chief justice refers not merely to the several parts of the same statute, in construing a provision in it, but to the whole course of legislation on the subject, and he says, he would avoid a construction which is opposite to the whole spirit of that legislation. He does not confine himself to sections or to single acts, but takes the whole of what the legislature have done on the subject, to come at the meaning. The rule I would adopt in expounding the act of 1790, is the same that is taken by the court of king's bench in the case of the University of Cambridge *v.* Bryer. Lord ELLENBOROUGH says, "I think the sound rule of construing any statute, as indeed it is of construing any instrument, whether it be a statute, will or deed, is to look into the body of the thing to be construed, and to collect, so far as may be done, what is the intrinsic meaning of the thing." I would observe, in relation to the case of Ewer *v.* Coxe, that Lord ELLENBOROUGH admits that he would be obliged, by subsequent statutes, to put a perverse, and, what he should consider, an unnatural interpretation on the statute as originally passed; but he would endeavor to maintain the integrity of the original text, unvitiated by subsequent misconstructions. LE BLANC says, "that construction may be materially aided and explained by the language of other statutes." He does not agree with Lord ELLENBOROUGH that he would follow a legislative *misconstruction of a statute. For myself, I would deny that a legislature has a right to impose upon a court their [*734
construction of their statutes previously passed; it is for the court to construe the law; but it is, nevertheless, the right and duty of a judge to look into all the statutes made upon the same subject, to discover what was the intention and meaning of any of their provisions, thus to ascertain the true meaning and construction, by his own judgment, and not by any subsequent legislative declaration of intention or construction.

In the statute of 8 Ann., c. 19, the requisition of a registry with the Stationers' Company is what is called directory, and is contained in a different section from that which confers the right; but the lord chancellor, in 2 Atk. 95, thought it was, nevertheless, essential to the right. The object of the registry, as declared by the statute, was to give such notice and information of the right, as to prevent an infringement of it through ignorance; but the connection of this direction with the forfeitures is direct and explicit, which it is not in our act of 1790. I am aware, that the king's bench, in Beckford *v.* Hood, 7 T. R. 620, held a different opinion as to the necessity of the registry. They consider it not to be essential to the right, but as only affecting the remedy, or forfeitures given by the statute. This seems to me to place the court and the parties in that suit in a singular predicament. The right claimed was under the statute, and not at common law, and since the passing of the statute, could not be claimed according to the common law. But the party who had the right given by the statute, had lost the remedy. He is, therefore, sent for this back to the common law. The statute, therefore, which has confessedly modified, restrained, limited the common-law right, has, nevertheless, left his common-law remedy as it was before, entirely unimpaired, unaffected by the statute. He comes, therefore, into court with the statute in one hand and the common law in the other, having a perfect right under neither; that is, his common-law right is curtailed by the statute, and his statute remedy is taken away by the common-law construction of the statute. These are technical refinements which would occur only to learned ingenuity. The author has forfeited his claim to the remedies of the statute by virtue of which he claims the right, by virtue of which he makes out that he has been wronged, because he has not obeyed the injunctions of the statute by which both the right and the remedy are given; but still he is allowed to retain the right, and enforce it in another way,

notwithstanding such a disobedience of the injunctions of the statute as have forfeited its remedies. I agree, that all this, be it incongruous or not, may be done by the legislature, if they choose, but I do not see why judges have so labored their wits to come to such a result, by forced constructions, doubtful implications and tortuous reasoning. Would it not be more consonant with reason and convenience, to send the party to his common-law right, if he wishes a common-law remedy, and to enforce his statute rights only by the means provided for it by the statute; and not permit
*735] him by this curious machinery to take all that is granted to him by the statute, and disregard all that is required of him by the same statute. It is agreed, *that his common-law right, if he had any, is cut down by the statute but yet there is no limit to its remedies; he may recover under all and any circumstances, whatever he may persuade a jury has been his damages by the violation he complains of; thus depriving the citizens of that part of the statute which was enacted for their benefit and protection.

Can we believe, that such distinctions, introduced by the ingenious learing of judges, sometimes prone to be law-makers, sometimes desirous of favoring some strong case of conscience, ever occurred to the legislature who made these statutes? Did they suppose, that parts of their enactments, when they had not said so, were to be strictly carried into effect, and other parts were to be called directory, and therefore, to be obeyed or not, at the option of the party enjoined to perform them? When they declared, that an author shall have a certain right, they also declared that he shall do certain things, which are explicitly described. Did they suppose, he might take the one and reject the other; that the only consequence of his disobedience would be to deprive him of the remedy provided for him by the statute, and leave him one which perhaps he likes better? Did they not believe, that when he took the grant, he bound himself to do all that was enjoined upon him by the same authority and the same instrument that created the grant? unless they were clearly separated and made independent of each other by the unequivocal language of that instrument. I have been tedious on this subject, but as I have ventured in this part of the case, I mean the construction of the act of 1790, to differ with the learned, careful and excellent judge whose opinion in Ewer *v.* Coxe, has been so frequently referred to, as well as from the judgment of a majority of the judges of the supreme court of errors in the case of Nichols *v.* Ruggles, 3 Day 145, I have thought myself bound to explain my reasons as I have done. As to Judge WASHINGTON, I would observe, that having made up his opinion on the act of 1802, he may not have bent the force of his mind to that of 1790, or have come to a certain conclusion how he would have considered the case if it had stood on that act alone. The case of Nichols *v.* Ruggles was very fully argued by the counsel; but the opinion of the court appears to have been given *instanter;* no argument or reasons accompany it; and in one particular, to wit, that "the copy to be delivered to the secretary of the state appears to be designed for public purposes, and to have no connection with the copyright," it seems to me, that the court are clearly mistaken. This will be a subject of remark hereafter.

The complainants have contended, with great earnestness and plausibility, that if there has not been a literal compliance with the requisitions of the fourth section of the act, they have been substantially performed, for all the beneficial purposes intended by their enactment. In support of this position, that part of the deposition of Mr. Brent is relied on, in which he has testified, that eighty copies of each of the volumes of Wheaton's Reports, beginning with February term, 1817, were delivered to the department of state; he further testifies, that all of the said eighty volumes were
*736] received under the act of congress giving a salary to the reporter for preparing and furnishing the said reports. He further says, that *according to his recollection, there has always been one or more complete sets of said reports, from the time or their publication, in the said department of state. The argument assumes, that the object of the act of 1790, in directing one copy of a book to be delivered to the secretary of state, is the same with that of the reporter's act of 1817, in directing eighty copies of the reports to be delivered there, one of which is for the secretary of

state, and that that object was to form a library for the government, just as the statute of Anne imposes it on authors to present copies of their works to the universities; and that if this object is accomplished, it matters not whether it is done under and according to the fourth section of the law of 1790, or to the directions of the act of 1817. This construction of these laws has many difficulties to overcome. In the first place, it would not be a little singular, that two acts of congress should direct the same thing to be done, for the same purpose; and as both acts are unquestionably in force, the consequence would be, that it is the duty of the author or proprietor of those reports to deliver two copies of each volume, for the supposed library, one under each act, and his delinquency will not be relieved by the argument. But, in truth, the differences in the provisions and objects in these acts are manifest on the first inspection. The act of 1817 has nothing to do with the copyright, either of books in general, or of the particular works mentioned in it; nor has the provision of the fourth section of the act of 1790 any reference to a public library. The law of 1817 was passed for a special work and a special object, "to provide for the reports of the decisions of the supreme court." It gives to the reporter an annual compensation for his services of one thousand dollars, and one of the conditions of this grant is, that he shall deliver to the secretary of state eighty copies of the decisions, to be distributed in the manner, and to the public officers, designated by the act. One of these copies is to be given "to the secretary of state," and "the residue of the said copies shall be deposited in and become part of the library of congress." When a library is intended, it it thus expressly mentioned, and the library is not for the government or the department of state, but the library of congress, an establishment or institution well known to have no connection with the department, and to be kept in the capitol, at the distance of more than a mile from the office of the department of state.

The reporter is bound to deliver these eighty copies, not in consideration of his copyright, as in England, where it is so much complained of, but in consideration of the salary paid to him by the United States. It is a purchase of his books. It has no connection with his copyright; he must deliver them, whether he has a copyright or no. As to the object or purposes of these deliveries of a copy to the secretary, under the respective acts; the one copy out of the eighty to be given to the secretary of state, is for his personal use and accommodation, as the copies are that are to be distributed to the other secretaries, to the judges and other officers named in the act. He may take and use it, where he finds it most convenient, and not in his office exclusively, being bound only to transmit it to his successor, who will hold it as he had done. Again, *the reporter is not bound to see that the secretary, or any other of the officers named, gets the copy designed for him. He sends the whole to [*737
the department of state, and the due and proper distribution of them must be there attended to. Very different in all respects are the provisions of the copyright law. By them, it is incumbent on the author or proprietor of the book to deliver one copy to the person designated to receive it, to wit, the secretary of state. The copy so delivered is to be preserved in the office; not as a gift to him, nor for his use, nor to be at his disposal beyond the limits of his office, but for an object connected with the grant of the copyright, and with nothing else. This copy must remain in the office; the secretary has no more right to remove it than any other person. It seems to me, to be intended for the same purposes as the drawings and models of machines in the patent-office; that our citizens may know where to go to be correctly informed what it is that is patented, and not to be led into an infringement of the right, by an ignorance of what it is. I am confirmed in this view of the case, by the testimony of Mr. Brent, who says, that the memorandum of the deposit of books for securing copyrights was kept in the patent-office, a branch of the department of state, and it is fair to presume, that the books were kept in the same place. This negatives the suggestion, that these books were for the use of the secretary, or to form a library for the public. The patent-office could hardly be selected as the place for a public library. The use

or purpose I have assigned to the delivery of this book, is not only reasonable, but necessary for the safety of the citizens against the penalties of the act.

There are numerous publications, of which no information would be derived from the titles deposited in the clerk's office and published in the newspapers; such as, extracts from poets or eminent prose writers, collections or abridgements of voyages, selected letters, &c. The materials are common property, and exist in great masses; and it is only by an examination of the work, that any one can know in what manner, or to what extent, the copyright author has appropriated them to himself. The intention of this provision is, at least, much more likely to be that which I have suggested, than that it should have been for the use of the secretary or his department. The injunction is laid on the proprietors of all books for which a copyright is claimed, not only for the reports of the decisions of the supreme court, which we may believe would be a desirable acquisition for that officer. But how can we make this supposition of many other books which have been or may be deposited for copyright? Was it intended to give so dignified a destiny to a spelling-book, a Greek grammar, an edition of Hoyle's games, an apothecary's manual—as in the case of Ewer *v.* Coxe, a cooking book, a song-book, a jest-book? We cannot, without something more than a smile, imagine that congress directed such works to be delivered to the secretary of state, for his special use, or for the formation of a public library. The delivery of the copy under our copyright law, as I have said, is analogous to that required by the statute of Anne, to be sent to the Stationers' Company, and not to the copies to be given to the libraries of the *universities. It is true, that nine copies of every work are to be sent for the universities, to a stationers' company, as well as that which is to be preserved there, but none are sent to the universities but such as they shall demand; and they will not, therefore, have their shelves loaded with such stuff as I have alluded to, which will, perforce, be crowded into our public library and must be preserved there, on the construction given to this provision by the complainant.

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Nor is it enough to say that if a copy be, in fact, in the office of the secretary of state, it is a compliance with the law for all the purposes of the law; it must be delivered in pursuance of the act, to be preserved there, as the act directs, or the court cannot know that it is there, how long it has been there, or how long it will remain there. It may have been there, at the period the witness speaks of—it may not be there the next day, for there is no obligation to keep it there, unless it were brought there by and in conformity with the act of congress, which makes it the duty of the secretary to preserve it in the office. I know that courts of equity have gone very far, and very frequently, in substituting what they have deemed to be a substantial compliance with the requisitions of a statute, for the actual requisitions. This has been especially done in relation to the recording acts, and the statute of frauds. As to the first, they have felt authorized to accept proof of notice in fact, of an actual personal knowledge, for the recorded notice called for by the law. I think, I shall be supported by the profession, in saying, that it is regretted that these departures from the enactments of the statutes were ever indulged. It has thrown into uncertainty that which the law had made certain; it has left to floating, transitory and fallible evidence, what the law had provided for by permanent immutable testimony. Nor can I perceive how it is that the legislature had not the same absolute authority to prescribe the kind of notice that shall be received by the courts of any fact, as that any notice should be given of it; nor how judges can dispense with the one more than with the other. What has been decided and done in such cases, must remain; but I will never add another step to it.

If the complainants have failed to sustain their case by and under the acts of congress, the question occurs, are they supported in it by the common law? The question of the existence of a common law in the United States was particularly noticed, I believe, for the first time, judicially, in the case of the United States *v.* Worrall, 2 Dall. 384. In that case Judge Chase, a most learned constitutional as well as common-law lawyer, said, in page 394, "in my opinion, the United States, as

a federal government, have no common law; if, indeed, the United States can be supposed, for a moment, to have a common law, it must, I presume, be that of England; and yet it is impossible to trace when or how the system was adopted or introduced. With respect to the individual states, the difficulty does not occur. When the American colonies were first settled by our ancestors, it was held, as well by the settlers as the judges and lawyers of England, that they brought hither as a birthright and inheritance, so much of the common law as was applicable to their local situation and change of circumstances. But each colony judged for itself *what parts of the common law were applicable to its new condition; and [*739 in various modes, by legislative acts, by judicial decisions, or by constant usage, adopted some and rejected others. The whole of the common law has nowhere been introduced; some states have rejected what others have adopted; and there is, in short, a great and essential diversity in the subjects to which the common law is applied, as well as in the extent of its application;" he adds, as the result of these positions, "that the common law will always apply to suits between citizen and citizen, whether they are instituted in a federal or a state court." As regards a common law of the United States, as such, he says, "the United States did not bring it with them from England; the constitution does not create it; and no act of congress has assumed it. Besides, what is the common law to which we are referred? Is it the common law entire, as it exists in England; or modified as it exists in some of the states; and of the various modifications, what are we to select? the system of Georgia or New Hampshire, of Pennsylvania or Connecticut?"

In general, it seems to me, that these principles and arguments cannot be controverted; they have never been judicially repudiated. When in a suit in the courts of the United States, the common law has been received as the rule of decision, it has been received, not as a law of the United States, prevailing with authority through all, equally and alike, but as the law of some particular state, by which the particular case was governed. The court does not adopt it as the common law of England, or of the United States, but as the law of the state which has adopted it and made it tis own.

The question, however, discussed by Judge Chase is much broader than that we have to entertain. It has not been contended, it could not be, that the whole common law of England, as it exists there, has ever been received in the United States, or in any one of them. Parts of it only have been adopted, and the evidence of such adoption is to be sought in "legislative acts, in judicial decisions or constant usage." Has any such evidence—has any evidence of any description, been produced, to show that what is asserted to be the common-law copyright in England, has ever been adopted by any one of the United States? Was it brought hither by our ancestors? Was it applicable to their local situation and change of circumstances? Or has it ever been so considered? A question meets us here at once—was it, at the period of the migration of our ancestors, a known, recognised and settled right, even in England? What is its history—its judicial history? It is wrapt in obscurity and uncertainty. The general question was first discussed in 1760, long after the settlement of these colonies, in the case of Tonson *v.* Collins, and no decision was given. In 1769, the celebrated case of Millar *v.* Taylor was argued, in which the subject was examined at great length. The great question was, whether the right of an author in his works, after publication, was a common-law right which always existed, and did still exist, independent of, and not taken away by the statute of Anne? Three of the judges were in favor of the plaintiff's copyright; but their judgment was shaken violently, if not to the foundation, by the opposing argument *of Judge Yates. Some [*740 years after this decision, that is, in 1774, the question came before the house of lords, in the case of Donaldson *v.* Beckett. Of eleven judges, eight to three were in favor of the common-law right. Seven to four held, that printing and publishing did not deprive the author of the right. Five thought that the action at common-law was not taken away by the statute, and six were of an opposite opinion. Judge Kent, speaking of the judgment in Millar *v.* Taylor, says, "the court was not unanimous;

and the subsequent decision of the house of lords in Donaldson *v.* Beckett, in February 1774, settled this litigated question against the opinion of the king's bench, by establishing that the common-law right of action (if any existed) could not be exercised beyond the time limited by the statute."

Can we believe, that this common-law copyright was a known, understood and settled thing, in these colonies, brought here by our ancestors as their birthright, when down at least to 1774, the greatest lawyers in England where disputing about its existence there; and when even those who held that it did exist, could not agree as to what it was, nor how far it was, or was not, modified by the statutory provisions? Did our forefathers ascertain, adopt and regulate a right, which MANSFIELD, YATES and CAMDEN could not agree about, or understand alike? Judge KENT adds his doubt on the question, when he says, "if any existed." As to its reception and adoption as part of the law of the United States, we cannot but observe, that this learned and searching jurist, although treating very fully on the subject of copyright, gives no suggestion of the existence of a common-law right in the United States, or in any of them, nor of any other right than that which is granted by the acts of congress, to be enjoyed on complying with the terms prescribed by them. He particularly notices the agitation of the question in England, and, as we have seen, does not seem to consider it certainly settled there. Here, he was directly upon the subject; and although he thinks the laws of congress afford an inadequate protection, he does not intimate that an author has any beyond them.

The efforts of those judges in England who have labored to preserve to an author the common-law right, together with that given to him by the statute, seem to me not to have sufficiently considered the uncertainty and inconvenience which would grow out of such a system. If these two rights are co-existent, the question occurs, who would take for a limited period, under the statute, what he may enjoy in perpetuity, by the common law? or what is there to prevent an author from using the privileges and remedies of the statute for the term prescribed, and then going back to his common-law right? The injustice and incongruity of such a proceeding was admitted; and how is it avoided? These judges have said, and such was the final disposition of the question, if it be finally determined, that they would confine this common-law within the limits of time prescribed by the statute. And where do they find their authority for this arrangement? The statute gives no warrant for it; the common law gives none. The limits imposed by the statute have relation expressly and only to the rights derived from it, and not to any *right which was vested in an author, *741] independent of the statute. If they may fetter the common-law right with this enactment, why did they not impose upon it all the other conditions of the law; and, in short, bring the whole right under and within the statutory provisions, and take the statute as a modification or substitute of any pre-existent rights; as a legislative declaration of what should be the whole law on the subject for the future? The judges themselves made themselves legislators, when they thus regulated the enjoyment of a right by their own authority. We shall keep ourselves free from such embarrassments, and from the necessity of resorting to such expedients to escape from them, by resting the protection of authors upon the statutes expressly enacted for that purpose, and in believing that our legislature has done that which is just to them, and without inconvenience and danger to the public. This is the only right, the only protection that I can recognise, and I do not find that any other has ever been recognised here. No judicial decision or *dictum* of any court of the United States, or of any court of a state, before or since the adoption of our present constitution, before or since the revolution, has been produced on this argument, which recognises the common-law right now claimed; on the contrary, before the whole power of legislating on this subject was surrendered to the federal government, many of the states did pass laws for the protection of authors; and if, as is unquestionable, the acts of congress have superseded all the state statutes on the subject, why have they not also superseded the state common law, if it ever existed? It certainly never had a more sacred and intangible character than the statute law; and the same policy which

abrogated the latter and transferred the whole subject to federal legislation, has swept away every other law inconsistent with that policy and legislation. It was intended to put the whole subject under the regulation of congress, and of congress only. But I have found, the counsel have found, no common law, such as is now set up, in the colonies, in the states, or in the United States, and if I am now to recognise it, I must first make it. As I have mentioned the state statutes on this subject, I should notice an argument much pressed from the use in them of the word *securing* and not *vesting* the right. This is too slender a foundation to raise an acknowledged, pre-existing right upon. The same term is used in the act of congress 1790, but was it an acknowledgment by congress that the United States, as such, had a common law which vested the right, and that they passed their law only to secure it? Holding the opinion that the complainants have not entitled themselves to the aid and benefit of the statutes of the United States, for the protection of authors, and that they have no right at common law, which this court can recognise and protect, it is not necessary for me to give any opinion on the remaining question argued at the bar, whether the reports in question may or may not be the subject of literary property. Let the complainants go to the law side of the court, and if they shall establish their right there, they may return and claim the aid of this court to protect that right. As it now stands, or were it even more doubtful, equity cannot interpose her extraordinary powers between the parties.

*I am conscious of the importance of the questions which have been discussed in this cause, to the parties and to the public; and it is a real satisfaction [*742
to me to know that my opinion may be, and I presume will be, reviewed by another tribunal. Injunction dissolved, and the bill dismissed.

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INDEX

TO THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

The References in this Index are to the STAR *pages.

ADMIRALTY AND ADMIRALTY PRACTICE.

1. A libel was filed in the district court of Maryland, for a salvage service performed by the libellant, the master and owner of the sloop Liberty, and by his crew, in saving certain goods and merchandise on board of the brig Spark, while aground on the bar at Thomas's Point, in the Chesapeake Bay. The goods were owned by a number of persons, in several and distinct rights; and a general claim and answer were interposed in behalf of all of them, by Jarvis & Brown (the owners of a part of them), without naming who, in particular, the owners were, or distinguishing their separate proprietary interests. This proceeding was doubtless irregular in both respects; Jarvis & Brown had no authority, merely as co-shippers, to interpose any claim for other shippers with whom they had no privity of interest or consignment; several claims should have been interposed by the several owners, or by other persons authorized to act for them in the premises; each intervening in his own name for his proprietary interest, and specifying it. If any owner should not appear to claim any particular parcel of the property, the habit of courts of admiralty is, to retain such property, or its proceeds, after deducting the salvage, until a claim is made, or a year and a day have elapsed from the time of the institution of the proceedings. And when separate claims are interposed, although the libel is joined against the whole property, each claim is treated as a distinct and independent proceeding, in the nature of a several suit, upon which there may be a several independent hearing, decree and appeal. This is very familiar in practice in prize causes and seizures *in rem* for forfeitures; and is equally applicable to all other proceedings *in rem*, whenever there are distinct and independent claimants. *Stratton* v. *Jarvis*.....*4
2. The district court decreed a salvage of one-fifth of the gross proceeds of the sales of the goods and merchandises, and directed the same to be sold accordingly; the salvage thus decreed was afterwards ascertained, upon the sales, to be, in the aggregate, $2728.38; but no formal apportionment thereof was made. From this decree, an appeal was interposed in behalf of all the owners of the goods and merchandise to the circuit court; but no appeal was interposed by the libellant; the consequence is, that the decree of the district court is conclusive upon him as to the amount of salvage in his favor; he cannot in the appellate court, claim anything beyond that amount; since he has not, by any appeal on his part, controverted in sufficiency .....*Id.*
3. Although no apportionment of the salvage among the various claimants was formally directed to be made by any interlocutory order of the district court, an apportionment appears to have been in fact made, under its authority; a schedule is found in the record, containing the names of all the owners and claimants, the gross sales of their property, and the amount of salvage apportioned upon each of them respectively; by this schedule, the highest salvage chargeable on any distinct claimant, is $906.17, and the lowest $47.60,

the latter sum being below the amount for which an appeal, by the act of 3d of March 1803, is allowed from a decree of the district court in admiralty and maritime causes. . *Id.*

4. In the appeal here, as in that from the district court, the case of each claimant having a separate interest, must be treated as a separate appeal, *pro interesse suo*, from the decree, so far as it regards that interest; and the salvage chargeable on him constitutes the whole matter in dispute between him and the libellants; with the fate of the other claims, however disposed of, he has and can have nothing to do. It is true, that the salvage service was in one sense entire; but it certainly cannot be deemed entire, for the purpose of founding a right against all the claimants jointly, so as to make them all jointly responsible for the whole salvage; on the contrary, each claimant is responsible only for the salvage properly due and chargeable on the gross proceeds or sales of his own property, *pro rata*; it would otherwise follow, that the property of one claimant might be made chargeable with the payment of the whole salvage; which would be against the clearest principles of law on this subject. The district and circuit courts manifestly acted upon this view of the matter; and their decrees would be utterly unintelligible upon any other; their decrees, respectively, in giving a certain proportion of the gross sales, must necessarily apportion that amount *pro rata* upon the whole proceeds, according to the distinct interests of each claimant. This court has no jurisdiction to entertain the present appeal in regard to any of the claimants, and the cause must for this reason be dismissed. The district court, as a court of original jurisdiction, has general jurisdiction of all causes of admiralty and maritime jurisdiction, without reference to the sum or value of the matter in controversy; but the appellate jurisdiction of this court and of the circuit courts, depends upon the sum or value of the matter in dispute between the parties, having independent interests. . . . *Id.*

5. Nothing is better settled, both in England and America, than the doctrine that a non-commissioned cruiser may seize for the benefit of the government; and if his acts are adopted by the government, the property, when condemned, becomes a *droit* of the government. *Carrington* v. *Merchants' Insurance Company* *495

AGREEMENT.

1. N. stipulated in certain articles of agreement to transport and deliver, by the steamboat Paragon, to R., a certain quantity of subsistence stores, supposed to amount to 3700 barrels, for the use of the United States; in consideration whereof, R. agreed to pay to N., on the delivery of the stores at St. Louis, at a certain rate per barrel, one-half in specie funds or their equivalent, and the other half to be paid in Cincinnati, in the paper of banks current there at the period of the delivery of the stores at St. Louis; under the agreement was the following memorandum: "It is understood, that the payment to be made in Cincinnati, is to be in the paper of the Miami Exporting Company or its equivalent." The court erred in refusing to instruct the jury, that the plaintiffs could only recover the stipulated price for the freight actually transported, and that they were entitled to no more than the specie value of the notes of the Miami Exporting Company Bank, at the time that payment should have been made at Cincinnati; the specie value of the notes, at the time they should have been paid, is the rule by which such damages are to be estimated. *Robinson* v. *Noble's Administrators* *181

2. The plaintiff, the owner of the steamboat, was not entitled, under the contract, to recover in damages more than the stipulated price for the freight actually transported. If R. had bound himself to deliver a certain number of barrels, and had failed to do so, N. would have been entitled to damages for such failure; but a fair construction of the contract imposed no such obligation on R. *Id.*

3. There is no pretence, that R. did not deliver the whole amount of freight in his possession, at the places designated in the contract; in this respect, as well as in every other, in regard to the contract, he seems to have acted in good faith; and he was unable to deliver the number of barrels supposed, either through the loss stated, or an erroneous estimate of the quantity. But to exonerate R. from damages on this ground, it is enough to know, that he did not bind himself to deliver any specific amount of freight; the probable amount is stated or supposed, in the agreement, but there is no undertaking as to the quantity. . . . . *Id.*

APPEAL.

1. A party may, after an appeal has been dismissed for informality, if within five years, bring up the case again. *Yeaton* v. *Lenox* *123

2. In the circuit court of Alexandria, in 1817, several suits were brought against sundry individuals, who had associated to form a bank, called the Merchants' Bank of Alexandria; the proceedings were regularly carried on, in

one of them, brought by Romulus Riggs; and a decree was pronounced by the court, from which the defendants appealed; on a hearing, the decree was reversed and the cause remanded for further proceedings, in conformity with certain principles prescribed in the decree of reversal. It appears, that decrees were pronounced in all the causes, though regular proceedings were had only in the case of Romulus Riggs; appeals were entered in these cases from the decrees of the court; under such circumstances, the court can only reverse the decree in each case for want of a bill. *Mandeville* v. *Burt.* *256

3. The whole business appearing to have been conducted, in the confidence that the pleadings in the case of Romulus Riggs could be introduced into the other causes, the cases were remanded to the circuit court, with directions to allow bills to be filed, and to proceed thereon according to law..... *Id.*

See ADMIRALTY AND ADMIRALTY PRACTICE.

ARBITRAMENT AND AWARD.

1. In the circuit court of the county of Washington, Linthicum instituted an action of covenant, on articles of agreement, by which Lutz covenanted that Linthicum should have peaceable possession of a certain house in Georgetown, and retain and keep the same for five years; Linthicum was evicted by Lutz, before the time expired. The articles were spread upon the record, by which it appeared, that they were made "by and between John Lutz, agent of, &c., and agent for John McPherson, of Fredericktown, in the state of Maryland, on the one part, and Otho M. Linthicum, of Georgetown, &c., of the other part;" and it was witnessed, "that the said John Lutz, agent as aforesaid, has rented and leased," &c., the premises to Linthicum; and on the other hand, Linthicum covenanted to pay the rent, &c., as stated in the declaration; there was no covenant in the lease, by Lutz, for quiet enjoyment, as stated in the declaration; but the latter was founded upon the covenant implied by law in cases of demise; "the articles concluded with these words, "In witness whereof, we, the said John Lutz and O. M. Linthicum, have hereunto interchangeably set our hands and seals, day and date above." The defendant Lutz pleaded performance, without praying *oyer*, and issue was joined; afterwards, the parties, by consent, agreed to refer the cause; and accordingly, by a rule of court, it was ordered, "that Wm. S. Nichols and Francis Dodge, be appointed referees between the parties aforesaid, with liberty to choose a third person; and that they, or any two of them, when the whole matter concerning the premises, between the parties aforesaid in variance, being fairly adjusted, have their award in writing under their hands, and return the same to the court here; and judgment of the court to be rendered according to such award, and to be final between the said parties." The referees so named, on the 28th of January 1833, chose John Kurtz the third referee; and afterwards, on the same day, made their award in the following words, "We, the subscribers, appointed arbitrators to settle a dispute between Otho M. Linthicum and John Lutz, in which the executors of the late John McPherson, of Frederick, are interested, do award the sum of $1129.93, to be paid to the said Linthicum, in full for all expenses and damages sustained by him, in consequence of not leaving him in quiet possession of the house, at the corner of Bridge and High streets, in Georgetown (the demised premises), for the full term of the lease for five years. Any arrear of rent due from Linthicum, to be paid by him." Judgment was given by the circuit court for the full amount of the award so made and costs. *Lutz* v. *Linthicum*..... *165

2. The articles purport to be made by Lutz, and to be sealed by him; and not to be made and sealed by his principal. The description of himself, as agent, does not, under such circumstances, exclude his personal responsibility; but this very liability was necessarily submitted to the referees, and came within the scope of their award..... *Id.*

3. It was objected to the award, that it was uncertain, not mutual and final: that it did not state whether the money was to be paid by Lutz, or the executors of McPherson; that it did not find the arrears of rent due, and to whom due; that it did not appear to be an award in the cause; that the award and the proceedings thereon were not according to the laws of Maryland; that the appointment of the third referee ought not to have been made, until after the other two referees had met and heard the cause, and disagreed thereon. The court held all these objections invalid..... *Id.*

4. Without question, due notice should be given to the parties, of the time and place for hearing the cause by the referees; and if the award was made without such notice, it ought, upon the plainest principles of justice, to be set aside; but it is by no means necessary that it should appear upon the face of the award, that such notice was given; there is no statute of Maryland, whose laws govern in this part of the district, which requires such facts to be set forth in the award. If no notice is, in fact, given, and no due hear-

ing had, the proper mode is to bring such facts, not appearing on the face of the award, before the court, upon affidavit, and motion to set aside the award; but *primâ facie*, the award is to be taken to have been regularly made, where there is nothing on its face to impeach it ..... *Id.*

5. The statute of Maryland requires that notice of an award shall be given to the party against whom it is made, by service of a copy, three days before judgment is moved; and judgment is not to be entered but on motion and direction of the court; it was alleged, that a copy of the award was not delivered. How that may have been, we have no means of knowing, for nothing appears upon the record respecting it, and there is no ground to say, that it ought to constitute any part of the record, or that it is properly assignable as error; it is matter purely collateral, and *in pais;* if no such copy had been delivered, the proper remedy would have been to take the objection in the court below, upon the motion for judgment, or to set aside the judgment for irregularity, if there had been no waiver, or no opportunity to make the objections before judgment. But in the present case, sufficient does appear upon the record, to show that the party had full opportunity to avail himself of all his legal rights in the court below; the cause was referred at November term 1832; pending the term, to wit, on the 18th of January 1833, the award was filed in court; the cause was then continued until the next term, viz., the fourth Monday in March 1833; at which time, the parties appeared by their attorneys, and upon motion, and after argument of counsel, judgment was entered. We are bound to presume, in the absence of all evidence to the contrary, that all things were rightfully and regularly done by the court, and that the parties were fully heard upon all the matters properly in judgment ..... *Id.*

ATTORNEY AT LAW.

1. An attorney at law, in virtue of his general authority as such, is entitled to take out execution upon a judgment recovered by him for his client, and to procure a satisfaction thereof, by a levy on lands or otherwise, and to receive the money due on the execution, and thus to discharge the execution; and if the judgment-debtor has a right to redeem the property sold under the execution, within a particular period of time, by payment of the amount to the judgment-creditor, who has become the purchaser of the property, there is certainly strong reason to contend, that the attorney is impliedly authorized to receive the amount, and thus indirectly to discharge the lien on the land. At least, if (as is asserted at the bar) this be the common course of practice in the state of Tennessee, it will furnish an unequivocal sanction for such an act. *Erwin* v. *Blake*..... *18

BILLS OF EXCEPTION.

1. This court have frequently remonstrated against the practice of spreading the charge of the judge at length upon the record, instead of the points excepted to, as productive of no good, but much inconvenience. *Gregg* v *Sayre*..... *244

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. In the case of the Bank of the United States *v.* Dunn, 6 Pet. 51, this court decided, that a subsequent indorser was competent to prove facts which would tend to discharge the prior indorser from the responsibility of his indorsement; by the same rule, the maker of the note is equally incompetent to prove facts which tend to discharge the indorser. *Bank of the Metropolis* v. *Jones*..... *12
2. The officers of the bank have no authority, as agents of the bank, to bind it, by assurances which would release the parties to a note from their obligations..... *Id.*

BILLS OF REVIEW.

1. The Bank of the United States and others, under the authority of the act of the legislature of Maryland, passed in the year 1785, entitled an act for enlarging the powers of the "high court of chancery" under which the real estates of persons descending to minors, and persons *non compos mentis*, were authorized to be sold for the debts of the ancestor, proceeded against the real estate of A. R., for debts due by him; and in 1826, the estate was sold by a decree of the circuit court of the district of Columbia, exercising chancery jurisdiction; afterwards, in 1828, some of the infant heirs of A. R., by their next friend, filed a bill of review against the administrator of A. R., the purchaser of his real estate, and others, stating various errors in the original suit and in the decree of the court, and prayed that the same should be reversed: *Held*, that a bill of review could be sustained in the case. *Bank of United States* v. *Ritchie*..... *128
2. From the language of the fifth section of the act, some doubt was entertained, whether the act conferred a personal power on the

chancellor, or was to be construed as an extension of the jurisdiction of the court; if the former, it was supposed, that a bill of review would not lie to a decree made in execution of the power. On inquiry, however, the court are satisfied, that in Maryland, the act has been construed as an enlargement of jurisdiction, and that decrees for selling the lands of minors and lunatics, in the cases prescribed by it, have been treated, by the court of appeals of that state, as the exercise of other equity powers..... *Id.*

3. The principle is unquestionable, that all the parties to the original decree ought to join in the bill of review. *Bank of United States* v. *White*.....*262

BOTTOMRY.

1. On an appeal from the decree of the circuit court of Maryland, on a libel on a bottomry-bond, originally filed in the district court, it appeared, that commissioners appointed by the circuit court had reported, that a certain sum, being a part of the amount of the bond, was absolutely necessary for the ship, as expenses and repairs in the common course of her employment; no exception was taken to this report by either party, in the circuit court, and it was accordingly confirmed by that court. The report is not open for revision in this court, there being nothing on its face impeaching its correctness. *The Virgin*..... *528

2. It is no objection to a bottomry-bond, that it was taken for a larger amount than that which could be properly the subject of such a loan; for a bottomry-bond may be good in part and bad in part; and it will be upheld by courts of admiralty, as a lien, to the extent to which it is valid; as such courts, in the exercise of their jurisdiction, are not governed by the strict rules of the common law, but act upon enlarged principles of equity..... *Id.*

3. It is notorious, that in foreign countries supplies and advances for repairs and necessary expenditures of the ship, constitute, by the general maritime law, a valid lien on the ship; a lien which might be enforced *in rem* in our courts of admiralty, even if the bottomry-bond, were, as it certainly is not, void *in toto*..... *Id.*

4. An objection was taken to the bond, that the supplies and advances might have been obtained on the personal credit of the owners of the ship, without an hypothecation: *Held*, that the necessity of the supplies and advances being once made out, it was incumbent upon the owners, who assert, that they could have been obtained upon their personal credit, to establish that fact by competent proofs; unless it was apparent from the circumstances of the case..... *Id.*

5. It was objected, that the supplies and repairs were, in the first instance, made on the personal credit of the master of the ship, and therefore, could not be afterwards made a lien on the ship: *Held*, that the lender on the bottomry-bond might well trust the credit of the master as auxiliary to his security; and the fact that the master ordered the supplies and repairs, before the bottomry was given, could have no legal effect to defeat the security, if they were ordered by the master, upon the faith, and with the intention, that a bottomry-bond should be ultimately given to secure the payment of them. In cases of this sort, the bottomry-bond is, in practice, ordinarily given after the whole supplies and repairs have been furnished; for the plain reason, that the advances required can rarely be ascertained with exactness, until that period..... *Id.*

6. It was objected, that the advances were for a voyage not authorized by the owners; that the original orders were for the master to get a freight for Baltimore or New York, and if he could not, then to proceed to New Orleans; whereas, the master broke up his voyage, and without any freight, returned to Baltimore. It may be admitted, that if a bottomry-lender, in fraud of the owners, and by connivance with the master, for improper purposes, advances his money on a new voyage, not authorized by the instructions of the owner, his bottomry-bond may be set aside as invalid; but there is no pretence to say, that if the master does deviate from his instructions, without any participation or co-operation or fraudulent intent of the bottomry-lender, the latter is to lose his security for his advances, *bonâ fide* made for the relief of the ship's necessities..... *Id.*

7. Seamen have a lien, prior to that of the holder of a bottomry-bond, for their wages; but the owners are also personally liable for such wages; and if the bottomry-holder is compelled to discharge that lien, he has a resulting right to compensation over, against the owners, in the same manner as he would have, if they had previously mortgaged the ship..... *Id.*

8. Graf, one of the owners, had the ship delivered up to him, upon an appraisement at the value $1800, and he gave a stipulation according to the course of admiralty proceedings, to refund that value, together with damages, interest and costs, to the court. He is not at liberty now to insist, that the ship is of less than that value in his hands, or that he has discharged other liens diminishing the value

for which the owners were personally liable, *in solido*, in the first instance..... *Id.*
9. To the extent, then, of the appraised value of the ship delivered upon the stipulation, the owners are clearly liable; for she was pledged for the redemption of the debt, and they cannot take the fund, except *cum onere*; but beyond this, there is no personal obligation upon the owners..... *Id.*
10. In this case, the value of the ship, the only fund out of which payment can be made, fell far short of a full payment of the amount due upon the bottomry-bond; but this is the misfortune of the lender, and not the fault of the owners; they are not to be made personally responsible for the act of the master, because the fund has turned out to be inadequate; since, by our law, he had no authority, by a bottomry-bond, to pledge the ship and also the personal responsibility of the owners. The consequence is, that the loss *ultra* the amount of the fund pledged, must be borne by the libellant..... *Id.*

CASES CITED AND AFFIRMED.

1. The principles of the case of the Bank of the United States *v.* Dunn, 6 Pet. 51 affirmed. *Bank of the Metropolis* v. *Jones*....*12
2. The case of Craig *v.* State of Missouri, 4 Pet. 410, in which it was decided, that the act of the legislature of the state of Missouri, passed 27th July 1821, entitled an act for establishing loan-offices, was repugnant to the constitution of the United States, revised and confirmed. *Byrne* v. *State of Missouri*.....*40
3. The cases of the United States *v.* Quincy, 6 Pet. 466; and The William King, 2 Ibid. 153, cited. *Lee* v. *Lee*.....*44
4. The cases of Calder *v.* Bull, 3 Dall. 386; Fletcher *v.* Peck, 5 Cranch 138; Ogden *v.* Saunders, 2 Wheat. 266; and Satterlee *v.* Mathewson, 2 Pet. 380, cited. *Watson* v. *Mercer*.....*88
5. The cases of Bingham *v.* Cabot, 3 Dall. 328; Abercrombie *v.* Dupuis, 1 Cranch 343; Wood *v.* Wagnon, 2 Ibid. 9; Capron *v.* Vanorden, Ibid. 126, cited. *Brown* v. *Keene*.....*112
6. Opinion of the circuit court of the district of Columbia in the case of Mason *v.* Muncaster, as to poundage fees payable by the United States to the marshal of the district of Columbia, in cases where the debtor to the United States has been discharged from custody under execution by the United States. *United States* v. *Ringgold*.....*154

CHANCERY AND CHANCERY PRACTICE.

1. A bill was filed in the circuit court of the district of Columbia, claiming a legacy under an alleged codicil, made in Paris, to a will made in the United States; the testator was a native of Poland; at the time of the making of the codicil, he resided in France; and when he made the will, to which the instrument, upon which the legacy was claimed was said to be a codicil, he was in the United States; he went to Europe, soon after he made the will, and many years afterwards, he died, in Switzerland. The bill alleged, that the instrument on which the legacy was claimed had been duly proved in the orphans' court of Washington county, in the district of Columbia, where the administrator with the will annexed resided; there was no allegation, that the codicil had been established to be a valid will by the law of France, the place of the domicil of the testator, where the same was made; the administrator submitted to the court, whether it would decree the payment of the money to the complainant, "upon an instrument made under the circumstances, and authenticated in the manner that the aforesaid instrument is, and whether the said instrument shall have effect to revoke or alter any part of said testator's will, solemnly executed and left in the hands of his executors in this country," &c. This is certainly a very informal and loose mode of putting in issue (if upon the bill such a question can be tried) the validity of a will made in a foreign country, whose laws are not brought before the court, either by averment or evidence. The answer contained an allegation, that certain persons residing in Europe have filed a bill in the circuit court of the district of Columbia against him, the administrator claiming a large portion of the assets, if not the whole, as creditors or mortgagees of the testator; and certain persons, also residing in Europe have filed another bill against him (it was probably meant in the same court), claiming the whole assets, as heirs-at-law of the testator, and therefore, as distributees of the said assets; none of the parties to either of these latter bills are made parties to the present bill. The persons claiming as heirs of the testator should be made parties, that they may have an opportunity to contest the plaintiff's title, as the real parties in interest, the administrator being but a mere stakeholder. The heirs and legal representatives of the testator filed a bill in the circuit court claiming from the administrator of the testator with the will annexed, the funds which had come into his hands; which bill was still pending; the allegations in the bill went to defeat the validity of the will made in the United States, and also asserted other grounds of claim. All the bills ought, if possible, to be brought to a hearing at the same time, in

the circuit court, in order that a final disposition may, at the same time, be made of all the questions arising in all of them. If the intention is to put in issue (as it seems to be), not only the construction and operation of the testamentary instrument in favor of the plaintiff, but its validity and effect as a *will*, it is material, that the law of France, the place of the domicil of the testator, at the time of its execution, should be brought before the court, and established as a matter of fact; for the court cannot judicially take notice of foreign laws, but they must be proved by proper evidence. The present allegations of the bill and answer are quite too loose for this purpose; and they should be amended and made more distinct and direct. *Armstrong* v. *Lear*.....*52

2. There may arise some nice questions of inter national law in which the fact of the domicil of the testator, at the time of his birth, at time of his making the will made in the United States, and at the time of his death, may become material; the court do not mean to say, what is the rule that is to govern in cases of wills of personalty, whether it be the rule of the native domicil, or of the domicil at the time of the execution of the will, or of the domicil at the death of the party, where there have been changes of domicil; these are points, which ought, under the circumstances of this case, to be left open for argument. But the facts on which the argument should rest ought to be distinctly averred in the bill, and met in the answer..... *Id.*

3. The place of domicil of the testator, at the time of his death, may also become material, under another aspect of the case, viz., the question, who are his heirs, entitled to the succession, *ab intestato*, or under the other will or wills executed by him, to which reference is made in some of the papers in the case; the persons claiming as such heirs, must establish their title under and according to the law of his domicil, at the time of his death; so that, perhaps, it may become material, if Switzerland was the domicil of the testator, at the time of his death, to bring the law of that country distinctly, as matter of fact, before the court..... *Id.*

4. The plaintiffs united severally in a suit, claiming the return of money paid by them on distinct promissory notes given to the defendants; these are several contracts, having no connection with each other; the parties cannot join their claims in the same bill. *Yeaton* v. *Lenox*.....*123

5. Several creditors cannot unite in a suit to attach the effects of an absent debtor; they may file their separate claims, and be allowed payment out of the same fund, but they cannot unite in the same original bill..... *Id.*

6. The Bank of the United States and others, under the authority of the act of the legislature of Maryland, passed in the year 1785, entitled an act for enlarging the powers of the "high court of chancery," under which the real estates of persons descending to minors, and persons *non compos mentis*, were authorized to be sold for the debts of the ancestor, proceeded against the real estate of A. R., for debts due by him; and in 1826, the estate was sold by a decree of the circuit court of the district of Columbia, exercising chancery jurisdiction; afterwards, in 1828, some of the infant heirs of A. R., by their next friend, filed a bill of review against the administrator of A. R., the purchaser of his real estate, and others, stating various errors in the original suit, and in the decree of the court, and prayed that the same should be reversed: *Held*, that a bill of review could be sustained in the case. *Bank of United States* v. *Ritchie*.....*128

7. From the language of the fifth section of the act, some doubt was entertained, whether the act conferred a personal power on the chancellor, or was to be construed as an extension of the jurisdiction of the court; if the former, it was supposed, that a bill of review would not lie to a decree made in execution of the power. On inquiry, however, the court are satisfied, that in Maryland the act has been construed as an enlargement of jurisdiction, and that decrees for selling the lands of minors and lunatics, in the cases prescribed by it, have been treated, by the court of appeals of that state, as the exercise of other equity powers..... *Id.*

8. In all suits brought against infants, whom the law supposes to be incapable of understanding and managing their own affairs, the duty of watching over their interests devolves, in a considerable degree, upon the court; they defend by guardian, to be appointed by the court, who is usually the nearest relation, not concerned, in point of interest, in the matter in question. It is not error, but it is calculated to awaken attention, that, in this case, though the infants, as the record shows, had parents living, a person, not appearing, from his name, or shown on the record, to be connected with them was appointed their guardian *ad litem*..... *Id.*

9. The answer of the infant defendants, in the original proceedings, was signed by their guardian, but not sworn to; it consented to the decree for which the bill prayed; and, without any other evidence, the court proceeded to decree a sale of their lands. This

is entirely erroneous; the statute under which the court acted, authorizes a sale of the real estate, only where the personal estate shall be insufficient for the payment of debts, when the justice of the claims shall be fully established, and when, upon consideration of all circumstances, it shall appear to the chancellor to be just and proper, that such debts should be paid by a sale of the real estate; independent of these special requisitions of the act, it would be obviously the duty of the court, particularly in the case of infants, to be satisfied on these points.....*Id.*

10. The insufficiency of the personal estate of A. R. to pay his debts, was stated in the answer of his administrator, but was not proved; and was admitted in that of the guardian of the infants, but his answer was not on oath; and it were, the court ought to have been otherwise satisfied of the fact.....*Id.*
11. The justice of the claims made by the complainants in the original proceeding, was not established otherwise than by the acknowledgment of the infant defendants in their answer, that, "according to the belief and knowledge of their guardian, they are as alleged in said bill, respectively due." The court ought not to have acted on this admission; the infants were incapable of making it, and the acknowledgment of the guardian, not on oath, was totally insufficient; the court ought to have required satisfactory proof of the justice of the claims, and to have established such as were just, before proceeding to sell the real estate..*Id.*
12. There was error in the original proceedings in ordering the sale of the real estate of A. R., for the payment of his debts, before the amount of the debts should be judicially ascertained by the report of an auditor..*Id.*
13. The eighth section of the law which authorizes the sale of real estate descending to minors, enacts, "that all sales made by the authority of the chancellor, under this act, shall be notified to, and confirmed by, the chancellor, before any conveyance of the property shall be made." This provision was totally disregarded; the sale was never confirmed by the court; yet the conveyance was made. It is a fatal error in the decree, that it directs the conveyance to be made on the payment of the purchase-money, without directing that the sale shall first "be notified to, and approved by," the court.....*Id.*
14. The conveyances of the real estate, made under the original proceeding, were properly set aside by the decree of the court below; the relief might be very imperfect, if, on the reversal of a decree, the party could, under no circumstances, be restored to the property which had been improperly and irregularly taken from him.....*Id.*
15. The 20th of the rules made by this court, at February term 1822, for the regulation of proceedings in the circuit courts, in equity causes, prescribes, "if a plea or demurrer be overruled, no other plea or demurrer shall be thereafter received; and the defendant shall proceed to answer the plaintiff's bill; and if he fail to do so, within two calendar months, the same, or so much thereof as was covered by the plea or demurrer, may be taken for confessed, and the matter thereof be decreed accordingly." *Bank of United States* v. *White*.....*262.
16. By the terms of this rule, no service of any copy of the interlocutory decree taking the bill *pro confesso*, is necessary, before the final decree; and therefore, it cannot be insisted on, as a matter of right, or furnish a proper ground for a bill of review. If the circuit court should, as matter of favor and discretion, enlarge the time for an answer, or require the service of a copy, before the final decree; it may furnish a ground why that court should not proceed to a final decree, until such order was complied with; but any omission to comply with it, would be a mere irregularity in its practice; and if the court should afterwards proceed to make a final decree, without it, would not be error for which a bill of review lies; but it would be to be redressed, if at all, by an order to set aside the decree for irregularity, while the court retained possession and power over the decree and the cause.....*Id.*
17. No practice of the circuit court, inconsistent with the rules of practice established by this court for the circuit courts, can be admissible to control them.....*Id.*
18. The principle is unquestionable, that all the parties to the original decree ought to join in a bill of review.....*Id.*
19. In 1799, the heir of a vendor, he having died, obtained a complete title to the land by patent, and the vendee did not die until seven years after; after his death, in 1806, no step was taken by his heirs or devisees, for the purpose of asserting any claim to a performance of the contract for the sale of the land, until 1819; and no suit was commenced, until 1823; in the meantime, the property had materially risen in value, from the general improvement and settlement of the country. The objection from lapse of time, is decisive; courts of equity are not in the habit of entertaining bills for a specific performance, after a considerable lapse of time, unless upon very special circumstances; even where time is not of the es-

sence of the contract, they will not interfere, where there have been long delay and *laches* on the part of the party seeking a specific performance; and especially, will they not interfere, where there has, in the meantime, been a great change of circumstances, and new interests have intervened. In the present case, the bill was brought after a lapse of twenty-nine years. *Holt* v. *Rogers*..*420

CHESAPEAKE AND OHIO CANAL COMPANY.

1. A bill was filed in the circuit court of the district of Columbia, against the Chesapeake and Ohio Canal company, claiming, as riparian proprietor, from the company, a right to use, for manufacturing purposes, the water of the Potomac, introduced through the land of the appellant, when the quantity of water so introduced should exceed that required for navigation. The bill charged, that the land of the appellant was susceptible of being improved, and was intended so to be, for the purpose of manufacturing, by employing the water of the Potomac, prior to 1784, in which year the Potomac company was chartered; all the chartered rights of that company, and all their obligations were, in 1825, transferred to the Chesapeake and Ohio Canal company. By the improvements made by the Potomac company, much surplus water was introduced and wasted on the land of the appellant; the Chesapeake and Ohio Canal company had deepened the canal, and made other improvements on the land of the appellant; thus introducing a large quantity of water for navigation and manufacturing. The appellant claimed, that under the charter of the Potomac company, held by the Chesapeake and Ohio Canal company, he was entitled to use this surplus water for manufacturing purposes; if the water was insufficient for this purpose, he claimed to be allowed to have the works enlarged, to obtain a sufficient supply. The court held, that under the provisions of the charter, the purposes for which lands were to be condemned and taken were for navigation only; limiting the quantity taken to such as was necessary for public purposes. By the 13th section of the charter of the Potomac Canal company of 1784, the company were authorized, but not compelled, to enter into agreements for the use of the surplus water; the owner of the adjacent lands required no such special permission by law; this was a right incident to the ownership of land; the authority, on both sides, was left open to the mutual agreements of the parties; but neither could be compelled to enter into an agreement relative to the surplus water. *Binney* v. *Chesapeake and Ohio Canal Co*.....*201
2. The 13th section of the act of Virginia, of January 1824, incorporating the Chesapeake and Ohio Canal company, declares, that upon such surrender and acceptance, the charter of the Potomac company shall be, and the same is hereby vacated and annulled, and all the powers and rights thereby granted to the Potomac company, shall be vested in the company hereby incorporated. By this provision, the Potomac company ceased to exist, and a *scire facias* on a judgment obtained against the company, before it was so determined, cannot be maintained. *Mumma* v. *Potomac Company*.....*281
3. There is no pretence to say, that a *scire facias* can be maintained, and a judgment had thereon, against a dead corporation, any more than against a dead man.....*Id.*
4. The dissolution of the corporation, under the acts of Virginia and Maryland (even supposing the act of confirmation of congress out of the way), cannot, in any just sense, be considered, within the clause of the constitution of the United States on this subject, an impairing of the obligation of the contracts of the company, by those states, any more than the death of a private person may be said to impair the obligations of his contract. The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation, which has not passed into the hands of *bonâ fide* purchasers; but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws....*Id.*

COMMON LAW.

1. There can be no common law of the United States; the federal goverment is composed of twenty-four sovereign and independent states, each of which may have its local usages, customs and common law; there is no principle which pervades the Union, and has the authority of law, that is not embodied in the constitution or laws of the Union; the common law could only be made a part of our system, by legislative adoption. *Wheaton* v. *Peters*.....*591
2. When a common-law right is asserted, we look to the state in which the controversy originated.....*Id.*
3. When the ancestors of the citizens of the United States migrated to this county, they brought with them, to a limited extent, the English common law, as part of their heritage; no one will contend, that the common law, as it existed in England, has ever been

in force, in all its provisions, in any state in this Union; it was adopted only so far as its principles were suited to the condition of the colonies; and from this circumstance, we see, what is the common law in one state, is not so considered in another. The judicial decisions, the usages and customs of the respective states, must determine how far the common law has been introduced, and sanctioned in each.....*Id.*

CONSTITUTIONALITY OF STATE LAWS.

1. In 1785, M. and wife executed a deed, conveying certain lands of the wife to T., who immediately reconveyed them to M.; the object of the conveyance was, to vest the lands of the wife in the husband; the deed of M. and wife to T. was not acknowledged, according to the forms established by the law of Pennsylvania, of 20th February 1770, to pass the estates of *femes covert;* and after the death of the wife of M., the land was recovered in an ejectment, from the heirs of M., in a suit instituted against him by the heirs or the wife of M. In 1826, after the recovery in ejectment, the legislature of Pennsylvania passed an act, the object of which was, to cure all defective acknowledgments of this sort, and to give them the same efficacy as if they had been originally taken in the proper form. The plaintiffs in the ejectment claimed title to the premises, under James Mercer, the husband; and the defendants, as heirs-at-law of his wife, who died without issue; this ejectment was brought after the passage of the act of 1826. The authority of this court to examine the constitutionality of the act of 1826, extends no further than to ascertain, whether it violates the constitution of the United States; the question, whether it violates the constitution of Pennsylvania, is, upon the present writ of error, not before the court. *Watson* v. *Mercer*.....*88
2. This court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that it divests antecedent vested rights of property; the constitution of the United States does not prohibit the states from passing retrospective laws generally; but only *ex post facto* laws. It has been solemnly settled by this court, that the phrase, *ex post facto* laws, is not applicable to civil laws, but to penal and criminal laws; which punish a party for acts antecedently done, which were not punishable at all, or not punishable to the extent or in the matter prescribed; *ex post facto* laws relate to penal and criminal proceedings which impose punishments or forfeitures; and not to civil proceedings which affect private rights retrospectively.....*Id.*
3. The act of 1826 does not violate the obligation of any contract, either in its terms or its principles; it does not even affect to touch and title acquired by a patent of any other grant; it supposes the title of the *femes covert* to be good, however acquired; and even provides that deeds of conveyancy made by them shall not be void, because there is a defective acknowledgment of the deeds, by which they have sought to transfer title. So far, then, as it has any legal operation, it goes to confirm, and not to impair, the contract of the *femes covert;* it gives the very effect to their acts and contracts which they intend to give; and which, from mistake or accident, has not been effected. The cases of Calder *v.* Bull, 3 Dall. 386; Fletcher *v.* Peck, 5 Cranch 138; Ogden *v.* Saunders, 12 Wheat. 266; and Satterlee *v.* Matthewson, 2 Pet. 380, fully recognise this doctrine. *Id.*

CONSTITUTIONAL LAW.

1. The certificates authorized by the act of the legislature of Missouri, passed on the 27th June 1821, were bills of credit, and the act was repugnant to the constitution of the United States. *Byrne* v. *State of Missouri*.....*40
2. Construction of the act of limitations of Pennsylvania. *Gregg* v. *Sayre*.....*244

CONSTRUCTION OF STATE STATUTES.

1. Construction of the statute of Maryland passed in 1785, entitled "an act for enlarging the powers of the high court of chancery." *Bank of United States* v. *Ritchie*..*128
2. Construction of the acts of the legislature of Tennessee, in relation to the emancipation of slaves. *McCutchen* v. *Marshall*.....*220

CONSULS OF FOREIGN NATIONS.

See *Davis* v. *Packard*, *312.

CONTINUANCE.

1. An appeal was taken at the December term 1832, of the circuit court for the district of Columbia, to the January term 1833, of this court; the appeal was not entered to that term, but was entered to January term 1834. The case being called for argument, the defendant asked for a continuance, which was granted. *Brown* v. *Swann*.....*435
2. Under the 65th section of the duty act of 1766, where a bond has been given for duties on merchandise, and errors in the calcula-

tion thereof are alleged on affidavit. at the first term on which the suit has been brought on the bond, a delay of one term is allowed for examination and correction; where there is a real defence to the claim on the bond, an opportunity to obtain evidence, by a continuance for a longer period, according to the circumstances of the case, must be given. *United States* v. *Phelps*.....*700

CONTRABAND AND ILLICIT TRADE.

See INSURANCE.

CONTRACT.

1. An action was instituted in the district court of the United States for the western district of Virginia, on a promissory note made in the state of Kentucky, and the defendants pleaded the statute of limitations of Virginia; the plaintiffs replied, that by the statute of limitations of Kentucky, the defendants were not discharged; *Held*, that the statute of limitations of Kentucky was not available in Virginia. *United States* v. *Donnally*..*361
2. The general principle adopted by the civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the laws of the country where the contracts are made, or to be performed; but the remedies are to be governed by the laws of the country where the suit is brought; or, as it is compendiously expressed, by the *lex fori*. Because an action of covenant will lie in Kentucky, on an unsealed instrument, it will not lie, in another state, where covenant can only be brought on an instrument under seal.....*Id.*
3. A contract was made for the delivery of rations for the use of the troops of the United States, "thirty days' notice being given of the post or place where the rations may be wanted;" in an action on a bond, with sureties, for a balance claimed to be due to the United States by the contractor, the United States introduced the testimony of one Abbott, and proved by him, that at the time when contracts were made for the supply of the United States troops, the contractors (as he believed) were then informed of the fixed posts, within the limits of the contract, and the number of troops there stationed; that rations were to be regularly supplied by such contractor, according to the number of troops so stationed at such places; that the contractor was informed he was to continue so to do, without any other notice; that special requisitions and notices of thirty days would be made and given, for all other supplies at other places or posts, and for any change in the quantity of supplies which might become necessary at the fixed posts, from a change in the number of troops stationed at such fixed posts; and that such was the understanding at the war department, in settling the accounts of contractors; but he did not know of any verbal explanation between the secretary of war and Orr on this subject, specifying anything more or less than what the contract specified; and he did not know that there had been any submission or agreement of contractors, to such a construction of their contracts, but that such was the rule adopted by the accounting officers, in settling the accounts of contractors. The defendant, among other things, introduced evidence to show, that the contractor always insisted on the necessity of requisitions and notices, according to the terms of the contract, for supplies at all posts, before he could be charged with a failure; and also to show the custom of making requisitions, and giving such notices for supplies, at all posts where provisions were required, and without regard to their being old established posts, or new ones established after the contract. After the whole evidence was closed, the attorney for the United States prayed the court to instruct the jury, "that it was competent for them to infer from the said evidence, that the contractor, in supplying the fixed posts as he had before done under his former contract, and knowing thereby the number of rations there required, dispensed with any special requisition and notice, in relation to such supplies to said posts; and in case of failure to supply such posts, according to usage and knowledge, was liable, under the bond and contract upon which this action was founded." The circuit court refused to give this instruction, and the question was, whether it ought to have been given: *Held*, that there was no error in the refusal of the circuit court to give the instructions. *United States* v. *Jones' Administrator*.....*399
4. R. executed a bond to D., conditioned, that he would make him a fair and indisputable title to a certain tract of land, on or before the 1st of January 1795; and if no conveyance was then made, that R. would stand indebted to D., in a certain sum of money, being the sum acknowledged to be paid to R., at the time of the contract. No other just interpretation can, under the circumstances, be put upon this language, than the parties intended, that R. should perfect his title to the land by a patent, and should make a conveyance of an indisputable title to D., on or before the 1st of January 1795; and if not then made, the contract of sale was to be

deemed rescinded, and the forty-five pounds purchase-money was to be repaid to D. *Holt* v. *Rogers*... .....*420

COPYRIGHT.

1. From the authorities cited in the opinion of the court, and others which might be referred to, the law appears to be well settled in England, that since the statute of 8 Ann. the literary property of an author in his works can only be asserted under the statute; and that notwithstanding the opinion of a majority of the judges in the great case of Millar *v.* Taylor was in favor of the common-law right, before the statute, it is still considered in England as a question by no means free from doubt. *Wheaton* v. *Peters*...*591
2. That an author, at common law, has a property in *his manuscript*, and may obtain redress against any one who deprives him of it, or, by obtaining a copy, endeavors to realize a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world .....*Id.*
3. The argument, that a literary man is as much entitled to the product of his labor as any other member of society, cannot be controverted; and the answer is, that he realizes his product, in the sale of his works, when first published.....*Id.*
4. In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine? In the production of this, his mind has been as intensely engaged, as long, and perhaps, as usefully to the public, as any distinguished author in the composition of his book; the result of their labors may be equally beneficial to society; and in their respective spheres, they may be alike distinguished for mental vigor. Does the common law give a perpetual right to the author, and withhold it from the inventor? And yet it has never been pretended, that the latter could hold, by the common law, any property in his invention, after he shall have sold it publicly; it would seem, therefore, that the existence of a principle which operates so unequally, may well be doubted. This is not a characteristic of the common law; it is said to be founded on principles of justice, and that all its rules must conform to sound reason.....*Id.*
5. That a man is entitled to the fruits of his own labors must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property which regulate society, and which define the rights of things in general.....*Id.*
6. It is clear, there can be no common law of the United States; the federal goverment is composed of twenty-four sovereign and independent states, each of which may have its local usages, customs and common law; there is no principle which pervades the Union, and has the authority of law, that is not embodied in the constitution or laws of the Union. The common law could be made a part of our system only by legislative adoption.....*Id.*
7. When a common-law right is asserted, we look to the state in which the controversy originated.....*Id.*
8. When the ancestors of the citizens of the United States migrated to this country, they brought with them, to a limited extent, the English common law, as part of their heritage. No one will contend, that the common law, as it existed in England, has ever been in force, in all its provisions, in any state in this Union; it was adopted only so far as its principles were suited to the condition of the colonies; and from this circumstance, we see, what is the common law in one state, is not so considered in another; the judicial decisions, the usages and customs of the respective states must determine how far the common law has been introduced, and sanctioned in each..... .....*Id.*
9. If the common law, in all its provisions, has not been introduced into Pennsylvania, to what extent has it been adopted? Must not this court have some evidence on the subject? If no copyright of an author in his work has been heretofore asserted there, no custom or usage established, no judicial decisions been given; can the conclusion be justified, that, by the common law of Pennsylvania an author has a perpetual property in the copyright of his works. These considerations might well lead the court to doubt the existence of this law; but there are others of a more conclusive character.....*Id.*
10. In the eighth section of the first article of the constitution of the United States it is declared, that congress shall have power "to promote the progress of science and the useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and inventions." The word "secure," as used in the constitution, could not mean the protection of acknowledged legal right; it refers to inventors, as well as authors; and it has never been pretended by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented.....*Id.*

11. It is presumed, that the copyright recognised in the act of congress, and which was intended to be protected by its provisions, was the property which an author has, by the common law, in his *manuscript*, which would be protected by a court of chancery; and this protection was given, as well to books published under the provisions of the law, as to manuscript copies.....*Id.*

12. Congress, by the act of 1790, instead of sanctioning an existing perpetual right in an author in his works, created the right secured for a limited time by the provisions of that law.....*Id.*

13. The right of an author to a perpetual copyright, does not exist by the common law of Pennsylvania.....*Id.*

14. No one can deny, that where the legislature are about to vest an exclusive right in an author, or in an inventor, they have the power to provide the conditions on which such right shall be enjoyed; and that no one can avail himself of such right, who does not substantially comply with the requisites of the law. This principle is familiar as it regards patent-rights; and it is the same in relation to the copyright of a book; if any difference should be made, as respects a strict conformity to the law, it would seem to be more reasonable, to make the requirement of the author, rather than of the inventor.....*Id.*

15. The acts required by the laws of the United States, to be done by an author, to secure his copyright, are in the order in which they must naturally transpire; first, the title of the book is to be deposited with the clerk, and the record he makes must be inserted in the first or second page; then the public notice in the newspapers is to be given; and within six months after the publication of the book, a copy must be deposited in the department of state.....*Id.*

16. It has been said, these are unimportant acts. If they are, indeed, wholly unimportant, congress acted unwisely in requiring them to be done; but whether they are unimportant or not, is not for the court to determine, but the legislature; and in what light they were considered by the legislature, the court can only know by their official acts. Judging of those acts, by this rule, the court are not at liberty to say, they are unimportant, and may be dispensed with; they are acts which the law requires to be done; and may this court dispense with their performance?..*Id.*

17. The security of a copyright to an author, by the acts of congress, is not a technical grant on precedent and subsequent conditions; all the conditions are important; the law requires them to be performed, and consequently, their performance is essential to a perfect title. On the performance of a part of them, the right vests; and this was essential to its protection under the statute; but other acts are to be done, unless congress have legislated in vain to render this right perfect. The notice could not be published, until after the entry with the clerk; nor could the book be deposited with the secretary of state, until it was published; but they are acts not less important than those which are required to be done previously; they form a part of the title; and until they are performed, the title is not perfect....*Id.*

18. Every requisite under both the acts of congress relative to copyrights, is essential to the title.....*Id.*

19. The acts of congress authorizing the appointment of a reporter of the decisions of the supreme court of the United States, require the delivery of eighty copies of each volume of the reports to the department of state. The delivery of these copies does not exonerate the reporter from the deposit of a copy in the department of state, required under the copyright act of congress of 1790; the eighty copies delivered under the reporter's act, are delivered for a different purpose, and cannot excuse the deposit of one volume as specially required by the copyright acts.....*Id.*

20. No reporter of the decisions of the supreme court has, nor can he have, any copyright in the written opinions delivered by the court; and the judges of the court cannot confer on any reporter any such right.....*Id.*

CORPORATION.

1. A corporation, by the very terms and nature of its political existence, is subject to dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuser and non-user. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them; and it would be a doctrine new in the law, that the existence of a private contract of the corporation should force upon it a perpetuity of existence, contrary to public policy, and the nature and objects of its charter. *Mumma* v. *Potomac Company*.....*281

2. There is no pretence to say, that a *scire facias* to revive a judgment can be maintained, and a judgment had thereon, against a dead corporation, any more than against a dead man.....*Id.*

COSTS.

1. It is undoubtedly a general rule, that no

court can give a direct judgment against the United States for costs, in a suit to which they are a party, either on behalf of any suitor, or any officer of the government; but it by no means follows from this, that they are not liable for their own costs. No direct suit can be maintained against the United States; but when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them for costs, it would be a very rigid principle, to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to congress, except for the purpose of remedy; and no such necessity can exist, when this right can properly be set up by way of defence to a suit by the United States. *United States* v. *Ringgold*.....*150

DAMAGES.

1. N. stipulated in certain articles of agreement, to transport and deliver by the steamboat Paragon, to R., a certain quantity of subsistence stores supposed to amount to 3700 barrels for the United States; in consideration whereof, R. agreed to pay to N., on the delivery of the stores at St. Louis, at a certain rate per barrel, one half in specie funds, or their equivalent, and the other half to be paid in Cincinnati, in the paper of banks current there at the period of the delivery of the stores at St. Louis; under the agreement was the following memorandum: "It is understood that the payment to be made in Cincinnati, is to be in the paper of the Miami Exporting Company, or its equivalent." The circuit court erred in refusing to instruct the jury, that the plaintiffs could only recover the stipulated price for the freight actually transported, and that they were entitled to no more than the specie value of the notes of the Miami Exporting Company bank, at the time the payment should have been made at Cincinnati; the specie value of the notes, at the time they should have been paid, is the rule by which such damages are to be estimated. *Robinson* v. *Noble*.....*181
2. The plaintiff, the owner of the steamboat, was not entitled, under the contract, to recover in damages more than the stipulated price for the freight actually transported; if R. had bound himself to deliver a certain number of barrels, and had failed to do so, N. would have been entitled to damages for such failure; but a fair construction of the contract imposed no such obligation on R... *Id.*
3. There is no pretence that R. did not deliver the whole amount of freight in his possession, at the places designated in the contract: in this respect, as well as in every other, in regard to the contract, he seems to have acted in good faith; and he was unable to deliver the number of barrels supposed, either through a loss stated, or an erroneous estimate of the quantity. But to exonerate R. from damages on this ground, it is enough to know, that he did not bind himself to deliver any specific amount of freight; the probable amount is stated or supposed, in the agreement, but there is no undertaking as to the quantity..... *Id.*

DEVISE.

1. William King, in his will, made the following devise: "In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King (the appellant), son of my brother James King, on condition of his marrying a daughter of William Trigg and my niece Rachel his wife, lately Rachel Finlay, in trust for the eldest son or issue of said marriage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King, or of sister Ellzabeth, wife of John Mitchell, and to their issue." Upon the construction of the terms of this clause, it was decided by this court, in 3 Pet. 346, that William King, the devisee, took the estate upon a condition subsequent, and that it vested in him (so far as not otherwise expressly disposed of by the will), immediately upon the death of the testator. William Trigg having died without ever having had any daughter born of his wife Rachel, the condition became impossible; all the children of William Trigg and Rachel his wife, and of James King and Elizabeth Mitchell, were married to other persons: and there had been no marriage between any of them, by which the devise over, upon the default of marriage of William King (the devisee) with a daughter of the Triggs, would take effect. The case was again brought before the court, on an appeal by William King, in whom, it had been decided, the estate devised was vested in trust; and the court held, that William King did not take a beneficial estate in fee in the premises, but a resulting trust for the heirs-at-law of the testator. There is no doubt, that the words "in trust," in a will may be construed to create a use, if the intention of the testator, or the nature of the devise requires it; but the ordinary sense

or the term is descriptive of a fiduciary estate or technical trust; and this sense ought to be retained, until the other sense is clearly established to be that intended by the testator. In the present case, there are strong reasons for construing the words to be a technical trust; the devise looked to the issue of a person not then in being, and, of course, if such issue should come *in esse*, a long minority must follow; during this period, it was an object with the testator, to uphold the estate in the father, for the benefit of his issue; and this could be better accomplished by him, as a trustee, than as a guardian. If the estate to the issue were a use, it would vest the legal estate in them, as soon as they came *in esse;* and if first-born children should be daughters, it would vest in them, subject to being divested by the subsequent birth of a son; a trust estate would far better provide for these contingencies than a legal estate; there is then no reason for deflecting the words from their ordinary meaning. *King* v. *Mitchell*.....*326

2. Emancipation of slaves by devise, under the laws of Tennessee. *McCutchen* v. *Marshall*.....*220

DUTIES ON MERCHANDISE.

1. The denomination of merchandise, subject to the payment of duties, is to be understood in a commercial sense, although it may not be scientifically correct. All laws regulating the payment of duties are for practical application to commercial operations, and are to be understood in a commercial sense; and it is to be presumed, that congress so used and intended them to be understood. *United States* v. 112 *Casks of Sugar* *227

2. Under the 65th section of the duty act of 1799, where a bond has been given for duties, and errors in the calculation thereof are alleged on affidavit, at the first term to which suit has been brought on the bond, a delay of one term is allowed for the purpose of examination and correction; where there is a real defence to the claim on the bond, an opportunity to obtain evidence by a continuance, according to the circumstances of the case, must be given. *United States* v. *Phelps*.....*700

EJECTMENT.

1. A declaration in ejectment was dated on the 22d of May 1831, and a judgment was rendered on the 14th of January 1832; the plaintiff in ejectment counted on a demise made by Amos Binney, on the first day of January 1828; his title, as shown in the abstract, commenced on the 17th of May 1828, which was subsequent to the demise on which the plaintiff counted. Though the demise is a fiction, the plaintiff must count on one which, if real, would support his action. *Lessee of Binney* v. *Chesapeake and Ohio Canal Co.*.....*214

ENTRIES OF LAND, FOR THE PURPOSES OF SURVEY.

See LANDS AND LAND TITLES: *Garnett* v. *Jenkins*. *75.

ERROR AND WRIT OF ERROR.

1. In conformity with the charter of the Chesapeake and Ohio Canal Company, an inquisition, issued at the instance of the company, by a justice of the peace, in the county of Washington, district of Columbia, addressed to the marshal of the district, was executed and returned to the circuit court of the county of Washington, estimating the value of the lands mentioned in the warrant, and all the damages the owners would sustain by cutting the canal through the land, at $1000; certain objections being filed to the inquisition, the court quashed the same; and a writ of error was brought on this judgment. The order or judgment, in quashing the inquisition in this case, is not final; the law authorizes the court, "at its discretion, as often as may be necessary, to direct another inquisition to be taken;" the order or judgment, therefore, quashing the inquisition, is in the nature of an order setting aside a verdict, for the purpose of awarding a *venire facias de nova*. *Chesapeake and Ohio Canal Co.* v. *Union Bank of Georgetown*.....*256

2. A writ of error will not lie to the supreme court, from such an order.....*Id.*

3. A writ of error brought in the name of "Mary Deneale *and others*;" dismissed for irregularity: a new one in due form may be brought. *Deneale* v. *Stump's Executors*.*526

EVIDENCE.

1. In the case of the Bank of United States *v.* Dunn, 5 Pet. 51, the court decided, that a subsequent indorser was not competent to prove facts which would tend to discharge the prior indorser from the responsibility of his indorsement; by the same rule, the maker of a note is equally incompetent to prove facts which tend to discharge the indorser. *Bank of the Metropolis* v. *Jones*.....*12

2. The acts of 1715 and of 1766 of Maryland, require that all conveyances of land shall be enrolled in the records of the same county

where the lands, tenements or hereditaments conveyed by such deed or conveyance do lie, or in the provincial court, as the case may be; the courts of Maryland are understood to have decided, that copies of deeds thus enrolled may be given in evidence. *Dick* v. *Balch*.....*30

3. Copies of deeds that are not required to be enrolled, cannot be admitted in evidence; but deeds of bargain and sale are, by the laws of the state, required to be enrolled; and by the uniform tenor of the decisions of the courts of the state, exemplifications of records of deeds of bargain and sale are as good and competent evidence as the originals themselves.....*Id.*
4. The receipts of a contractor, for moneys paid to him by the United States, are *primâ facie* evidence that the money was received by him on account of the contract, and it is incumbent, in an action on the bond given, with sureties, for the performance of the contract, for the parties to show that the money was not paid on account of the contract, as stated in the receipts; but they are not bound to show, that it was so stated by mistake or design on the part of the government and the contractor, and intended to be applicable to some other contract. *United States* v. *Jones*.....*399

See TREASURY TRANSCRIPT.

FLORIDA LAND-CLAIMS.

1. Construction of the articles of the treaty between the United States and Spain, ceding Florida, relating to the confirmation of grants of land made by the Spanish authorities, prior to the treaty. *United States* v. *Clarke*.....*436
2. An examination of the authority of the governors of Florida, and of other Spanish officers, under the crown of Spain, to grant lands within the territory, and of the manner in which that authority was exercised.....*Id.*
3. An examination of the legislation of the United States, on the subject of the examination and confirmation of Spanish grants of land in the territory of Florida, made before the cession of the same to the United States.....*Id.*
4. As the United States are not suable of common right, the party who institutes a suit against them must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction.....*Id.*
5. In courts of a special limited jurisdiction, which the superior court of East Florida unquestionably is, in this case, the pleadings must contain averments which bring the cause within the jurisdiciton of the court, or the whole proceedings will be erroneous.....*Id.*
6. It was obviously the intention of congress, to extend the jurisdiction of the court to all existing claims, and to have them finally settled; the purpose for which the act was made could not be otherwise accomplished; any claim which the court was unable to decide, on the petition of the claimant, would remain the subject of ligitation; this would defeat the obvious intention of congress, which ought to be kept in view in construing the act.....*Id.*
7. The words in the law, which confer jurisdiction, and describe the cases on which it may be exercised are, "all the remaining cases which have been presented according to law, and not finally acted upon;" the subsequent words, "shall be adjudicated," &c., prescribe the rule by which the jurisdiction previously given shall be exercised.....*Id.*
8. Confirmation of a grant of land by governor Coppinger, made in June 1828. *United States* v. *Richard*.....*470
9. The grant was made to the appellee, on his stating his intention to build a saw-mill; the decree granted to the petitioner, "license to construct a water saw-mill, on the creek known by the name of Pottsburg, bounded by the lands of Strawberry Hill, and this tract not being sufficient, I grant him the equivalent quantity in Cedar Swamp, about a mile east of McQueen's mill, but with the precise condition, that, as long as he does not erect said machinery, this grant will be considered null, and without value nor effect, until that event takes place; and then, in order that he may not receive any prejudice from the expensive expenditures which he is preparing, he will have the faculty of using the pines and other trees comprehended in the square of five miles, or the equivalent thereof, which five miles are granted to him in the mentioned place, avails of which he will enjoy without any defalcation whatever." The judge of the superior court construed this concession to be a grant of land, and we concur with him.....*Id.*
10. The decree of the superior court of East Florida, confirming a concession of land by Governor Kindelan, to Antonio Huertas, affirmed. *United States* v. *Huertas*....*475
11. The decree of the superior court of East Florida, confirming a grant of land to Eusebio M. Gomez, affirmed. *United States* v. *Gomez*.....*477
12. The decree of the superior court of East Florida, confirming a grant of land to George Fleming, affirmed. *United States* v. *Fleming's Heirs*.....*478
13. The decree of the superior court of East

Florida, confirming grants of land claimed by Moses E. Levi, affirmed in part *United States* v. *Levi*.....*479
14. The decree of the superior court of East Florida, confirming a grant of land to Philip R. Younge, affirmed. *United States* v. *Younge* *484
15. The decree of the superior court of East Florida, confirming a concession of land by Governor Coppinger, to Joseph H. Hernandez, affirmed. *United States* v. *Hernandez* *485
16. The decree of the superior court of East Florida, confirming a concession of land to John Huertas, by Governor Coppinger, in 1817, affirmed. *United States* v. *Huertas*. *488
17. Confirmation of a Spanish grant of land in Florida, to Philip P. Fatio. *United States* v. *Fatio*.....*492
18. Confirmation of the decree of the superior court of Florida, in favor of a grant of land to Francis P. Fatio. *United States* v. *Gibson*.....*494

FLORIDA TREATY.

1. Construction of the articles of the treaty between the United States and Spain, ceding Florida, relating to the confirmation of grants of land made by Spanish authorities, prior to the treaty. *United States* v. *Clarke*....*436

See Florida Land-Claims.

FOREIGN JUDGMENT.

1. An adjudication made by a Spanish tribunal in Louisiana, is not void, because it was made after the cession of the country to the United States; for it is historically known, that the actual possession of the country was not surrendered, until some time after the proceedings and adjudication in the case took place. It was the judgment, therefore, of a competent Spanish tribunal, having jurisdiction of the case, and rendered, whilst the country, though ceded, was, *de facto*, in the possession of Spain, and subject to Spanish laws; such judgments, so far as they affect the private rights of the parties thereto, must be deemed valid. *Keene* v. *McDonough*. *308

FRAUD.

1. It is an admitted principle, that a court of law has concurrent jurisdiction with a court of chancery, in cases of fraud; but when matters alleged to be fraudulent are investigated in a court of law, it is the province of a jury to find the facts, and determine their character. *Gregg* v. *Sayre*.....*244
2. Fraud, it is said, will never be presumed, though it may be proved by circumstances. Now, where an act does not necessarily import fraud; where it has more likely been done through a good than bad motive, fraud should never be presumed.....*Id.*
3. Even if the grantor in deeds be justly chargeable with fraud, but the grantees did not participate in it; and, when they received their deeds, had no knowledge of it, but accepted the same in good faith, the deeds upon their face purporting to convey a title in fee, and showing the nature and extent of the premises; there can be no doubt, the deeds do give color of title under the statute of limitations .....*Id.*

INDICTMENT.

1. The defendant was indicted, in April 1833, in the circuit court for the district of Pennsylvania, for passing a counterfeit note of the denomination of ten dollars, purporting to be a note of the Bank of the United States, with intent to defraud the bank, &c.; he pleaded, that the note described in the indictment had been heretofore given in evidence on the trial of the defendant, upon a former indictment found against him for passing another counterfeit ten dollar note, upon which indictment he had been acquitted. The offence for which the defendant was indicted, and to which indictment he pleaded the plea of a former acquittal, was entirely a distinct offence from that on which the verdict of acquittal was found; the plea does not show that he had ever been indicted for passing the same counterfeit bill, or that he had ever been put in jeopardy for the same offence; the matter pleaded is no bar to the indictment. *United States* v. *Randenbush*.....*289

INFANT AND INFANCY

1. In all suits brought against infants, whom the law supposes to be incapable of understanding and managing their own affairs, the duty of watching over their interests devolves in a considerable degree, upon the court; they defend by guardian, to be appointed by the court, who is usually the nearest relation, not concerned, in point of interest, in the matter in question It is not error, but is calculated to awaken attention, that, in this case, though the infants, as the record shows, had parents living, a person not appearing from his name, or shown on the record, to be connected with them, was appointed their guardian *ad litem*. *Bank of United States* v. *Ritchie*.....*128

INJUNCTION.

1. A bill for an injunction is not considered an original bill between the same parties, as at law; but if other parties are made in the bill, and different interests involved, it must be considered, to that extent, at least, an original bill. *Dunn* v. *Clarke*.....*1

INQUISITION.

1. In conformity with the charter of the Chesapeake and Ohio Canal Company, an inquisition, issued at the instance of the company, by a justice of the peace, in the county of Washington, district of Columbia, addressed to the marshal of the district, was executed and returned to the circuit court of the county of Washington, estimating the value of the lands mentioned in the warrant, and all the damages the owners would sustain by cutting the canal through their land, at $1000; certain objections being filed to the inquisition, the court quashed the same; and a writ of error was brought on this judgment. The order or judgment, in quashing the inquisition in this case, is not final; the law authorizes the court, "at its discretion, as often as may be necessary, to direct another inquisition to be taken;" the order or judgment, therefore, quashing the inquisition, is in the nature of an order setting aside a verdict, for the purpose of awarding a *venire facias de novo*. *Chesapeake and Ohio Canal Co.* v. *Union Bank of Georgetown*.... *259

INSURANCE.

1. In a policy of insurance, there was a memorandum, stipulating, that "the assurers shall not be liable for any charge, damage or loss which may arise in consequence of seizure or detention for or on account of illicit trade, or trade in articles contraband of war." This provision is not to be construed, that there must be a legal or justifiable cause of condemnation, but that there must be such a cause for seizure or detention. *Carrington* v. *Merchants' Insurance Co*.....*495
2. It is not every seizure or detention which is excepted, but such only as is made for and on account of a particular trade; a seizure or detention, which is a mere act of lawless violation, wholly unconnected with any supposed illicit or contraband trade, is not within the terms or spirit of the exception; and as little is a seizure or detention, not *bonâ fide* made upon a just suspicion of illicit or contraband trade, but the latter used as a mere pretext or color for an act of lawless violence; for, under such circumstances, it can in no just sense be said to be made for or on account of such trade; it is a mere fraud, to cover a wanton trespass; a pretence and not a cause for the tort. To bring a case then within the exception, the seizure or detention must be *bonâ fide*, and upon a reasonable grounds, if there has not been an actual illicit or contraband trade, there must at least be a well-founded suspicion of it—a probable cause to impute guilt, and justify further proceedings and inquiries; and this is what the law deems a legal and justifiable cause for the seizure or detention.....*Id.*
3. The ship insured, when seized, had not unloaded all her outward cargo, but was still in the progress of the outward voyage originally designated by the owners; she sailed on that voyage from Providence, R. I., with contraband articles on board, belonging, with the other parts of the cargo, to the owners of the ship, with a false destination and false papers, which yet accompanied the vessel; the contraband articles had been landed, before the policy, which was a policy on time, designating no particular voyage, had attached; the underwriters, though taking no risks within the exception, were not ignorant of the nature and objects of the voyage; and the alleged cause of the seizure and detention was the trade in articles contraband of war, by the landing of the powder and muskets, which formed a part of the outward cargo. By the principles of the law of nations, there existed, under these circumstances, a right to seize and detain the ship and her remaining cargo, and to subject them to adjudication for a supposed forfeiture, notwithstanding the prior deposit of the contraband goods; there was a legal and justifiable cause of seizure.....*Id.*
4. According to the modern law of nations, for there has been some relaxation in practice from the strictness of the ancient rules, the carriage of contraband goods to the enemy, subjects them, if captured *in delicto*, to the penalty of confiscation; but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty; the penalty is applied to the latter, only when there has been some actual co-operation on their part, in a meditated fraud upon the belligerents, by covering up the voyage under false papers and with a false destination. This is the general doctrine, when the capture is made *in transitû*, while the contraband goods are yet on board; but when the contraband goods have been deposited at the port of destination, and the subsequent voyage has thus been disconnected with the noxious articles, it has not been usual to apply the

penalty to the ship or cargo, upon the return-voyage, although the latter may be the proceeds of the contraband; and the same rule would seem, by analogy, to apply to cases where the contraband articles have been deposited at an intermediate port on the outward voyage, and before it had terminated; although there is not any authority directly in point. But in the highest prize courts of England, while the distinction between the outward and homeward voyage is admitted to govern, yet it is established, that it exists only in favor of neutrals, who conduct themselves with fairness and good faith in the arrangement of the voyage; if, with a view to practise a fraud upon the belligerent, and to escape from his acknowledged right of capture and detention, the voyage is disguised, and the vessel sails under false papers and with a false destination, the mere deposit of the contraband, in the course of the voyage, is not allowed to purge away the guilt of the fraudulent conduct of the neutral..... *Id.*

5. When there has been a *bonâ fide* seizure and detention, for and on account of illicit or contraband trade, and by a clause in the policy of insurance, it was agreed, that "the insurers should not be liable for any charge, damage or loss, which may arise in consequence of seizure or detention, for or on account of illicit trade, or trade in articles contraband of war," a sentence of condemnation or acquittal, or other regular proceeding to adjudication, is not necessary, to discharge the underwriters. If the seizure or detention be lawfully made, for or on account of illicit or contraband trade, all charges, damages and losses consequent thereon, are within the scope of the exception; they are properly attributable to such seizure and detention, as the primary cause, and relate back thereto; if the underwriters be discharged from the primary hostile act, they are discharged from the consequence of it..... *Id.*

6. Insurance was effected in Boston, Massachusetts, on the ship Dawn, from New York to the Pacific ocean, on a whaling voyage, and until her return; the letter ordering insurance was written in New York, by the owner of the ship, who resided there; and she was represented to be a "coppered ship." The ship, on the outward passage, struck at the Cape de Verd Islands, and knocked off a part of her false keel, but proceeded on her voyage and continued cruising, and encountered some heavy weather, until she was finally compelled to return to the Sandwich Islands; where she arrived in a leaky condition, and upon examination by competent surveyors, she was found to be so entirely perforated by worms, in her keel, stem and stern-post, and some of her planks, as to be wholly innavigable; and being incapable of repair at that place, she was condemned and sold. The vessel, on her outward voyage, had put into St. Salvador, and both at the Cape de Verds, and at St. Salvador, her bottom was examined by swimmers; it was in evidence, that the terms "a coppered ship," had a different meaning, and were differently understood in Boston and in New York: *Held*, that the assured, in making the representation in the letter, was bound by the usage and meaning of the terms contained therein, in New York, where the letter was written and his ship was moored, and not by those of Boston, where the insurance was effected. *Hazard* v. *New England Marine Insurance Co*..... *557

7. A representation to obtain an insurance, whether it may be made in writing or by parol, is collateral to the policy; and as it must always influence the judgment of underwriters, in regard to the risk, it must be substantially correct. It differs from an express warranty; as that always makes a part of the policy, and must be strictly and literally performed..... *Id.*

8. The underwriters are presumed to know the usages of foreign ports to which insured vessels are destined; also the usages of trade and the political condition of foreign nations; men who engage in this business are seldom ignorant of the risks they incur; and it is their interest to make themselves acquainted with the usages of the different ports of their own country, and also those of foreign countries; this knowledge is essentially connected with their ordinary business; and by acting on the presumption that they possess it, no violence or injustice is done to their interests..... *Id.*

9. It is upon the represention, that the underwriters are enabled to calculate the risk, and fix the amount of the premium; and if any fact material to the risk be misrepresented, either through fraud, mistake or negligence, the policy is avoided; it is, therefore, immaterial, in what way the loss may arise, where there has been such a misrepresentation as to avoid the policy..... *Id.*

10. The judge of the circuit court, on the trial of the case, charged the jury, that "if they should find that, in the Pacific ocean, worms ordinarily assail and enter the bottoms of vessels, then the loss of a vessel destroyed by worms would not be a loss within the policy." In the form in which this instruction was given, there was no error..... *Id.*

11. The circuit court instructed tho jury, "that if there was no misrepresentation in regard

to the ship, and she substantially corresponded with the representation, if the injury which occurred to the vessel at the Cape de Verds were reparable, and could have been repaired there, or at St. Salvador, or at any other port at which the vessel stopped in the course of her voyage, the master was bound to have caused such repairs to be made, if they were material to prevent any loss; and if he omitted to make such repairs, because he did not deem them necessary; and by such neglect alone, the subsequent loss of the ship by worms was occasioned, the underwriters are not liable for any such loss." If the loss by worms is not within the policy, as has been decided, the court did not err in giving this instruction; the negligence or vigilance of the master would be of no importance, under the circumstances, in regard to the liability of the underwriters..... *Id.*

JURISDICTION.

1. The complainants filed their bill in the circuit court of Ohio, praying for an injunction to a judgment in an ejectment, and for a conveyance of the premises; all the complainants were residents in the state of Ohio, and so were the defendants; the judgment was obtained in the circuit court, by G., a citizen of Virginia, and the defendant Clarke held the land recovered, under the will of G., in trust. Jurisdiction may be sustained, so far as to stay execution at law against D.; he is the representative of Graham, and although he is a citizen of Ohio, yet this fact, under the circumstances, will not deprive this court of an equitable control over the judgment; but beyond this, the decree of this court cannot extend. *Dunn* v. *Clarke*. *1
2. Of the action at law, the circuit court had jurisdiction, and no change in the residence or condition of the parties can take away a jurisdiction which has once attached; if G. had lived, the circuit court might have issued an injunction to his judgment at law, without a personal service of process, except on his counsel; and as D. is his representative, the court may do the same thing, as against him. The injunction bill is not considered an original bill between the same parties, as at law; but if other parties are made in the bill, and different interests involved, it must be considered to that extent, at least, an original bill; and the jurisdiction of the circuit court must depend upon the citizenship of the parties..... *Id.*
3. Several persons are made defendants, who were not parties or privies to the suit at law, and no jurisdiction as to them can be exercised, by this or the circuit court; but as there appear to be matters of equit in the case, which may be investigated by a state court, it would be reasonable and just, to stay all proceedings on the judgment, until the complainants shall have time to seek relief from a state court..... *Id.*
4. The district court, as a court of original jurisdiction, has general jurisdiction of all causes of admiralty and maritime jurisdiction, without reference to the sum or value of the matter in controversy; but the appellate jurisdiction of this court and of the circuit courts, depends upon the sum or value of the matter in dispute between the parties, having independent interests. *Stratton* v. *Jarvis*..... *4
5. The pleadings in the cause brought up the question, whether an act of the legislature of the state of Missouri, by virtue of which certificates in the nature of bills of credit were issued, and which formed the consideration of a writing obligatory, upon which a suit had been instituted by the state, on which the judgment of the state court was rendered, were constitutional or not, directly and plainly before the court, and the decision of the state court was in favor of its validity; consequently, the case is within the 25th section of the judiciary act. *Byrne* v. *State of Missouri*..... *40
6. The plaintiffs in error filed a petition for freedom, in the circuit court of the United States for the county of Washington, and proved that they were born in the state of Virginia, as slaves of Richard B. Lee, now deceased, who moved, with his family, into the county of Washington, in the district of Columbia, about the year 1816, leaving the petitioners residing in Virginia as his slaves, until the year 1820, when the petitoner Barbara was removed to the county of Alexandria, in the district of Columbia, where she was hired to Mrs. Muir, and continued with her, thus hired, for the period of one year; that the petitioner Sam was, in like manner, removed to the county of Alexandria, and was hired to General Walter Jones, for a period of about five or six months; that after the expiration of the said periods of hiring, the petitioners were removed to the said county of Washington, where they continued to reside, as the slaves of the said Richard B. Lee, until his death, and since, as the slaves of his widow, the defendant. On the part of the defendant in error, a preliminary objection was made to the jurisdiction of this court, growing out of the act of congress of the 2d of April 1816, which declares, that no cause shall be removed from the circuit court for the district of Columbia, to the supreme court, by appeal or writ of

error, unless the matter in dispute shall be of the value of $1000, or upwards. The matter in dispute in this case, is the freedom of the petitioners; the judgment of the court below is against their claims to freedom; the matter in dispute is, therefore, to the plaintiffs in error, the value of their freedom, and this is not susceptible of a pecuniary valuation; had the judgment been in favor of the petitioners, and the writ of error brought by the party claiming to be the owner, the value of the slaves, as property, would have been the matter in dispute, and affidavits might be admitted to ascertain such value; but affidavits, estimating the value of freedom, are entirely inadmissible; and no doubt is entertained of the jurisdiction of the court. *Lee* v. *Lee*.....*44

7. A petition, filed in the district court of Louisiana, averred, that the plaintiff, Richard Raynal Keene, was a citizen of the state of Maryland, and that James Brown, the defendant, was a resident of the state of Louisiana, holding his fixed and permanent domicil in the parish of St. Charles. The decisions of this court require, that the averment of jurisdiction shall be positive, that the declaration shall state expressly the fact on which jurisdiction depends; it is not sufficient, that jurisdiction may be inferred, argumentatively, from its averments. *Brown* v. *Keene*.....*112

8. A citizen of the United States may become a citizen of that state in which he has a fixed and permanent domicil; but the petition does not aver that the plaintiff is a citizen of the United States .... *Id.*

9. The constitution extends the judicial power to "controversies between citizens of different states;" and the judiciary act gives jurisdiction, "in suits between a citizen of the state where the suit is brought, and a citizen of another state."..... *Id.*

10. It is an admitted principle, that a court of law has concurrent jurisdiction with a court of chancery, in cases of fraud; but when matters alleged to be fraudulent are investigated in a court of law, it is the province of a jury to find the facts and determine their character. *Gregg* v. *Sayre*.....*244

11. T. Boon, a citizen and resident of Pennsylvania, filed a bill in the circuit court of Kentucky, against W. Chiles and others, praying that the defendant and such others of the defendants as might hold the legal title to certain lands, might be decreed to convey them to him, and for general relief; the bill stated, that Reuben Searcy, being entitled to one moiety of a settlement and pre-emption right of 1400 acres of land, located in Licking, sold the same to William Hay, in September 1781, and executed a bond for a conveyance; in December following, Hay assigned this bond to George Boon, who, in April 1783, assigned it to the plaintiff; Hay, while he held the bond, obtained an assignment of the plat and certificate of survey, which he caused to be registered, and the patent was issued in his name, in 1785; in 1802, the plaintiff made a conditional sale of this land to Hezekiah Boon, but the conditions were not complied with, and the contract was considered by both parties as a nullity; yet a certain William Chiles, and the said Hezekiah Boon, and George Boon, fraudulently uniting the plaintiff's name with their own, without his consent or knowledge, filed a bill in chancery, praying that the heirs of Hay might be decreed to convey the legal title to the said William Chiles, who claimed the right of Searcy, through the plaintiff, under his pretended sale to Hezekiah Boon; a decree was obtained, under which a conveyance was made to Chiles, by a commissioner appointed by the court; the plaintiff averred his total ignorance of these transactions at the time, and disavowed them. While this suit was depending, the decree of Bourbon court was reversed in the court of appeals of the state, and the cause remanded to that court for further proceedings; the complainant died, and the suit was revived in the name of his heirs; the complainants amended their bill, showing a reversal of the decree of Bourbon court and making the heirs of Hay defendants, and praying a conveyance from them; their amended bill, was not in the record; they also filed an amended bill, making the heirs of George Boon parties, and stating that these heirs disclaimed all title to the property. One of them answered and disclaimed title; it was not stated, whether process was, or was not, executed on the other heirs of George Boon; the defendant William Chiles, in his answer stated, that there were other heirs of Hay than those mentioned in the bill and made defendants, who were not residents of Kentucky. The circuit court of Kentucky were divided in opinion on two questions, which were certified to this court as follows: 1st. This court being then divided, and the judges opposed in opinion as to the jurisdiction over the case, and unable therefore to render a decree on the merits, they resolve to adjourn that question to the supreme court; to wit, under all the circumstances appearing as above, can this court entertain cognisance of the case? 2d. The judges were also opposed in opinion on the point, whether the complainants were entitled to a decree, in the absence of any proof that the persons made defendants in the

amended bill, as heirs of George Boon, were in fact his heirs; both of which points occurred, and became material in this case. The question between the plaintiffs, and the defendant William Chiles, is within the jurisdiction of the circuit court for the district of Kentucky, and may be decided by that court, though Hay's heirs were not parties to the suit; that they were made parties, cannot oust the jurisdiction as between those who are properly before the court. *Boon's Heirs* v. *Chiles*.....*532

12. It is not intended to say, that where there are several heirs, some out of the jurisdiction of the court, a decree may not be made for a conveyance of their own shares, from those on whom process has been served; but it is not thought necessary to decide that question, in this case, as it is stated.....*Id.*

13. The principles settled in the answer to the first question decide the second; George Boon's heirs are not necessarily defendants; they can have no interest in the contest, nor is any decree asked against them; if they are made defendants, and the answer admits that they are heirs, as is admitted by the defendant who has answered, no further proof can be required; if they do not answer, and the process is executed, so that the bill is taken for confessed, no further proof is necessary; if the process be not executed, they are not before the court .....*Id.*

JURY AND TRIAL BY JURY.

1. When the intention with which an act is done becomes the subject of inquiry, it belongs exclusively to the jury to decide; whatever is done in fraud of law, is done in violation of it. *Lee* v. *Lee*.....*44

LANDS AND LAND TITLES.

1. The following entry of lands in Kentucky is invalid: "May, 10th, 1780, Ruben Garnett enters 1164 2-3 acres, upon a treasury-warrant on the seventh big fork, about thirty miles below Bryant's station, that comes in on the north side of North Elkhorn, near the mouth of said creek, and running upon both sides thereof for quantity." It is a well settled principle, that if the essential call of an entry be uncertain as to the land covered by the warrant, and there are no other calls which control the special call, the entry cannot be sustained. In the case under consideration, there are no calls in the entry which control the call for the "seventh big fork," and that this call would better suit a location at the mouth of McConnell's than at Lecompt's run, has been shown by the facts in the case; this uncertainty is fatal to the complainant's entry. *Garnett* v. *Jenkins*.....*75

2. To constitute a valid entry, the objects called for must be known to the public, at the time it was made, and the calls must be so certain as to enable the holder of a warrant to locate the vacant land adjoining; it is not necessary that all the objects called for shall be known to the public, but some one or more leading calls must be thus known, so that an inquirer, with reasonable diligence, may find the land covered by the warrant.....*Id.*

3. If an object called for in an entry is well known by two names, so that it can be found by a call for either, such a call will support the entry.....*Id.*

4. Some of the witnesses say, that being at Bryant's station, with the calls of Garnett's entry to direct them, they could have found his land on Lecompt's run, without difficulty; if this were correct, the entry must be sustained, for it is the test by which a valid entry is known.....*Id.*

5. If the complainants clearly sustain their entry by proof, their equity is made out, and they may well ask the aid of a court of chancery to put them in possession of their rights; but if their equity be doubtful, if the scale be nearly balanced, if it do not preponderate in favor of the complainants, they must fail.....*Id.*

LEX LOCI AND LEX FORI.

1. The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the laws of the country where the contracts are made, or are to be performed; but the remedies are to be governed by the laws of the country where the suit is brought, or, as it is compendiously expressed, by the *lex fori*. No one will pretend, that because an action of covenant will lie in Kentucky, on an unsealed contract made in that state, therefore, a like action will lie in another state, where covenant can be brought only on a contract under seal. *Bank of United States* v. *Donnally*.....*361

2. It is an appropriate part of the remedy which every state prescribes to its own tribunals, in the same manner in which it prescribes the times within which all suits must be brought; the nature, validity and interpretation of the contract, may be admitted to be the same in other states; but the mode by which the remedy is to be pursued, and the time within which it is to be brought,

may essentially differ. The remedy on a contract made out of the state, by a suit in Virginia, must be sought within the time, and in the mode, and according to the descriptive characters of the instrument, known to the laws of Virginia; and not by the description and characters of it, presented in another state.....*Id.*

3. An instrument may be negotiable in one state, which yet may be incapable of negotiability by the laws of another state; and the remedy must be in the courts of the latter on such instruments, according to its own laws.....*Id.*

See CONTRACT.

LIABILITY OF THE UNITED STATES FOR COSTS.

United States v. *Ringgold*, *150.

LIEN.

1. It is understood to be settled in Virginia, that no judgment against the executors can bind the heirs, or in any manner affect them; it could not be given in evidence against them. *Deneale* v. *Stump's Executors*....*528

See MORTGAGOR AND MORTGAGEE.

LIMITATION OF ACTIONS.

1. The eighth section of the statute of limitations of Pennsylvania, fixes the limitation of twenty-one years as taking away the right of entry on lands; and the ninth section provides, that if any person or persons, having such right or title, be or shall be, at the time such right or title first descended or accrued, within the age of twenty-one years, *femes covert*, &c., then such person or persons, and the heir or heirs of such person or persons, shall and may, notwithstanding the said twenty-one years be expired, bring his or their action, or make his or their entry, &c., within ten years after attaining full age, &c. The defendant in error was born in 1791, and was twenty-one years of age in 1812; an interest in the property, for which this ejectment was brought, descended to her in 1799; the title of the plaintiff in error commenced on the 13th April 1805, under deeds adverse to the title of the defendant in error, and all others holding possession of the property under the same; on the 13th April 1826, twenty-one years prescribed by the statute of limitations for a right of entry against her possession, expired; and the bar was complete at that time, as more than ten years had run from the time the defendan. in error became of full age; this suit was not commenced until May 1830. *Gregg* v. *Sayre*.....*244

2. By the revised code of Virginia, it is enacted, that "judgments in any court of record within this commonwealth, where execution hath not issued, may be revived by *scire facias*, or an action of debt brought thereon, within ten years next after the date of such judgment, and not after." The proceedings in this case were a *scire facias* on a judgment against the testator, against his executrix, and an execution on the judgment rendered against her on that *scire facias*. The writ of *scire facias* is no more an execution than an action of debt would have been; and the execution which was issued on the judgment against the executrix, is not an execution on the judgment against George Deneale. *Deneale* v. *Stump's Executors*.....*528

3. It is understood to be settled in Virginia, that no judgment against the executors can bind the heirs, nor in any manner affect them; it could not be given in evidence against them.....*Id.*

4. If the defence set up by the defendants in the district court had rested on the presumption of payment, the *scire facias* against the executor would undoubtedly have accounted for the delay, and have rebutted that presumption; but the statute creates a positive bar to proceeding on any judgment on which execution has not issued, unless the plaintiff brings himself within one of the exceptions of the act; proceedings against the personal representative, is not one of these exceptions.....*Id.*

See CHANCERY AND CHANCERY PRACTICE: PLEAS AND PLEADING.

MANDAMUS.

1. The district judge of Louisiana refused to sign the record of a judgment rendered in a case by his predecessor in office; by the law of Louisiana, and the rule adopted by the district court, the judgment, without the signature of the judge, cannot be enforced, it is not a final judgment, on which a writ of error may issue, for its reversal; without the action of the judge, the plaintiffs can take no step in the case; they can neither issue execution on the judgment, nor reverse the proceedings by writ of error. On a motion for a *mandamus*, the court *held*, the district judge is mistaken in supposing that no one but the judge who renders the judgment, can grant a new trial; he, as the successor of the predecessor, can exercise the same powers, and has a right to act on every

case that remains undecided upon the docket, as fully as his predecessor could have done; the court remains the same, and the change of the incumbents cannot, and ought not, in any respect, to injure the rights of litigant parties. The judgment may be erroneous, but this is no reason why the judge should not sign it; until his signature be affixed to the judgment, no proceedings can be had for its reversal; he has, therefore, no right to withhold his signature, where, in the exercise of his discretion, he does not set aside the judgment. The court, therefore, directed, that a writ of *mandamus* be issued, directing the district judge to sign the judgment. *New York Life and Fire Insurance Co.* v. *Wilson*.....*291

2. On a *mandamus*, a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised, but they will, in a proper case, require an inferior court to decide. But so far as regards the case under consideration, the signature of the judge was not a matter of discretion; it followed as a necessary consequence of the judgment, unless the judgment had been set aside by a new trial; the act of signing the judgment is a ministerial and not a judicial act. On the allowance of a writ of error, a judge is required to sign a citation to the defendant in error; he is required, in other cases, to do acts which are not strictly judicial.....*Id.*
3. The writ of *mandamus* is subject to the legal and equitable discretion of the court, and it ought not to be issued in cases of doubtful right; but it is the only adequate mode of relief, where an inferior tribunal refuses to act upon a subject brought properly before it.....*Id.*
4. Motion for an attachment against the judge of the nothern district of New York, for a contempt of this court, in refusing to obey its *mandamus*, directing him to reinstate certain suits which had been dismissed from the docket of that court, and to proceed to adjudicate them according to law; the motion also asked for a rule to show cause why a *mandamus* should not issue to the district judge. A judge must exercise his discretion in those intermediate proceedings which take place between the institution and trial of a suit; and if in the performance of this duty he acts oppressively, it is not to this court that application is to be made. *Ex parte Martha Bradstreet*.....*588
5. A *mandamus*, or a rule to show cause why a *mandamus* should not issue, is asked in a case in which a verdict has been given, for the purpose of ordering the judge to enter up judgment upon the verdict; the affidavit itself shows that judgment is suspended for the purpose of considering a motion which has been made for a new trial; the verdict was given at the last term, and we understand it is not unusual in the state of New York, for a judge to hold a motion for a new trial under advisement till the succeeding term; there is then nothing extraordinary in the fact, that the judge should take time till the next term to decide on the motion for a new trial; this court entertains no doubt of his power to grant it.....*Id.*

MANDATE.

See *Davis* v. *Packard*, *312 : Proceedings of State Courts.

MARSHAL OF THE DISTRICT OF COLUMBIA.

1. The marshal of the district of Columbia, upon the settlement of his accounts at the treasury, claimed an allowance and credit by the United States, the sum of $1111.02, being the amount of his poundage fees on a *capias ad satisfaciendum*, against John Gates, at the suit of the United States, and upon which Gates was arrested by the defendant, as marshal, and committed to jail, and afterwards discharged by order of the United States. *United States* v. *Ringgold*.....*150
2. Admitting the defendant in an execution to be liable for poundage, if the plaintiff releases or discharges him, and thereby deprives the marshal of all recourse to the defendant, there can be no doubt, that the plaintiff would thereby make himself responsible for the poundage.....*Id.*
3. By the statutes of Maryland, relative to poundage fees, in force in the county of Washington, in the district of Columbia, the marshal is entitled to poundage on an execution executed, and they fix the rate of allowance; those statutes do not designate which of the parties shall pay the poundage....*Id.*
4. It is undoubtedly a general rule, that no court can give a direct judgment against the United States for costs, in a suit to which they are a party, either on behalf of any suitor, or any officer of the government; but it by no means follows, from this, that they are not liable for their own costs. No direct suit can be maintained against the United States; but when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them for costs; it would be a very rigid principle, to deny to him the right of setting up such claim in a court of justice, and turn him

round to an application to congress; if the right of the party is fixed by the existing law, there can be no necessity for an application to congress, except for the purpose of remedy; and no such necessity can exist, when this right can properly be set up by way of defence to a suit by the United States..... *Id.*

5. The discharge, in this case, was absolute and unconditional; and the marshal had no authority to hold the defendant in custody afterwards; admitting Gates to have been liable for these poundage fees, the marshal's power or right to compel payment from him, was taken away by authority of the United States, the plaintiff in the suit; and the right of the marshal to claim his poundage fees from them, is thereby clearly established. *Id.*

MORTGAGOR AND MORTGAGEE.

1. A mortgage was executed and recorded in 1809, and the mortgagee took no measures to enforce the payment of the money due upon it, until 1821; in the meantime, the property mortgaged was sold by the mortgagor, the mortgagee having given no notice to the purchaser of his lien. If the mortgagee never did assert any claim, or intimate its existence to the purchaser or her friends, he was not restrained from doing so, by having released it; but the mortgage deed was recorded, and this is considered in law as notice to all the world, and dispenses with the necessity of personal notice to the purchasers; a deed cannot, with any propriety, be said to be concealed, which is placed upon the public record, as required by law; nor can a previous conveyance and delivery of the title deeds to a purchaser, be justly denominated collusion, because a subsequent incumbrance is taken on the same property. Common prudence would have directed the purchaser to search the records of the county, before she paid the purchase-money; had she done so, she would have found the deed on record; it is not in proof, that he has done any act to deceive or mislead her; he has been merely silent respecting a deed which was recorded as the law directs. *Dick* v. *Balch*.....*30

NEW TRIAL.

1. A motion for a new trial is always addressed to the discretion of the court, and this court will not control the exercise of that discretion by a circuit court, either by a writ of *mandamus*, or on a certificate of division between the judges. *New York Life and Fire Insurance Co.* v. *Wilson*.....*291

PARTNER AND PARTNERSHIP.

1. The priority of the United States does not extend so as to take the property of a partner from partnership effects, to pay a separate debt, due by such partner to the United States, when the partnership effects are not sufficient to satisfy the creditors of the partnership. *United States* v. *Hack*.....*271

2. It is a rule too well settled to be now called in question, that the interest of each partner in the partnership property, is his share in the surplus, after the partnership debts are paid; and that surplus only is liable for the separate debts of such partner..... *Id.*

3. Construction of articles of copartnership, as they related to the expenses of the copartners. *Withers* v. *Withers*.....*355

PLEAS AND PLEADING.

1. Action of debt, brought by the Bank of the United States, upon a promissory note, made in the state of Kentucky, dated the 25th of June 1822, whereby, sixty days after date, Campbell, Vaught & Co., as principals, and David Campbell, Steeles and Donnally, the defendant, as sureties, promised to pay, jointly and severally, to the order of the president, directors and company of the Bank of the United States, $12,877, negotiable and payable at the office of discount and deposit of the said bank, at Louisville, Kentucky, value received, with interest thereon, at the rate of six per centum per annum thereafter, if not paid at maturity. The declaration contained five counts; the fourth count stated, that the principal and sureties "made their other note in writing," &c., and thereby promised, &c. (following the language of the note), and then proceeded to aver, "that the said note in writing, so as aforesaid made, at, &c., was, and is, a writing without seal, stipulating for the payment of money; and that the same, by the law of Kentucky, entitled an act, &c. (reciting the title and annexing the enacting clause), is placed upon the same footing with sealed writings, containing the same stipulations, receiving the same consideration in all courts of justice, and, to all intents and purposes, having the same force and effect as a writing under seal;" and then concluded with the usual assignment of the breach by non-payment of the note; the fifth count differed from the fourth, principally, in alleging, "that the principals and sureties, by their certain writing obligatory, duly executed by them, without a seal, bearing date, &c., and here shown to the court, did promise, &c.,"

and contained a like averment with the fourth, of the force and effect of such an instrument, by the laws of Kentucky; the defendant demurred generally to the fourth and fifth counts, and the district court sustained the demurrers. The fourth and fifth counts are, upon general demurrer, good; and the judgment of the court below, as to them, was of law; and the averment that the contract was made in Kentucky, and that, by the laws of that state, it has the force and effect of a sealed instrument, does not vitiate the general structure of those counts, founding a right of action on the note set forth thereon; at most, they are surplusage; and if they do not add to, they do not impair, the legal liability of the defendant, as asserted in the other parts of those counts. *Bank of United States* v. *Donnally*.....*361

2. According to the laws of Virginia, the defendant had a right to plead as many several matters, whether of law or fact, as he should deem necessary for his defence, and he pleaded *nil debet* to the first three counts of the declaration, on which issue was joined; the defendant also pleaded the statutes of limitation of Virginia to the other counts; the court held the plea of the statute of limitations a good bar to all the counts, and gave judgment in favor of the defendant. The statute of limitations of Virginia provides, that all actions of debt, grounded upon any lending or contract, without specialty, shall be commenced and sued within five years, next after the cause of such action or such suit, and not after. The act of Kentucky of the 4th of February 1812, provides, "that all writings hereafter executed, without a seal or seals, stipulating for the payment of money or property, or for the performonce of any act, duty or duties, shall be placed upon the same footing with sealed writings, containing the like stipulations, receiving the same consideration in all courts of justice, and, to all intents and purposes, having the same force and effect, and upon which the same species of action may be founded, as if sealed:" *Held*, that the statute of limitations of Virginia, precluded the plaintiff's recovery in the court where the action was instituted; the statute pleaded (the statute of Kentucky), not being available in Virginia. As the contract upon which the original suit was brought, was made in Kentucky, and is sought to be enforced in the state of Virginia, the decision of the case in favor of the defendant, upon the plea of the statute of limitations, will operate as a bar to a subsequent suit in the same state; but not necessarily as an extinguishment of the contract elsewhere, and especially in Kentucky.....*Id.*

PRACTICE.

1. In the cases where constitutional questions are involved, unless four judges of the court concur in opinion, thus making the decision that of a majority of the whole court, it is not the practice of the court to deliver any judgment, except in cases of absolute necessity. *Briscoe* v. *Commonwealth Bank of Kentucky*, *118; *City of New York* v. *Miln*.....*120

2. Four judges not having concurred in opinion as to the constitutional questions argued in these cases, the court directed that the cases should be re-argued at the next term....*Id.*

3. A party may, after an appeal has been dismissed for informality, if within five years, bring up the case again. *Yeaton* v. *Lenox*.....*123

4. The plaintiffs united severally in a suit, claiming the return of money paid by them on distinct promissory notes, given to the defendants. They are several contracts, having no connection with each other; the parties cannot join their claims in the same bill. *Id.*

5. Several creditors cannot unite in a suit to attach the effects of an absent debtor; they may file their separate claims, and be allowed payment out of the same fund, but they cannot unite in the same original bill.....*Id.*

6. The caption of the bill was in the following terms: "Thomas Jackson, a citizen of the state of Virginia, William Goodwin Jackson and Maria Congreve Jackson, citzens of Virginia, infants, by their father and next freind, the said Thomas Jackson *v.* The Reverend William E. Ashton, a citizen of the state of Pennsylvania. In equity." In the body of the bill, it was stated, that "the defendant is of Philadelphia." The title or caption of the bill, is no part of it, and does not remove the objection to the defects in the pleadings; the bill and proceedings should state the citizenship of the parties, to give the court jurisdiction of the case. *Jackson* v. *Ashton*.....*148

7. The only difficulty which could arise to the dismissal of the bill, presents itself upon the statement, "that the defendant is, of Philadelphia." If this were a new question, the court might decide otherwise; but the decisions of the court, in cases which have heretofore been before it, have been express upon the point .....*Id.*

8. On the opening of the record for the argument of this case, it was found, that the sum in controversy was less than the amount which, according to the act of congress, authorizes a writ of error, except on a special *allocatur*, from the circuit court of the district of Columbia to this court; the provis-

ions of the law permit writs of error to be sued out, without such *allocatur*, when the sum in controversy amounts to $1000 and upwards. *United States* v. *Ringgold*...*250

9. On the application of the counsel, stating, the questions in the case were of great public importance, and were required to be determined, in order to the final settlement of other accounts in which the same principles were involved, the court gave the special *allocatur*.....*Id.*

10. A declaration in ejectment was dated the 22d May 1831, and judgment was rendered on the 14th January 1832; the plaintiff in ejectment counted on a demise made by Amos Binney, on the 1st January 1828; his title, as shown in the abstract, commenced on the 17th May 1828, which was subsequent to the demise on which the plaintiff counted; the court held, that although the demise is a fiction, the plaintiff must count on one, which, if real, would support his action. The counsel for the defendants insisted, that, if the cause could not be decided on its supposed real merits, it ought to be remanded to the circuit court, for the purpose of receiving such modifications as would bring before this court those questions of law on which the rights of the parties depend. Where error exists in the proceedings of the circuit court, which will justify a reversal of its judgment, this court may send back the cause, with such instructions as the justice of the case may require; but if, in point of law, the judgment ought to be affirmed, it is the duty of this court to affirm it; this court cannot, with propriety, reverse a decision which conforms to law, and remand a cause for further proceedings. *Binney* v. *Chesapeake and Ohio Canal Co*.....*214

11. In the circuit court of Alexandria, in 1817, several suits were brought against sundry individuals, who had associated to form a bank, called the Merchants' Bank of Alexandria; the proceedings were regularly carried on in one of them, brought by Romulus Riggs; and a decree was pronounced by the court, from which the defendants appealed. On a hearing, the decree was reversed, and the cause remanded for further proceedings, in conformity with certain principles prescribed in the decree of reversal It appeared, that decrees were pronounced in all the causes, though regular proceedings were had only in the case of Romulus Riggs; appeals were entered in these cases from the decree of the court; under such circumstances, the court can only reverse the decree in each case, for want of a bill. *Mandeville* v. *Burt*.....*256

12. The whole business appearing to have been conducted in the confidence that the pleadings in the case of Romulus Riggs could be introduced into the other cases, the cases were remanded to the circuit court, with directions to allow bills to be filed, and to proceed thereon according to law.....*Id.*

13. The district judge of Louisiana refused to sign the record of a judgment rendered in a case, by his predecessor in office; by the law of Louisiana, and the rule adopted by the district court, the judgment, without the signature of the judge, cannot be enforced; it is not a final judgment, on which a writ of error may issue, for its reversal; without the action of the judge, the plaintiffs can take no step in the case; they can neither issue execution on the judgment, nor reverse the proceedings by writ of error. *New York Life and Fire Insurance Co.* v. *Wilson*.....*291

14. On a motion for a *mandamus*, the court held, the district judge was mistaken in supposing that no one but the judge who rendered the judgment, could grant a new trial. He, as the successor of his predecessor, can exercise the same powers, and has a right to act on every case that remains undecided upon the docket, as fully as his predecessor could have done; the court remains the same, and the change of the incumbents cannot, and ought not, in any respect, to injure the rights of litigant parties. The judgment may be erroneous, but this is no reason why the judge should not sign it; until his signature be affixed to the judgment, no proceedings can be had for its reversal; he has, therefore, no right to withhold his signature, where, in the exercise of his discretion, he does not set aside the judgment. The court, therefore, directed that a writ of *mandamus* be issued, directing the district judge to sign the judgment.....*Id.*

15. On a *mandamus*, a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised, but they will, in a proper case, require an inferior court to decide; but, so far as regards the case under consideration, the signature of the judge was not a matter of discretion; it followed as a necessary consequence of the judgment, unless the judgment had been set aside by a new trial. The act of signing the judgment is a ministerial and not a judicial act; on the allowance of a writ of error, a judge is required to sign a citation to the defendant in error; he is required, in other cases, to do acts which are not strictly judicial.....*Id.*

16. A pamphlet relating to a cause depending in the court, was sent to the judges at their chamber, by the agent of one of the parties, without the knowledge or approbation of the counsel in the case; the practice of the court

is not to receive or examine such papers, unless they have been presented in court, and shown to the opposite counsel. *Mitchell* v. *United States*.....*307

17. An appeal was taken at the December term 1832, of the circuit court for the district of Columbia, to the January term 1833, of this court; but the appeal was not entered to that term, but was entered to January term 1834; the case being called for argument, the defendant asked for a continuance, which was granted *Brown* v. *Swann*.....*435

See CONTINUANCE: DUTIES ON MERCHANDISE: PROCEEDINGS OF STATE COURTS: *Davis* v. *Packard*, *312.

PRIORITY OF THE UNITED STATES.

1. The priority of the United States does no extend so as to take the property of a partner from partnership effects, to pay a separate debt, due by such partner to the United States, when the partnership effects are not sufficient to satisfy the creditors of the partnership. *United States* v. *Hack*.....*271

PROCEEDINGS OF STATE COURTS.

1. At a former term of this court, the judgment of the court for the correction of errors of the state of New York, was reversed in this case, this court being of opinion, that Charles A. Davis being consul-general of the king of Saxony, was exempted from being sued in the state court, and that by reason thereof, the judgment rendered against him by the court for the correction of errors, was erroneous, and ordered and adjudged that the judgment of the court for the correction of errors should be and the same was thereby reversed; and that the cause be remanded to the court for the correction of errors, with directions to conform its judgment to this opinion. A mandate issued in pursuance of this judgment, to the court for the correction of errors, and that court declared and adjudged, "that a consul-general of the king of Saxony is, by the constitution and laws of the United States, exempt from being sued in a state court;" and that court further adjudged, that the supreme court of the state of New York, from which court this case had been brought, by a writ of error, to the court of errors of New York, was a court of general common-law jurisdiction, and that the court of errors had no power, jurisdiction or authority, for any error in fact, or any error than such as appeared upon the face of the record of the proceedings of the supreme court, to reverse a judgment of that court; that no other error could be assigned or regarded as a ground of reversal of the judgment of said supreme court than such as appeared upon the record of the proceedings of the said court, and which related to questions actually before the justices of that court, by a plea to its jurisdiction, or otherwise; and that the court of errors was not authorized to notice the allegations of Davis, assigned for error in that court, that he was consul-general of the king of Saxony, or to try or regard said allegation; and there being no error on the face of the record of the proceedings of the supreme court of New York, the defendant in error was entitled to a judgment of affirmance, according to the laws of that state, any matter assigned for error in fact to the contrary notwithstanding. The court of errors further declared, that for any error in the judgment of the supreme court or its proceedings, assignable for error in fact, the party aggrieved by such error might sue out a writ of error *coram vobis*, returnable to the supreme court, upon which the plaintiff might assign errors in fact; and if such fact was admitted or found by the verdict of the jury, the supreme court might revoke their judgment, and for any error in the judgment of the supreme court upon the writ of error *coram vobis*, the court of errors had jurisdiction, upon a writ of error to the supreme court, to review the last judgment. The defendants on error having, upon the filing of the mandate to the supreme court, applied to the court of errors to dismiss the writ of error to the supreme court of that state, the same was quashed, and the defendants in error adjudged to recover their costs against the plaintiff in error. If the jurisdiction of the court for the correction of errors does not, according to the laws by which the judicial system of New York is organized, enable that court to notice errors in fact in the proceedings of the supreme court, not apparent on the face of the record, it is difficult to perceive, how that court could conform its judgment to that of this court, otherwise than by quashing its writ of error to the supreme court; the judgment of the court of errors of New York was affirmed. *Davis* v. *Packard*.....*312

RECORDING OF DEEDS.

1. The acts of 1715 and 1766 of Maryland, require that all conveyances of land shall be enrolled in the records of the same county where the lands, tenements or hereditaments conveyed by such deed or conveyance do lie, or in the provincial court, as the case may be. The courts of Maryland are understood

to have decided, that copies of deeds thus enrolled may be given in evidence. *Dick* v. *Balch*.....*30

2. Copies of deeds that are not required to be enrolled, cannot be admitted in evidence; but deeds of bargain and sale are, by the laws of the state, required to be enrolled; and, by the uniform tenor of the decisions of the courts of the state, exemplifications of records of deeds of bargain and sale are as good and competent evidence as the originals themselves.....*Id.*

RULES OF COURT.

1. The 20th of the rules made by this court at February term 1822, for the regulation of proceedings in the circuit courts in equity causes, prescribes, "if a plea or demurrer be overruled, no other plea or demurrer shall be thereafter received; and the defendant shall proceed to answer the plaintiff's bill; and if he fail to do so within two calendar months, the same, or so much thereof as was covered by the plea or demurrer, may be taken for confessed, and the matter thereof be decreed accordingly." *Bank of United States* v. *White*.....*262

2. By the terms of this rule, no service of any copy of an interlocutory decree, taking the bill *pro confesso*, is necessary, before the final decree; and therefore, it cannot be insisted on as a matter of right, or furnish a proper ground for a bill of review. If the circuit court should, as matter of favor and discretion, enlarge the time for an answer, or require the service of a copy, before the final decree; that may furnish a ground why that court should not proceed to a final decree, until such order was complied with; but any omission to comply with it, would be a mere irregularity in its practice; and if the court should afterwards proceed to make a final decree without it, would not be error for which a bill of review lies; but it would be to be redressed, if at all, by an order to set aside the decree for irregularity, while the court retained possession and power over the decree and the cause.....*Id.*

3. No practice of the circuit court, inconsistent with the rules of practice established by this court for the circuit courts, can be admissible to control them.....*Id.*

SALVAGE.

See ADMIRALTY AND ADMIRALTY PRACTICE: *Stratton* v. *Jarvis*, *4.

SEAMEN'S WAGES.

1. Seamen have a lien prior to that of the holder of a bottomry-bond, for their wages; but the owners are also personally liable for such wages; and if the bottomry holder is compelled to discharge that lien, he has a resulting right to compensation over against the owners; in the same manner as he would have, if they had previously mortgaged the ship. *The Virgin*.....*538

SEIZURE FOR VIOLATION OF THE REVENUE LAWS.

1. A seizure was made in the port of New Orleans, under the 67th section of the act of 1799, for the collection of duties, which authorizes the collector, where he shall suspect a false and fraudulent entry to have been made of any goods, wares and merchandises, to cause an examination to be made, and if found to differ from the entry, the merchandise is declared to be forfeited, unless it shall be made to appear to the collector, or to the court in which a prosecution for the forfeiture shall be had, that such difference proceeded from accident or mistake, and not from an intention to defraud the revenue. After hearing the testimony offered in the cause, the court decreed and ordered, that the property seized be restored to the claimant, upon the payment of a duty of fifteen per cent. *ad valorem*; that the libel be dismissed, and that probable cause of seizure be certified of record; the United States appealed from this decree. *United States* v. 112 *Casks of Sugar*.....*277

2. The court not being able to decide, from the evidence sent up with the record, that the article, in point of fact, differed from the entry at the customhouse, affirmed the decree of the court below.....*Id.*

SLAVERY IN THE DISTRICT OF COLUMBIA.

1. The plaintiffs in error filed a petition for freedom, in the circuit court of the United States for the county of Washington, and proved, that they were born in the state of Virginia, as slaves of Richard B. Lee, then deceased, who moved, with his family, into the county of Washington, in the district of Columbia, about the year 1816, leaving the petitioners residing in Virginia as his slaves, until the year 1820, when the petitioner Barbara was removed to the county of Alexandria, in the district of Columbia,

where she was hired to Mrs. Muir, and continued with her, thus hired, for the period of one year; that the petitioner Sam was in like manner removed to the county of Alexandria, and was hired to General Walter Jones, for a period of about five or six months. That after the expiration of the said periods of hiring, the petitioners were removed to the said county of Washington, where they continued to reside, as the slaves of the said Richard B. Lee, until his death, and since, as the slaves of his widow, the defendant. On the part of the defendant in error, a preliminary objection was made to the jurisdiction of this court, growing out of the act of congress of the 2d of April 1816, which declares, that no cause shall be removed from the circuit court for the district of Columbia to the supreme court, by appeal or writ of error, unless the matter in dispute shall be of the value of $1000, or upwards. The matter in dispute in this case, is the freedom of the petitioners; the judgment of the court below is against their claims to freedom; the matter in dispute is therefore, to the plaintiffs in error, the value of their freedom, and this is not susceptible of a pecuniary valuation; had the judgment been in favor of the petitioners, and the writ of error brought by the party claiming to be the owner, the value of the slaves, as property, would have been the matter in dispute, and affidavits might be admitted to ascertain such value; but affidavits estimating the value of freedom, are entirely inadmissible; and no doubt is entertained of the jurisdiction of the court. *Lee* v. *Lee*...*44

2. The circuit court refused to instruct the jury, that if they should believe from the evidence, that the bringing the petitioners from Virginia to Alexandria, by their owner, and hiring them there, was merely colorable, with intent to evade the law, then the petitioners were entitled to their freedom. By the Maryland law of 1796, it is declared, that it shall not be lawful to import or bring into this state, by land or water, any negro, mulatto, or other slave, for sale, or to reside within this state; and any person brought into this state as a slave, contrary to this act, if a slave before, shall thereupon cease to be the property of the person so importing, and shall be free; and by the act of congress of the 27th of February 1801, it is provided, that the laws of the state of Maryland, as they then existed, should be and continue in force in that part of the district which was ceded by that state to the United States. The Maryland law of 1796 is, therefore, in force in the county of Washington; and the petitioners, if brought directly from the state of Virginia into the county of Washington, would, under the provisions of that law, be entitled to their freedom. By the act of congress of the 24th of June 1812, it is declared, "that hereafter it shall be lawful for any inhabitant or inhabitants, in either of the said counties Washington and Alexandria, owning and possessing any slave or slaves therein, to remove the same from one county into the other, and to exercise, freely and fully, all the rights of property, in and over the said slave or slaves therein, which would be exercised over him, her or them, in the county from whence the removal was made."..... *Id.*

3. The court erred in refusing to give the fourth instruction prayed on the part of the petitioner, which asked, that it should be submitted to the jury whether, from the evidence, the bringing of the petitioners from Virginia to Alexandria, and the hiring them there, was not merely colorable, with intent to evade the law..... *Id.*

4. Patrick McCutchen, of Tennessee, died in 1810, having previously made his last will and testament; by which will, among other things, he bequeathed to his wife Hannah, during her natural life, all his slaves, and provided, that they, naming them, should, at the death of his wife, be liberated from slavery, and be for ever and entirely set free; except those that were not of age, or should not have arrived at the age of twenty-one years at the death of his wife; and these were to be subject to the control of his brother and brother-in-law, until they were of age, at which period they were to be set free; as to Rose, one of the slaves, the testator declared, that she and her children, after the death of his wife, should be liberated from slavery, and for ever and entirely set free. Two of the slaves, Eliza and Cynthia, had children born after the death of the testator, and before the death of his wife; nothing was said in the will as to the children of Eliza and Cynthia. After the decease of the wife, the heirs of the testator claimed all the slaves, and their increase, as liable to be distributed to and among the next of kin of the testator; alleging, that by the laws of Tennessee, slaves cannot be set free by last will and testament, or by any direction therein; that if the law does authorize emancipation, they are still slaves, until the period for emancipation; and that the increase, born after the death of the testator, and before their mothers were actually set free, were slaves, and as such were liable to be distributed. The laws of Tennessee fully authorize the emancipation of slaves, in the manner provided by the last

will and testament of Patrick McCutchen. *McCutchen* v. *Marshall*.....*220

5. As a general proposition, it would seem a little extraordinary, to contend, that the owner of property is not at liberty to renounce his right to it, either absolutely, or in any modified manner he may think proper; as between the owner and his slave, it would require the most explicit prohibition by law, to restrain this right. Considerations of policy, with respect to this species of property, may justify legislative regulation, as to the guards and checks under which such manumission shall take place; especially so as to provide against the public's becoming chargeable for the maintenance of slaves so manumitted....*Id.*
6. It is admitted to be a settled rule in the state of Tennessee, that the issue of a female slave follows the condition of the mother; if, therefore, Eliza and Cynthia were slaves, when their children were born, it will follow, as matter of course, that their children are slaves also. If this was an open question, it might be urged with some force, that the condition of Eliza and Cynthia, during the life of the widow, was not that of absolute slavery; but was, by the will, converted into a modified servitude, to end upon the death of the widow, or on their arrival at the age of twenty-one years, should she die before that time; if the mothers were not absolute slaves, but held in the condition just mentioned, it would seem to follow, that their children would stand in the same condition, and be entitled to their freedom on their arrival at twenty-one years of age. But the course of decisions in the state of Tennessee, and some other states where slavery is tolerated, goes very strongly, if not conclusively, to establish the principle, that females thus situated, are considered slaves; that it is only a conditional manumission, and until the contingency happens, upon which the freedom is to take effect, they remain to all intents and purposes, absolute slaves. The court do not mean to disturb this principle; the children of Eliza and Cynthia must, therefore, be considered slaves.....*Id.*

STAY OF PROCEEDINGS.

1. Several persons were made defendants, who were not parties or privies to the suit at law, and no jurisdiction as to them can be exercised, by this or the circuit court; but as there appear to be matters of equity in the case, which may be investigated by a state court; it would be reasonable and just, to stay all proceedings on the judgment, until the complainants shall have time to seek relief from a state court. *Dunn* v. *Clarke*.....*1

SUPREME COURT OF THE UNITED STATES.

1. In cases where constitutional questions are involved, unless four judges of the court concur in opinion, thus making the decision that of a majority of the whole court, it is not the practice of the court, to deliver any judgment, except in cases of absolute necessity. *Briscoe* v. *Commonwealth Bank of Kentucky*, *118; *City of New York* v. *Miln*, *120
2. Four judges not having concurred in opinion as to the constitutional questions argued in these cases, the court directed that they should be re-argued at the next term....*Id.*

SURETIES.

1. The sureties in the bond of a contractor, given to secure the performance of a contract for the supply of rations for the troops of the United States, are not responsible for any balance in the hands of the principal, at the expiration of the contract, of advances made to him, not on account of that particular contract exclusively, but on account of that and other contracts, as a common fund for supplies; where accounts of the supplies, the expenditures and the funds, had all been throughout blended indiscriminately by both parties, and no separate portion had been designated, or set apart for the contract of 1818. *United States* v. *Orr's Administrator*.....*399
2. To say, that the sureties in the bond should be liable for the whole balance, would be to say, that they should be liable for advances made under any other contracts; and if not liable for the whole, the very case supposed in the instruction precludes the possibility of any legal separation of the items of the balance; each and all of them are blended, *per my et per tout*, as a common fund. The case, indeed, in the principles which must govern it, ranges itself under that large class of cases, where a party, bound for the fidelity of a clerk or other agent of A., as keeper of his money or accounts, is held not liable for acts done as the keeper of the money or accounts of A. and B. And in the present suit, there is no difference in point of law between the liability of the principal and that of the sureties upon the bond; it is the same contract, as to both; and binds both or neither. The United States are not, however, without remedy; for there can be no doubt, that an action in another form would lie against the contractor, for any balance, however received, which remained unexpended in

his hands, after the termination of the service for which the advances were made ..... *Id.*

See CONTRACT: EVIDENCE: TREASURY TRANSCRIPT.

TREASURY TRANSCRIPT.

1. A treasury transcript, produced in evidence by the United States, in an action on a bond for the performance of a contract for the supply of rations to the troops of the United States, contained items of charge which were not objected to by the defendant; the defendant objected to the following items, as not proved by the transcript: "February 19th, 1818, for warrant 1680, favor of Richard Smith, dated 27th December 1817, and 11th of February 1818, $20,000." And on the 11th of April, of the same year, another charge was made "for warrant No. 1904, for the payment of his two drafts, favor of Alexander McCormick, dated 11th and 17th of March 1818, for $10,000." And on the 14th of May, of the same year, a charge was made "for warrant No. 2038, being in part for a bill of exchange in favor of Richard Smith for $20,000, $12,832.78." And one other warrant was charged June 22d, "for a bill of exchange in favor of Richard Smith, dated June 22d, 1810, $4000; and also a warrant to Richard Smith, *per* order, for $8000." These items, the circuit court instructed the jury, were not sufficiently proved, by being charged in the account and certified under the act of congress. The officers of the treasury may well certify facts which come under their official notice, but they cannot certify those which do not come within their own knowledge; the execution of bills of exchange, and orders for money on the treasury, though they may be "connected with the settlement of an account," cannot be officially known to the accounting officers. In such cases, however, provision has been made by law, by which such instruments are made evidence, without proof of the handwriting of the drawer; the act of congress of the 3d of March 1797, makes all copies of papers relating to the settlement of accounts at the treasury, properly certified, when produced in court, annexed to the transcript, of equal validity with the originals; under that provision, had copies of the bills of exchange and orders, on which these items were paid to Smith and McCormick, been duly certified and annexed to the transcript, the same effect must have been given to them by the circuit court, as if the original had been produced and proved. And every transcript of accounts from the treasury, which contains items of payments made to others, on the authority of the person charged, should have annexed to it a duly certified copy of the instrument which authorized such payments; and so, in every case, where the government endeavors, by suit, to hold an individual liable for acts of his agent; the agency, on which the act of the government was founded, should be made to appear by a duly certified copy of the power. The defendant would be at liberty to impeach the evidence thus certified: and, under peculiar circumstances of alleged fraud, a court might require the production of the original instrument; this, however, would depend upon the exercise of the discretion of the court, and could only be enforced by a continuance of the cause, until the original should be produced. *United States* v. *Jones*.....*375

2. The following item in the treasury transcript was not admissible in evidence: "To accounts transferred from the books of the second auditor for this sum, standing to his debit under said contract, on the books of the second auditor, transferred to his debit on those of this officer, $45,000." The act of congress, in making a "transcript from the books and proceedings of the treasury" evidence, does not mean the statement of an account in gross, but a statement of the items, both of the debits and credits, as they were acted upon by the accounting officers of the department. On the trial, the defendant will be allowed no credit on vouchers, which have not been rejected by the treasury officers, unless it was not in his power to have produced them; and how could a proper effect be given to this provision, if the credits be charged in gross? The defendant is unquestionably entitled to a detailed statement of the items which compose his account ..... *Id.*

3. The defendant, in an action by the United States, where a treasury transcript is produced in evidence by the plaintiffs, is entitled to the credits given to him in the account; and in claiming those credits, he does not waive any objection to the items on the debit side of the account; he is unquestionably entitled to the evidence of the decision of the treasury officers upon his vouchers, without reference to the charges made against him; and he may avail himself of that decision, without in any degree restricting his right to object to any improper charge. The credits were allowed the defendant on the vouchers alone, and without reference to the particular items of demand which the government might have against him; and the debits, as well as the credits, must be established or distinct and legal evidence..... *Id*

4. The defendant is entitled to a certified statement of his credits, as allowed by the accounting officers, and he has a right to claim the full benefit of them, in a suit by the government; and under no circumstances has the government a right to withdraw credits which have been fairly allowed..... *Id.*

5. The law has prescribed the mode by which treasury accounts shall be made evidence, and whilst an individual may claim the benefit of this rule, the government can set up no exemption from its operation. In the performance of their official duty, the treasury officers act under the authority of law; their acts are public, and affect the rights of individuals as well as those of the government; in the adjustment of an account, they sometimes act judicially, and their acts are all recorded on the books and files of the treasury department; so far as they act strictly within the rules prescribed for the exercise of their powers, their decisions are, in effect, final; for if an appeal be made, they will receive judicial sanction. Accounts amounting to many millions annually, come under the action of these officers; it is, therefore, of great importance to the public, and to individuals, that the rules by which they exercise their powers, should be fixed and known..... *Id.*

6 In every treasury account on which suit is brought, the law requires the credits to be stated as well as the debits; these credits the officers of the government cannot properly either suppress or withhold; they are made evidence in the case, and were designed by the law for the benefit of the defendant. *Id.*

7. O. made a contract with the government to supply the troops of the United States with rations, within a certain district, and executed a bond and contract agreeable to the usages of the war department; the United States brought an action against O. on the bond, and gave in evidence the contract annexed to the bond, and a treasury statement, which showed a balance against O.; the United States also gave in evidence another transcript, to prove that O., under a previous account, had been paid a balance of $19,149.01, stated to be due to him, which was paid to his agent, under a power of attorney, and the receipt for the same indorsed on the back of the account. The circuit court instructed the jury, that the second transcript was not evidence, *per se*, to establish the items charged to O.: *Held*, that there was no error in this instruction. *United States* v. *Jones*..... .*387

8. The counsel for the United States also gave in evidence the power of attorney to R. Smith, and his receipt, proved by Smith, that the money received by him, under the said power of attorney, was applied to the credit of O., in the Bank of the United States, at Washington; which payment the witness supposed was made known to O., though he could not speak positively on the subject, as he did not communicate the information to him. And the counsel who offered this evidence stated, that he offered it to show that the accounts between O. and the government, under the contract of the 15th of January 1817, had been settled up to that time, and that the balance of $19,149.01 had been paid to Smith, as the agent of O., and that he offered the evidence for no other purpose. The counsel for the United States then gave in evidence to the jury, a subsequent account between O., and the government, under the contract. And, on the prayer of the defendant, the circuit court instructed the jury, "that the said accounts were not competent *per se*, upon which to charge the defendant, or his intestate, for any sums therein contained, further than the mere payment of money from the treasury to the said intestate, or to his authorized agent." The items embraced by this instruction were charges made against O., for the acts of certain persons, alleged to be his agents, without annexing to the transcript copies of any papers showing their agency, or offering any proof that they acted under the authority of O.; the circuit court, therefore, properly instructed the jury, that the transcript, *per se*, did not prove these items..... .....*Id.*

9. The plaintiffs then proved by R. S., that he received, as the agent of O. $6350.99, on warrant No. 5471, under the contract, and that the same was applied to the credit of O. in the Bank of the United States, at Washington, of which payment the witness believed O. had notice; the counsel for the plaintiffs stated, that they confined their claim to the above item, which was the first one charged in the treasury account exhibited. The counsel for the defendant then moved the court to instruct the jury, that this account, as also the preceding one offered in evidence by the plaintiffs, was evidence for the defendant, of the items of credits contained in either; and that in claiming them, he did not admit the debits; which instruction was given by the court, and to which an exception was taken. This instruction involves the same question which has already been decided, between the same parties, at the present term; there was no error in giving the instruction..... *Id.*

10. In the further progress of the trial, the plaintiffs offered to withdraw from the jury the said two accounts mentioned in the preceding exception, and all the evidence con-

nected with said accounts, to which the defendant's counsel objected, and the court refused the motion. A treasury account which contains credits as well as debits, is evidence for the defendant as well as the government; and unless there be an abandonment of the suit by the counsel for the government, it has no right to withdraw from the jury, any part of the credits relied on by the defendant. *Id.*

11. The circuit court, on the prayer of the defendant instructed the jury, that the transcript from the books and proceedings of the treasury, could only be regarded as establishing such of the items of debit, in the account stated in the said transcript, as were for moneys disbursed through the ordinary channels of the treasury department, where the transactions are shown by its books, and where the officers of the department must have had official knowledge of the facts stated; but that the transcript was evidence for the defendant of the full amount of the credits therein stated; and that, by relying on the said transcript, as evidence of such credits, the defendant did not admit the correctness of any of the debits in the said account, of which the transcript was not, *per se*, evidence; and that the said transcript was not, *per se*, evidence of any of the items of debit therein stated, except the first. The correctness of the principle laid down by the circuit court in this instruction, has been recognised by this court, in a case between the same parties, at the present term.....*Id.*

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